ANNOTATIONS INCLUDE VOL. 192

NORTH CAROLINA REPORTS

VOL. 14

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FROM JUNE TERM, 1831, TO DECEMBER TERM, 1832

BY THOMAS P. DEVEREUX
(VOL. III)

ANNOTATED BY
WALTER CLARK
(FURTHER ANNOTATIONS ADDED, 1927)

(3D EDITION, ANNO.)

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JUNE TERM, 1831, TO DECEMBER TERM, 1832

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HON. JOSEPH J. DANIEL

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JOHN SCOTT

CLERK:

WILLIAM ROBARDS

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MARSHAL EX OFFICIO:

SHERIFF OF WAKE COUNTY

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*Judge Hall resigned 15 December, 1832, and was succeeded by Judge Daniel.

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*Elected December, 1832, to succeed Judge Daniel, promoted to the Supreme Court.
†Elected to succeed Judge Swain, chosen Governor.

CASES REPORTED

CASES CITED

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE TERM, 1831

DEN EX DEM. OF WILLIAM DAVIDSON v. ANN FREW.

1. A sale of land under process of execution defeats the estate of the defendant, and bars the dower of his widow, although the purchaser does not take his deed until after the assignment of dower.

2. A sheriff's deed vests the title of land in the purchaser from the time of the sale.

(*McMillan v. Hafley*, 4 N. C., 186, doubted; *Frost v. Etheridge*, 12 N. C., 30, *dist.*)

EJECTMENT, tried before his Honor, *Martin, J.*, at MECKLENBURG, on the last circuit, when the following facts were given in evidence. The lessor of the plaintiff purchased at a sale made by the marshal, under a warrant of distress issued against Archibald Frew, the husband of the defendant, by the Secretary of the Treasury. After the sale, Frew continued in possession until his death; when dower in the premises was assigned to the defendant. The lessor of the plaintiff did not take a deed from the marshal, until after the assignment of dower to the defendant. The only question was whether the subsequent execution of the marshal's deed divested the title of the defendant, as tenant in dower.

The jury, under the directions of the judge, found a verdict for the plaintiff, and the defendant appealed.

(4) *Gaston for plaintiff.*
Devereux for defendant.

HENDERSON, C. J. It was said at the bar that this case was the same in principle as *Frost v. Etheridge,* but I think it is very distinguishable from it. That was the case of a levy on lands in the husband's lifetime, and sale after his death under a *fieri facias.* This, where both levy and sale were in the husband's lifetime; but the marshal's deed was executed to the purchaser after the husband's death. In the case of *Frost v. Etheridge,* it was held that the levy did not divest or disturb the husband's seizin; and that the purchaser was in from the purchase, not from the time of the levy, or *teste* of the *fieri facias.* But the lien or charge on the land, arising from the *teste* of the writ of *fieri facias,* was only against those who came in by contract with the defendant; and not as to those who came in by operation of law; that the lien was created by law, to protect the estate from the fraudulent acts of the defendant in the execution; and to that end, all liens or transfers of the estate by him, after the *teste* of the execution, were made fraudulent in law, whatever might have been the actual intent; but that where such fraudulent intent could not be imputed from the nature of the claim, there such presumption could not apply. And such was the nature of the widow's claim to dower, in which no presumption of fraud could arise. For it could not be supposed that her husband died to defeat the creditor. She was therefore entitled to dower. But the present
(5) is a case where there was an actual sale, which, if evidenced in the manner prescribed by law, entirely defeated the husband's estate, not by a fiction or relation to guard the estate from the acts or claims of anyone, but an *ipso facto* determination of it. I do not mean to say that the bare act of sale or crying out the property passes the title of land, or even returning it on the execution. But when the deed is afterwards made in conformity to the sale, the title to the estate is taken out of the defendant in the execution, and vested in the purchaser, from the time of the sale, whatever may be the effect on the possession; I mean the intermediate possession between the sale and the deed. I do not intend in this to overrule the case of *McMillan v. Hafley,* 4 N. C., 186, where it was decided that an action of trespass will not lie for the purchaser for an intermediate trespass. For the doctrine of that case does not stand in the way of this; and it may be sustained possibly upon something peculiar to the action of trespass. But I am much disposed to doubt its correctness.

We are all of opinion that the sheriff's or marshal's deed, so far as regards title, relates to the time of the sale, and divests the estate from the sale, and vests it in the purchaser, and gives to him the rights and im-

poses on him the obligations of the legal owner, whether or not in analogy to the execution of a power, I am not disposed to say; but I rather think that it is upon the ground that it evidences a transaction, to wit, the sale, which divested the title.

PER CURIAM. Judgment affirmed.

Cited: Pickett v. Pickett, post, 11; *Hoke v. Henderson, post,* 16; *Testerman v. Poe,* 19 N. C., 105; *Pressnell v. Ramsour,* 30 N. C., 507; *Woodley v. Gilliam,* 67 N. C., 239; *Cowles v. Coffey,* 88 N. C., 342; *McArtan v. McLauchlin, ibid.,* 393.

(6)

DEN EX DEM. WILLIAM PICKETT v. HENRY PICKETT.

1. In an appeal to the Supreme Court, if the case stated does not contain *the facts* to which the charge of the judge was applied, however erroneous the charge itself may be, as an abstract proposition, still the judgment must be affirmed. A judgment is not reversed because it does not appear to be right; it must be affirmed unless it appear to be wrong.
2. Declarations of a deceased tenant, made during his tenancy, as to the nature of his possession, are evidence in controversies between his landlord and others.
3. But this rule has its foundation in necessity, and does not apply where the tenant is alive, or where the declarations were made after the tenancy had ceased.
4. Until the right of entry of a creditor accrues, a fraudulent deed is void to all purposes as against him, whether offered as title or as color of title.
5. But after a sale by the creditor, if the possession of the fraudulent vendee be adverse to the purchaser, his fraudulent deed then becomes color of title, and may be perfected by subsequent possession.
6. A power over an estate is regarded as the estate itself; and a possession adverse to that estate will, under the statute of limitations, bar the power.
7. In analogy to this rule, if a purchaser at a sheriff's sale neglect to take a deed for seven years, a possession with color of title, adverse to the title conveyed by the sheriff, will bar the purchaser under the execution.

EJECTMENT, tried at DUPLIN on the last circuit, before his Honor, *Strange, J.*

"The lessor of the plaintiff claimed under an execution sale against one James Pickett, the father of the defendant, who had previously made a deed of bargain and sale to the defendant for the same land—which deed the lessor of the plaintiff alleged to be fraudulent. The defendant contended that his deed was not fraudulent, and that if it

was, he had been in the undisturbed adverse possession of the land under it for more than seven years, and had thereby rendered perfect a title which might have been originally invalid.

"It was in evidence that James Pickett remained in possession of the land after the deed made to his son, and even after the purchase by the lessor of the plaintiff at the execution sale, and the lessor of the plaintiff offered to prove that James Pickett had been heard to say, after the execution sale, that he remained in possession of the land by the permission of the lessor of the plaintiff. But this evidence being objected to by the counsel for the defendant, and it appearing that the declaration was not made in the personal presence of the defendant, it was rejected by the court.

"The judge charged the jury that although they might believe the deed to be fraudulent, if the defendant had remained in the undisturbed adverse possession of the land under it for seven years and upwards, they ought to find for the defendant. That from the time of the lessor of the plaintiff's purchase at execution sale, the defendant's posses-
(7) sion was adverse to him, without evidence of some kind qualifying the nature of that possession."

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

Gaston for plaintiff.
W. C. Stanly and Badger contra.

RUFFIN, J. The general rule of evidence is that the declarations of one person cannot be heard against another. He who offers them must bring the case within some established exception. Commonly, the declarations of a deceased occupier of land, made while he occupied, as to the particular person under whom he held, are evidence to show the tenancy. They are admitted from necessity. And it is deemed safe to admit them, because they are against the interest of the person
(8) making them, since they subject him to the action of the landlord for the rent, and for the recovery of the possession, which is, by the declaration, qualified from a prima facie seizin in fee to a tenancy of a particular estate. But declarations of one who had occupied land, made after he had left it, do not stand on the same ground. No case is found in which they have been admitted; and it would be against principle to admit them. Nor do I find a case in which they have been received while the tenant was living. I do not say that in such case they are not admissible; but I do not see any authority for it. And I incline to think they are not; because, while the person himself can be called, there is no necessity for the hearsay; and necessity alone seems

to justify such evidence. In this case, however, the other objection is decisive. For not only does the plaintiff fail to show the death of James Pickett, but he also fails to show, as far as stated in the case, that the declarations were made while he occupied. It is to be presumed that they were not, because it is stated only that they were made after the execution sale, and that the ground of rejection was that they were not made in the presence of the defendant; in which case, they would have been evidence, not as the declarations of James, but as the admissions of Henry. If, in fact, James was dead at the trial, and the declarations were made by him, while in possession of the land, it is much to be regretted that the plaintiff did not have those facts inserted in the case. They would have raised the question debated here—whether they could have been heard against James' own previous deed to his son, and his occupation under him. But we cannot enter into that, because at present we must take it that those declarations were not competent upon the general principle.

Upon the point made on the judge's charge, the statements of the case are more defective even than on that relating to the evidence. It sets forth that "the defendant contended that if his deed was (9) fraudulent, he had been in possession under it for more than seven years, and had thereby rendered his title valid." But it does not give *the facts*. It does not state the period of the purchase by the lessor of the plaintiff, or of the execution of the deed to him; nor the period of the defendant's purchase, and of his possession. The appellant must state, or cause to be stated, the facts on which the question is raised in the decision of which he assigns the error of the court below. Without the facts, the opinions of the court assume the character of mere abstract propositions, and, however erroneous, since they cannot be connected with the rights of the parties, a verdict which settles those rights upon the merits ought not to be disturbed. We cannot reverse a judgment because it does not appear to be right upon the merits. It must be affirmed unless it appear to be wrong. It is the province of the party to set down his case and exceptions truly, or to procure them to be set down by the judge. It is but common charity—not to say justice—to the judge to affirm that he will state, or permit to be stated, every fact, consistent with the truth, which the parties deem material to the point of the exception. Certainly a revising court is confined to the *facts stated,* and can no more imply others than it can presume those set forth not to be true. Where there are no facts stated, there can be no error found as having been committed at the trial. For then the facts are to be taken as alleged in the pleadings, and found in the verdict, so that the only error open for discussion here would be one assigned in arrest of judgment.

In the present case, therefore, the judgment must be affirmed, because from the case stated enough does not appear to enable this Court to determine whether the opinion of the Superior Court—which, taken in reference to one probable state of the facts, is deemed right—is
(10) erroneous, because the fact, not appearing, was otherwise. The furthest we can go is to take the fact to be as assumed by the presiding judge in the opinion given: which is always very unsatisfactory, because it is often difficult, and is so here, to determine what the assumption is.

The court first instructs the jury that although the deed to the defendant was fraudulent, yet if he had been in possession seven years under it, they ought to find for him. Now whether this be true or not depends upon the fact whether the defendant's possession was before or after the sale by the creditor; and that does not appear, or, at least, very indistinctly and by implication. It is the opinion of this Court that a fraudulent deed is void to *all* purposes as against a creditor, and will no more bar him as color of title than as a conveyance. The possession of a fraudulent grantee cannot be set up against the creditor defrauded. If it could, the period employed in establishing the debt might render it, when established, of no value. Until a sale by the creditor, there is no right or title to the thing fraudulently conveyed; there is no right of entry into or of action for the thing. Before such right accrues, the statute does not run. *Peterson v. Williamson,* 13 N. C., 326. It may be here that the possession of the defendant was in part, or even wholly, before the sale to the lessor of the plaintiff. But if it was, it does not appear, and the judgment cannot be reversed upon the ground that possibly it was erroneous.

Indeed, from the succeeding instruction, we suppose it probable that the possession was after the lessor of the plaintiff's purchase. The instruction is that from the time of the purchase the possession of the defendant was adverse to the lessor of the plaintiff, whence it may be inferred that *such* an adverse possession was the one contemplated by the court. And the opinion of this Court is that upon that state of facts the in-
(11) struction was right. For the reasons given by the *Chief Justice,* in *Davidson v. Frew, ante,* 3, the sheriff's deed relates, for the purchaser's benefit, to the sale. By parity of reasoning it is so, when that relation operates against him. In both instances, the effect flows from the nature of a power or authority, and interests derived from the execution of them. *Lord Mansfield* has said, long ago, that since powers of appointment, or revocation and appointment, have been commonly inserted in deeds, and the execution of them a common mode of assurance, the power must be regarded as the estate, within the statute of limitations. Were it not so, the statute might as well be repealed; for

it would be evaded, simply by creating a power. I do not mean that the power must be executed within seven years at all events. For the possession, for instance, of a grantee in a deed, which reserves a power to the grantor, or confers one on a third person, or the possession of the heir at law, where a power to sell is given by will, is consistent with the power, and not adverse to it. But where the possession is in one claiming against the power, and also adversely to the estate upon which the power is to operate, the power will be barred, as well as the right itself. For when the estate is gone, the power becomes, necessarily, extinct.

In precise analogy with this is the case of a purchaser at a sheriff's sale. The sheriff can convey immediately after the sale, and if the purchaser will delay taking his deed, it is his own folly. It is immaterial whether the sheriff's deed operates by way of passing a title that was in himself, or by way of executing an authority to pass that title which was in the debtor. The title is somewhere, and be it where it may, the possession of another, under a distinct title, is adverse to it. There is nothing left upon which the authority vested in the sheriff can work. Against the creditor, it is true, that no length of time will be a bar, because he has no specific right in the thing, and because it would be an obstruction to the statutes against fraudulent conveyances. It is likewise true that the purchaser has not a legal title until he gets (12) a deed. But he has an inchoate right by his purchase, which is the principal ingredient of his title, and he has a perfect right to call for a conveyance, which the sheriff hath power to make, which will complete the title. No reason of policy or justice authorizes a delay in perfecting his title to the specific thing purchased. But the peace of society, the security of titles, and every other consideration which induces the enactment of statutes of repose, demand that he should complete and enforce his title, within the time prescribed for other legal proprietors.

Supposing this to be the real case here, the judgment is affirmed, because it is approved by this Court. If the fact be otherwise, it must likewise be affirmed, because enough is not stated to exhibit the error.

PER CURIAM. Judgment affirmed.

Cited: Hoke v. Henderson, post, 16; *Testerman v. Poe,* 19 N. C., 105; *Thomas v. Alexander, ibid.,* 385; *Honeycutt v. Angel,* 20 N. C., 449; *Dobson v. Erwin, ibid.,* 341; *Flynn v. Williams,* 29 N. C., 38; *Presnell v. Ramsour,* 30 N. C., 507; *Brown v. Kyle,* 47 N. C., 443; *Rogers v. Wallace,* 50 N. C., 185; *Taylor v. Dawson,* 56 N. C., 92; *Woodley v. Gilliam,* 67 N. C., 239; *Cowles v. Coffey,* 88 N. C., 343; *McArtan v. McLauchlin, ibid.,* 393; *Ellington v. Ellington,* 103 N. C., 58; *Seals v. Seals,* 165 N. C., 409.

DEN EX DEM. OF JOHN HOKE v. LAWSON HENDERSON.

1. Where a purchaser of land under an execution, against a fraudulent vendor, neglected to take his deed from the sheriff, and before its delivery the fraudulent vendee entered into recognizance to the State: *It was held* that though between the State and a subject there is no priority obtained by the latter, from the relation of his execution, when they are pursuing the estate of a common debtor, yet as the land was primarily liable to the creditor of the vendor, the prerogative of the State did not operate, and that the sheriff's deed related to the sale.
2. A recognizance is a specific lien, which is not lost by suing out a *fi. fa.*
3. The cases of *Peterson v. Williamson*, 13 N. C., 326; *Burton v. Murphey*, 6 N. C., 339, and *State v. Magniss*, 2 N. C., 99, approved by RUFFIN, J.
4. A conveyance, fraudulent as to one creditor, is void as to all creditors.
5. A fraudulent deed is inoperative when offered as color of title, as well as when offered as title itself.
6. But after a sale under a creditor's execution, it is color of title against the purchaser.
7. The statute 13 Elizabeth, being intended to protect creditors, a *bona fide* purchaser from a fraudulent vendee has no title against the creditors of the vendor.
8. But the 27 Elizabeth, being intended for the benefit of purchasers, the first *bona fide* purchaser, whether from the fraudulent vendor or vendee, is within its operation.
9. A sheriff's deed is nothing but the execution of a power, and relates back to the power itself.
10. There is no relation against the State, between executions in its favor and that of a subject. The first has a preference, unless the debtor's goods have been actually sold under the process of the subject before that of the State is delivered.

EJECTMENT, in which both parties claimed under Robert Wier.

The lessor of the plaintiff produced a judgment in favor of John Wier against Robert Wier, which was entered up at the Fall Term, 1821, of LINCOLN Superior Court, executions upon which regularly issued
(13) until the Fall Term, 1822, when the lessor of plaintiff purchased, but did not take a deed from the sheriff until 26 April, 1827.

The lessor of the plaintiff also claimed title under two other sheriff's sales, made upon executions in favor of one Wilson and one Fulenwider, which it is unnecessary to notice further.

The defendant deduced his title as follows:

1. By a deed from Robert Wier to his son Joseph Wier, dated 6 March, 1809.

2. By proof of Joseph Wier's possession from the date of that deed until November, 1825.

3. He produced the record of a recognizance to the State, entered into by Joseph Wier, at the Spring Term, 1826, of Lincoln Superior Court, which was forfeited at the ensuing term, when process issued, and final judgment was afterwards entered in favor of the State; a *fi. fa.* issued on this judgment, and the defendant purchased in November, 1827.

It was in proof that in March, 1809, the date of the deed from Robert to Joseph, a suit was pending in Orange Superior Court, at the instance of one Robertson, against Robert Wier for a malicious prosecution, in which final judgment was afterwards obtained for $500, and an execution upon which was satisfied. It was also proved that Robert Wier lived on the land with his son Joseph.

His Honor, *Daniel, J.,* charged the jury that as the lessor of the plaintiff claimed under a judgment in favor of John Wier, a creditor of Robert, at the time of the conveyance by Robert to Joseph, in March, 1809, they ought to inquire whether that conveyance was made to hinder, delay or defraud the creditors of Robert Wier—that it was unnecessary to inquire whether Robertson was a creditor within the meaning of 13 Elizabeth, because the lessor of the plaintiff did not claim under him—that if they should think the deed of Robert to Joseph was fraudulent as to John Wier, then they should find for the lessor of the plaintiff, unless the possession of Joseph Wier had ripened his defective title into a good one, and barred the entry of the lessor of the (14) plaintiff; that under the Act of 1715, a fraudulent deed was color of title, and that if Joseph Wier continued in possession for the space of seven years, holding the land adversely to all the world, the lessor of the plaintiff would be barred by that act.

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

Seawell & Winston for lessor of plaintiff.
Hogg for defendant.

RUFFIN, J. The first position of the judge of the Superior Court, that it was immaterial to inquire whether the conveyance of Robert Wier to his son Joseph Wier was intended to defraud Robertson, since neither party claimed under him, is contrary to what I have always considered the law, and contrary to the authorities. I conceive that a conveyance in fraud of one creditor is void as to all creditors. It is upon this foundation that what are called *fishing* bills are filed in equity, to find out a creditor at the time of the conveyance, and to bring (15)

the whole fund into subjection to general creditors, including subsequent creditors, and *a fortiori* other creditors at the time. *Lush v. Wilkinson,* 5 Ves., 384; *Taylor v. Jones,* 2 Atk., 600.

This Court has likewise the misfortune to differ from the court below upon the next instruction given to the jury. The case of *Peterson v. Williamson,* 13 N. C., 326, and *Pickett v. Pickett, ante,* 6, establish that the possession of a fraudulent grantee does not bar a creditor under the statute of limitations. The title is void to all intents, and this extends to the deed when operating as color of title, as well as when offered as title itself. It will inure under the statute against the purchaser under the creditor's execution, but not before. For these reasons the judgment below must be reversed, unless the record shows that at all events the defendant hath a better title, and must obtain a verdict upon a second trial.

The counsel for the defendant, admitting that he could not support the charge of the court, has insisted here that the defendant has the better right. He founds his argument on this state of facts: That the lessor of the plaintiff, although he purchased under John Wier's execution against Robert Wier, in October, 1822, obtained his deed on 26 April, 1827, and that Joseph Wier being in possession, entered into recognizance to the State in April, 1826, on which execution afterwards issued, under which the defendant purchased 22 October, 1827, and took a sheriff's deed in November following. It is insisted, in the first place, that the State, by force of the recognizance, is a purchaser from Joseph Wier, within our statute against fraudulent conveyances; and that the true construction of that statute, since the proviso is adopted from the 27 Eliz. instead of 13 Eliz., is that the first *bona fide* purchaser, whether from the grantor or grantee, has a good title; and also, that a like purchaser from the grantee is to be preferred to a creditor of

(16) the grantor. This last position is one which requires to be established by very clear reasoning before it can be adopted. Where creditors are the peculiar objects of the protection of a statute, which makes an act done to their injury void as against them, it seems difficult to suppose that any subsequent occurrences can set it up again, contrary to the object and express words of the statute. Under the other statute, purchasers only are within the purview, and wherever a purchaser appears, whether from the grantor or grantee, there is a person for whose benefit the statute was designed, and can operate. In the case of creditors, those of the grantor alone are within the purview. Has the act been ever construed to set up a fraudulent conveyance for the benefit of the *grantee's creditors?* Can it be? If not, how does a *purchaser* from *him* stand better? The opposing decisions cited from Johnson's Re-

ports are entitled to much consideration, and would be to much more did they not conflict with each other. The Court would certainly pay very great respect to the latest, as the adjudication of the highest Court, and weigh the reasons well before adopting a contrary rule, and would not proceed to decide this case against those cases without discussing those reasons, if the decision depended upon the point. But we think it does not, because, admitting the State to be a purchaser, and that such a purchaser is within the proviso, yet here the creditor of the grantor had sold, and the lessor of the plaintiff purchased at his sale, before the State purchased. The sheriff's sale under John's execution was in October, 1822, and the recognizance was in April, 1826.

It is said, however, that the title did not pass by the sheriff's sale, but only by his deed, which was in April, 1827, after the recognizance; and, therefore, that the land remained the estate, in law, of Joseph, and was bound by the recognizance. The effect of a sheriff's sale, and the relation of his deed to the sale, have been considered by the Court, in the cases of *Davidson v. Frew, ante,* 3, and *Pickett v. Pickett, ante,* 6, as between individuals. In the former, the plaintiff claimed under execution against the husband, and the defendant by act of (17) law as his widow. In the latter, the plaintiff claimed in like manner under execution against a fraudulent grantor, and the defendant was the fraudulent grantee himself. In both it was held that the deed, operating as the execution of a power, related back to the power itself. There has been an attempt to distinguish this case from those by saying there is no relation against the sovereign, and a string of cases cited to show that the execution of the king is entitled to the first satisfaction, unless the debtor's goods be actually sold under the subject's process, before the sovereign is delivered. The Court is not disposed to contest that, nor to lay the public here under greater disadvantage than is imposed on the interest of the community represented by the crown in England. But the question in this case is altogether different. The cases relied on are those of *the same debtor* to the crown and the subject, and *no sale* by the latter before the former sues execution. Both circumstances must concur to give operation to the prerogative. The cases of *Rex v. Wells,* 16 East, 278, and *Rex v. Sloper,* 6 Price, 114, so lay down the rule. If the subject hath sold the goods of the king's debtor, before the sovereign sues execution, the sale is not disturbed. It is no longer a question of preference of satisfaction; for the goods have ceased to be the debtor's for any purpose. But here the question is not one of relation, on which depends the right of prior satisfaction. But the question is, Whose lands were these when the lien of the recognizance was created? If both parties claimed the lands under Joseph Wier,

then the reasoning might apply. And it would then have to be determined whether the sale by an individual of land for which no sheriff's deed was executed would defeat, by a subsequent execution of the deed, the lien of an intermediate recognizance. Upon that we will be ready to give an opinion when it arises, for there seems not much difficulty in it. But in our case the parties claim under different creditors, against *different debtors.* And to that case the doctrine of the prerogative does not extend. It is not a question of priority; but simply one for
(18) the creditors of which of two debtors is the land a fund. When the lessor of the plaintiff bought, his purchase was a good one, since the land was the father's for the purposes of his creditors. His deed, as to all persons claiming under the father, relates to the sale. A stranger claiming under Joseph subsequently has no interest in the question of its relation. The doctrine of relation does not concern him. He can only show that the lands remained Joseph's, to pay his debts. And in that respect the State and an individual stand on the same footing.

It will be perceived that the recognizance has been treated as creating a lien, and that such lien continues, notwithstanding the process of *fi. fa.* on it. The Court is not obliged, in this case, to decide the effect of suing that execution, but as the point was made, and it is of consequence that no doubt should be felt on it, the Court feels it a duty to express a prompt opinion upon it. The specific lien of a recognizance is not lost by suing a *fi. fa.,* notwithstanding the case of *Jones v. Edmunds,* 3 Murph., 45, rules it so, as to judgments generally. The security of the public and the ease of persons demanding to be let to bail require it. There has been no *extent* sued in this State within memory; indeed, none heard of; and without giving this effect to the ordinary process of execution, a recognizance would afford the State no assurance of the appearance of criminals. *Burton v. Murphey,* 2 Murph., 339, is in point, and that case is founded on the previous one of *S. v. Magniss,* in 1794, 1 Hay., 99, which recognizes the rule as so understood and generally received at that time, and is the stronger, because referring to what was said on the same subject in the argument of *Bell v. Hill,* 1 Hay., 87.

No notice is taken of the title set up under Wilson's executions, because the title of the plaintiff is plain under John Wier's, and the facts do not very clearly appear. The sale under Fulenwider's is certainly bad, because they were against Joseph himself, and posterior to his recognizance.

PER CURIAM. Judgment reversed.

Cited: Flynn v. Williams, 29 N. C., 38; *Justice v. Scott,* 39 N. C., 116; *Toole v. Darden,* 41 N. C., 396; *Toole v. Stancil, ibid.,* 502; *Young*

v. Lathrop, 67 N. C., 69, 70; *Woodley v. Gilliam, ibid.,* 239; *Davis v. Inscoe,* 84 N. C., 403; *Cowles v. Coffey,* 88 N. C., 342; *Dail v. Freeman,* 92 N. C., 356; *Ellington v. Ellington,* 103 N. C., 58; *Clements v. Cozart,* 112 N. C., 419; *Miller v. Alexander,* 122 N. C., 721; *Bank v. McCaskill,* 174 N. C., 364.

(19)

JOHN FORT ET AL. V. MARTHA FORT.

1. Where one gave direction for drafting a will, both of real and personal estate, and upon receiving the draft, was informed that, in its present shape, it was good only as to personalty, and did no act declaring it to be his will, but merely kept it with his valuable papers, *it was held* not to be a valid will of personalty.

2. Does the want of attestation, where there is a clause of attestation, defeat a will altogether? *Qu.*

THIS was an issue of *devisavit vel non* as to the will of one Ricks Fort.

On 1 July, 1828, the supposed testator applied to his counsel, Mr. Whitaker, to have his will drafted, expressed great anxiety to die testate, declared that he should not live long, and gave particular directions as to the disposition of his property. At the same time he handed Mr. Whitaker a paper, which had been executed by him as a will in the year 1823, as a part of his instructions for drafting the proposed will. On the 30th of the same month, Mr. Whitaker returned the will of 1823 to Fort, and at the same time gave him the will now offered for probate, which was the draft of a perfect will, with a clause of attestation. Mr. Whitaker informed the supposed testator that the will had been drafted according to his instructions—that in the situation in which it then was, without signature or attestation, it was a good will of personalty—but that to make it a good will of land, it ought either to be copied entirely in his own handwriting or signed in its then state, and have the execution attested by two witnesses. Mr. Whitaker also informed him that the will of 1823 had been revoked, by his, Fort's subsequent marriage and the birth of a child. At Fort's request, these instructions were repeated several times.

About fifteen days after this conversation, the supposed testator was taken suddenly ill, and continued in a state of delirium until his death, which took place on 25 August following, when the will, now offered for probate, was found wrapped up in that of 1823, placed among his valuable papers, and in all respects in the same state in which they were when received from Mr. Whitaker.

(20) Upon these facts, as a case agreed, it was submitted to the court, which of the papers above mentioned was the will of the supposed testator, or whether he died intestate.

His Honor, Judge Norwood, pronounced for the will of 1828, as a will of personalty, and the caveators appealed.

It did not appear that the will of 1823 had ever been offered for probate.

Badger for appellants.
Devereux on other side.

RUFFIN, J. The only question now before the Court is whether the paper written by Mr. Whitaker is the will of Ricks Fort, deceased, as to his personal estate. The question upon the paper dated in 1823 cannot arise until the paper be offered for probate. The Court declines giving an extrajudicial opinion upon it.

A point of very general consequence has been taken upon the paper now under consideration. Against that, as a will of personalty, it is objected that were it otherwise good for that purpose, yet as it purports to pass real as well as personal property, and something more was necessary to complete it as to lands, which the supposed testator (21) knew, and intended to add, it is incomplete for any purpose.

This position is one of very extensive bearing, and deserves very deliberate consideration before it is either adopted or rejected by the Court. I do not understand it to be carried to the extent that a will, disposing or affecting to dispose of realty and personalty, must be good as to both or neither; for example, a paper with one witness. Much of the argument, however, in support of the one position is equally applicable to the other. For it is said that where a father, for instance, by his will provides for one child out of his personal property, and for another with land, he cannot intend to die testate as to one without the other; to mean that one fund shall be disposed of in that manner, unless the other is also; because it is doing injustice among his children. Now this argument is as strong when the will is incomplete only in point of law as where it is incomplete within the purpose of the maker—that is, where it is not what he intends it shall be in point of formal execution, for the sake of making it good for all purposes. Yet a will attested by one witness is certainly good to pass chattels, and certainly not good to pass the lands mentioned in it. This may, however, be upon the ground that in the last case it is defective only by reason of a positive statute, and in the former upon the intention, or rather the want of intention, in the party to make it a will for one purpose, unless it be for all.

And upon this ground, it is contended here that it is not a will at all, because for the purpose of passing the real estate the signature of the supposed testator and attestation of two witnesses were necessary, and were intended. The case of *Walker v. Walker,* 1 Mer., 503, has been cited in support of the argument. The counsel in that case presented it in a clear and very strong light, and their reasoning is directly applicable to the case now under consideration. The decision was against the will. Unfortunately, the Court gave no reasons, so that we cannot tell whether they adopted the argument of the counsel or carried it out to the length contended for. The case itself did not make it necessary. It did not rest barely upon the facts, that the paper had a clause of attestation, and no subscription of witnesses. There was this (22) additional one: the will was found in the testatrix's drawer, after her death, in an envelope, on which she had herself written: "I have signed and sealed my will, to have it ready to be witnessed the first opportunity I can get proper persons," and she lived twelve years after the will bore date. This showed that she knew there ought to be witnesses; that she intended to get them when she wrote the will, and the memorandum on the envelope; and so that she did not intend her signing as a full execution for any purpose, and from her not having it attested for so long a period, a strong presumption arose that she had abandoned it altogether. The case may have turned on these circumstances. It is certainly not an authority direct to the point that the want of attestation, where there is a clause of attestation, will defeat a will altogether. And it is too important a principle to be determined in any case which does not require it.

The Court does not think this case turns on it. There is not the least evidence that the deceased published or otherwise treated *the particular paper* delivered to him by Mr. Whitaker as his will. He did not read it, nor have it read, nor otherwise express himself concerning the contents. When he was told that in the shape in which it then was it would not pass lands, but would personalty, he said not a word towards publishing it as a will of the latter sort; on the contrary, he anxiously sought instructions of the requisites to make it good as a will of lands. Can it be doubted that he did not mean to publish it until he could do so in a way to make it effectual for all its purposes? He took it home, and did not even sign it, as he probably would have done had he read it and been satisfied. But it is said that by putting it away with the old will he seems to have regarded it as a valuable paper, and so recognized it as his will. Not so; he doubtless recognized it as a paper which might be his will, which probably he intended to execute as his will, but not as his executed will. The preservation and custody of the old will being the same, the argument is much stronger in favor of a republica-

(23) tion of that, which is stated to have been duly executed to pass lands, and is signed by him, and must also have been written by him. For if the last paper was considered by him his will, why keep the former?

Without deciding any general question, this case may well be disposed of upon its particular circumstances. Although the deceased wished to make a will, there is no evidence of a publication of this particular paper as his will. He did not expressly say so at Whitaker's. It is not to be taken by inference when it appears the party did not know the contents of the paper, although he was told that in the state in which it then was it would be good for personalty. It may be presumed that he read it when he got home, but there is no evidence that he was satisfied with it, except that he preserved it. He never spoke of it, as he naturally would if he had considered it a will. And the preservation of both papers together is rather evidence of the republication of the first than a publication of the last in its incomplete state.

PER CURIAM. Judgment reversed.

PETER DOWELL v. JOEL VANNOY.

Where a sheriff executes a writ, and permits the defendant to go at large under a promise to give bail to a deputy, the latter is not liable to the sheriff for an escape of the defendant.

ASSUMPSIT, and upon the general issue the case was, that the plaintiff was sheriff of Wilkes, and received a writ, at the instance of one Gill, against one Shackelford, returnable to Iredell Superior Court; that the plaintiff arrested Shackelford, and permitted him to go in search of bail, informing him that the writ would be left in the hands of the defendant, who was deputy sheriff, and to whom he, Shackelford, might give bail, and the plaintiff directed the defendant to return the writ and bail bond to Iredell Superior Court. Shackelford absconded (24) without giving bail, and the plaintiff was fixed by Gill as special bail, and brought this suit upon the implied promise of the defendant faithfully to perform his duty as deputy sheriff, and indemnify him against the consequences of his acts or omissions.

His Honor, Judge Daniel, charged the jury that as the plaintiff gave Shackelford permission to look for bail, and bring the bail, when procured, to the defendant to be bound, the deputy was not liable in this action, unless he had orders to retake Shackelford in case bail was not given before the return day of the writ.

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

Badger for plaintiff.
Gaston for defendant.

HALL, J., after stating the case as above, proceeded: I think it is only necessary to read the statement to discover that whatever error was committed in the case was the error of the plaintiff himself. He indulged Shackelford, and not the defendant. The latter only acted in conformity to his instructions. There is certainly no ground upon which a new trial should be granted.

PER CURIAM. Judgment affirmed.

JOHN H. SWAIM v. ASHLEY SWAIM.

A right of action is not destroyed by an agreement, which only gives the plaintiff another action of the same kind. *Hence*, a parol agreement to refer a claim to arbitration is no bar to an action upon the original claim.

ASSUMPSIT for money had and received by the defendant, to the use of the plaintiff, tried on the fall circuit of 1830, before his Honor, *Strange, J.*

Upon *non assumpsit* pleaded, the case was that the defendant had sold the plaintiff a tract of land, and had executed a bond to make a title at a future period. The plaintiff gave his promissory note to secure the purchase money, and made some partial payments. After- (25) wards it was discovered that the defendant had no title to the land, and it was agreed that the bond of the defendant, as well as the note of the plaintiff, should be canceled, and that arbitrators should determine whether the defendant should return to the plaintiff the money which the latter had paid upon the note. His Honor, thinking that upon these facts the plaintiff was not entitled to a verdict, directed a nonsuit to be entered.

Winston for plaintiff.
Badger for defendant.

RUFFIN, J. If money be paid on a special agreement, which is not performed, and cannot be, the party paying may either sue on the contract or, in disaffirmance of it, he may bring *assumpsit* for money had and received to his use. The plaintiff then could have recovered in this action when the defendant failed to convey the land. Has anything since occurred to prevent him? The new agreement to refer the matter to arbitration, we think, does not. It was only a mode stipulated be-

tween the parties to ascertain the amount of the plaintiff's demand without going to law. It did not extinguish the plaintiff's original right. That was still recognized as existing. If there had actually been an agreement on the part of the defendant to give a certain thing in satisfaction, it would not have barred the plaintiff, unless the thing agreed on had been delivered and accepted. An accord without a satisfaction is nothing. The plaintiff's action is not destroyed by an agreement which merely gives him another action of the same kind for the same demand.

PER CURIAM. Judgment reversed.

Cited: *Williams v. Mfg. Co.*, 154 N. C., 209.

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(26)

DEN EX DEM. OF CHRISTIAN ROBERTS v. SAMUEL FORSYTHE ET AL.

1. The word *heirs* is absolutely necessary in a grant to create a fee, as well in a deed at common law as in one operating under the statute of uses. (Changed by Code 1883, sec. 1280.)
2. A life estate is not enlarged into a fee either by a warranty in fee or by a covenant for quiet enjoyment to the grantee and his heirs.

EJECTMENT, tried before his Honor, *Strange, J.*, on the fall circuit of 1830.

On the trial the lessor of the plaintiff claim title under a deed from one James Veazey to one William Jones, and by other *mesne* conveyances to himself. The defendant proved that William Jones was dead, and objected that the deed from Veazey to him created only an estate for the life of the vendee. This deed was in the usual form to the *habendum*, when it proceeded as follows: "To have and to hold the aforesaid land and premises, with all houses, orchards, etc., and all other and singular the improvements thereon, therein or thereunto belonging, or in any wise appertaining to the said land and premises, and he, the said J. V., doth hereby warrant and defend the said land from himself, his heirs, executors, administrators and assigns, and from all other persons lawfully claiming the said land, to him, the said W. J., his heirs and assigns forever."

A verdict was taken, subject to the opinion of the court upon the above-mentioned objection, and judgment having been rendered for the plaintiff, the defendant appealed.

Devereux for defendant.
Badger and W. H. Haywood contra.

HALL, J. It is a position disputed by no one that if it is intended to create a fee in the grantee, either by conveyance at common law or under the statute of uses, the conveyance must be made to the grantee and his *heirs.* If it be to the grantee, without superadding the word *heirs,* only a life estate passes. That appears to be the case in the deed from Veazey. The words *heirs of the grantee* are used in no part of the deed, except in the clause of warranty, or the clause for covenant of warranty. If it is considered as a warranty, although (27) the warranty is made to the grantee and *his heirs,* it cannot enlarge the estate before granted. *Seymour's case,* 10 Rep., 97. If it is considered as a clause for quiet enjoyment, there are no words in it importing a grant or transfer of anything, but only a guarantee of what has been granted. Nor can the difficulty be avoided by any fair transposition of the words or sentences in the deed. The meaning of the grantor cannot be better collected from the deed than by reading it naturally. It is very probable that he intended to convey the fee, but that intention cannot be collected from the deed.

PER CURIAM. Judgment reversed.

Cited: Snell v. Young, 25 N. C., 380; *Armfield v. Walker,* 27 N. C., 582; *Register v. Rowell,* 48 N. C., 315; *Gray v. Mathis,* 52 N. C., 504; *Stell v. Barham,* 87 N. C., 67; *Allen v. Baskerville,* 123 N. C., 127; *Bond v. R. R.,* 127 N. C., 126; *Coble v. Barringer,* 171 N. C., 449.

JEREMIAH WINTZ, ADMINISTRATOR OF JOHN WINTZ, v. ROBERT WEBB.

1. The *sci. fa.* given by the Act of 1806 (Rev., ch. 700) to secure creditors against fraudulent conveyances by debtors, is dependent upon the original action of the creditor, and to sustain it the first judgment must be in force.
2. Matter which abates an original suit abates one that is collateral to it as an interplea between the plaintiff, and a garnishee is abated by the death of the defendant in the attachment.
3. In *sci. fa.* under the Act of 1806, suggesting a fraudulent conveyance and concealment of the property, and not that it has been wasted or used, upon a verdict for the plaintiff, a personal judgment against the defendant is erroneous.

THIS was a *scire facias* under the Act of 1806 (Rev., ch. 700), whereby it was suggested "that Joseph Wier, against whom John Wintz, deceased, had in his lifetime obtained a judgment for, etc., hath no visible prop-

erty on which an execution can be levied to satisfy the same, and that he (the plaintiff) hath good reason to believe that the said Joseph Wier hath fraudulently conveyed his property to a certain Robert Webb (the defendant) to avoid the payment of his just debts, and that the said Robert Webb conceals the same, or procures the same to be concealed, so that it cannot be levied on to satisfy the said judgment." The writ then commanded "Robert Webb to be and appear, etc., to show cause why execution shall not issue against such property so concealed in his hands to satisfy the judgment aforesaid."

(28) The defendant denied, upon affidavit, having any of the goods or estate of Joseph Wier in his possession, under any conveyance made by the latter to defraud his creditors. Issue was taken by the plaintiff, and the jury, under the charge of his Honor, Judge Mangum, found "that the defendant did claim title to and did hold and secrete the property of Joseph Wier, and held and used it to avoid or delay the payment of the just debts of the said Joseph, which said property was of the value of $900." Whereupon judgment was entered in favor of the plaintiff for the amount of his original debt and costs, and the defendant appealed. Many points were made on the trial below, which it is unnecessary to notice. The case stated that pending the *scire facias,* Joseph Wier was executed for a capital felony (*vide* 12 N. C., 363), and that no administration had been taken on his estate.

Winston for plaintiff.
No counsel for defendant.

RUFFIN, J. No error to the prejudice of the appellant is perceived in the opinions of the judge of the Superior Court, either upon the questions of evidence or the instructions to the jury. Were there nothing more in the case, the judgment would therefore be affirmed. But the case states other facts, which the Court deems fatal to this proceeding.

It is a *scire facias* under the Act of 1806 (Rev., ch. 700). That in its nature is not an original, but a derivative writ, dependent upon the continuing existence and obligation of the record, to enforce which it issues. This statute, when giving it in the cases provided for in it, does not change or pervert its uses. The act declares that upon the plaintiff's affidavit that the defendant hath no visible property to satisfy his judgment, and suggesting that he hath fraudulently conveyed it to avoid or delay the payment of his just debts, or that some other person is in possession of the property, and conceals it, the court in which the

(29) judgment was rendered may, upon such judgment, issue a *sci. fa.* to such person. If it be acknowledged or found that property is held or claimed by such person, *"the court shall and may order the same*

to be delivered up, or made subject to the judgment of the plaintiff." If the effects be money, or have been used, wasted or destroyed, then there is to be "*judgment for the plaintiff against such party*" for the amount or value, to be ascertained by a jury.

To warrant the *sci. fa.*, it seems certain that the first judgment must be in existence and in full force. The *sci. fa.* is to be issued "*upon* any judgment." But what renders it clear is that in case the property be specific, and remaining in specie, there is to be no judgment for the debt, nor for the value of the property, but that it be delivered up and made subject to the judgment. The judgment must then be in a state to warrant execution on it, for without that, the property cannot be made subject to it. Here the case states that Wier, the original defendant, died in May, 1828, pending this suit upon *scire facias*, and that no administration hath ever been taken on his estate. And Wintz, the original plaintiff, was also dead, and his administrator had not revived the judgment. The judgment was therefore dormant when this case was tried below. No order for the delivery of the property could be effectual; and, therefore, no such order could be properly made. It is analogous to the death of the defendant in original attachment, after a collateral issue joined between the plaintiff and garnishee. Both proceedings are dependent upon those original ones, out of which they have grown. The death of the party, or any other matter which is destructive to the principal suit, arrests the progress of that which is incident.

If this were not so in a case where the suggestion was that the party had the defendant's money, or had used, wasted, or destroyed his goods, it nevertheless must be so in this case. The affidavit and *sci. fa.* here make no such suggestion; but are restricted to a fraudulent *conveyance of the property* to Webb, and a *concealment* by him; and the jury find that he held *or* used Wier's property (without saying what (30) in particular) to the value of $900. There was therefore no authority to give judgment against Webb personally; but only the first judgment prescribed in the act. An absolute judgment against Webb for the plaintiff's debt was given, which, for this reason, was erroneous, even if the judgment against Wier had then remained in full force. But after the death of both the parties to the original suit, no further step could be taken until that was revived by the administrator of the original plaintiff against the administrator of the original defendant. This proceeding is subsidiary to the first judgment, and died with it. The whole had abated.

PER CURIAM. Judgment reversed.

Cited: Malloy v. Mallett, 59 N. C., 347.

ASHMAN F. COLLIER v. SAMUEL NEVILL ET AL.

1. A bond which is valid between the obligor and obligee is also valid in the hands of an assignee who has discounted it at a higher rate than the legal rate of interest, and the latter may recover the full amount of the bond of the obligor, notwithstanding he claims through an usurious endorsement.
2. A mistake in the construction of the statute of usury, if it results in taking more than the legal rate of interest, will render the contract usurious. But an error in *fact*, by which more than the legal rate is reserved, will not vitiate.
3. If a security be usurious in its creation, it is void in the hands of an innocent holder.
4. But, if valid in its inception, a subsequent usurious agreement does not avoid it.
5. The object of the statute against usury is to protect the borrower, not to enable a real debtor to avoid the payment of a true debt; and hence the latter cannot aver an usurious assignment so as to defeat the assignee.
6. A distinction exists between the usurious discount of accommodation notes and notes which are perfect and on which an action can be maintained. In the first case, the discount is a loan to the maker, and the note is void under the statute. In the second, it is the purchase of an existing valid security, and the endorsee may recover on it.
7. The case of *Ruffin v. Armstrong*, 9 N. C., 411, approved by RUFFIN, J.

DEBT upon a single bond, executed by the defendants to James Mitchell and Alexander Cheek, and by them assigned to the plaintiff.

Plea—the statute of 1741 (Rev., ch. 28), "for restraining the taking of excessive usury." On the trial before his Honor, *Swain, J.*, at ORANGE, on the last spring circuit, a verdict was entered for the plaintiff, subject to the opinion of the court, upon the following case: The defendants executed the bond on which the action was brought, upon a *bona fide* consideration, moving from Mitchell and Cheek to them. Afterwards the obligees, Mitchell and Cheek, sold the bond to the plaintiff at a greater discount than six per cent per annum, and by their endorsement, bound themselves for its full amount.

His Honor, upon this case, set the verdict aside, and entered a (31) nonsuit, and the plaintiff appealed.

Badger for plaintiff.
Winston for defendants.

RUFFIN, J. The Court does not entertain a doubt that the transaction between the plaintiff and Mitchell and Cheek is usurious. The discount-

ing of a bill or bond, and taking the general endorsement of the holder, does *ex vi termini* constitute a loan; and if the rate of discount exceed that fixed by the statute, it is an usurious loan. It is said, *non constat,* that these parties knew that the endorsers were bound thereby; without which there was no corruption. It is to be taken they knew it, and that the endorsement expresses their contract, until the contrary, as a mistake in the writing, or the like, be shown. If a person misconstrues the statute or the law, he must abide by his error. If he mistakes the fact, as the amount reserved, he may show it. But here there was no attempt to show even a misapprehension of the liability created by the endorsement.

Taking the endorsement to be usurious, another question arises, namely, whether the defendants can avail themselves of it. The Court does not disguise that upon this question very serious difficulties exist, and that notwithstanding the authorities cited, doubts, not at all light, are yet entertained. But upon the strength of the authorities, and the opinion heretofore generally received by the country at large, (32) and the profession, the Court feels constrained to decide that the defendants cannot avail themselves of any intermediate illegality. The bond was available between the obligor and obligees. The former is not privy to the usurious agreement between the latter and the present holder. If the security be in its origin usurious, it is void, into whose hands soever it gets, by the words of the statute. If it be good in its origin, a subsequent usurious agreement between the same parties does not avoid it, though it may subject the one party to the penalty if anything be received under the corrupt agreement. And if it be good in its origin, the subsequent transfer of it, usuriously, does not affect it as against the maker. No redress can be had on the endorsement as between the parties to it. The very object of the statute is to protect the borrower, as an oppressed man. But there is no oppression on the obligor who is a true debtor. The law was not introduced for his protection. It is for the interest of the party injured, and the advancement of justice, that the transfer should be held valid, because where the assignee receives the money, the borrower can recover from him the excess above the principal advanced, and legal interest. But unless the obligor be obliged to pay, the endorser may be without remedy, without first paying to the endorsee the principal borrowed and interest. At least, it has been so decided. *Fitzroy v. Gwillim,* 1 T. R., 153. However, general reasoning on the subject, it is admitted, is not entirely satisfactory either way. And the Court would feel much hesitation in coming to a conclusion were there not adjudged cases in point. *Munn v. The Commission Company,* 15 John., 44, is direct. The decision is that a note valid between the maker and payee, so that the latter

could maintain an action on it, is also valid as against the maker in the hands of an endorsee, who has discounted it at a higher rate than is legal, and the endorsee himself may recover the whole amount from the maker. This goes the full length of the present case. So, also,
(33) does the case of *Bush v. Livingston et al.,* 2 Caines' Cas. in Er., 66, which is very strong, inasmuch as the endorser himself was a party. It was a bill for foreclosure by the assignee of a mortgage against the mortgagor, to which, of course, the mortgagee was made a defendant. The mortgagor relied in his answer upon the usury committed by the plaintiff in getting his assignment. It was held that it did not lie with him, and that his obligation to make payment of the original debt was not impugned by it.

A great number of cases were cited from the English books on the part of the defendant. But they are all *nisi prius* cases, except that of *Parr v. Eliason,* 1 East, 92, and are subject to this observation, that none of them state the facts in such a way as to show whether the security was an *accommodation* bill or note and intended originally to be usuriously discounted, or real paper usuriously discounted for the payee. *Lawes v. Mazzaredo,* 2 E. C. L., 438, is an exception, for in that the plaintiff was a remote and *bone fide* endorsee, and the usury was committed in discounting for an intermediate endorser. But that case is contradicted by *Parr v. Eliason,* in the King's Bench. It is true this last case was also one of a remote *bona fide* holder, and *Lord Kenyon,* as he is made to express himself, relies much on that. But it seems to me that gives up the question. For however honest the holder is, he must claim through the usurious endorsement, and it is a rule in relation to contracts void by statute that they must remain void to all intents and purposes. If the usurious endorsee could not recover against the maker by reason of his title being void, he cannot transfer a power of recovery to another. The right of the latter can only be sustained upon the ground that the consideration upon which the holder transferred his note, valid in the holder's hands, is collateral to him, the maker, altogether independent of his contract, and not affecting it. And this presses upon the Court the consideration of the futility of the rule contended for on the part of the defendants. For it is worth nothing if it and the statute can be evaded by an endorsement for
(34) value to an innocent party. And again a suit in the maker's name would set up the obligation, purged of the usury.

This case is altogether different from that of *Ruffin v. Armstrong,* 2 Hawks, 411, which was a suit against the endorser upon the usurious endorsement itself, and the Court purposely avoided going out of that question, though the whole doctrine had been discussed at the bar.

Without interfering, therefore, with the rights and liabilities of the endorser and endorsee, as between themselves, it appears to us that these defendants cannot allege this usury in discharge of themselves. They are like persons who have received money to the use of another on an illegal contract. They are not allowed to retain it, but must pay it to him for whose use it was received. *Tenant v. Elliott,* 1 B. and P., 3; *Farmer v. Russell, ibid.,* 296.

PER CURIAM. Judgment reversed.

Cited: *McElwee v. Collins,* 20 N. C., 352; *Ballinger v. Edwards,* 39 N. C., 452; *Ray v. McMillan,* 47 N. C., 229; *Bynum v. Rogers,* 49 N. C., 400; *Ward v. Sugg,* 113 N. C., 490; *Sedbury v. Duffy,* 158 N. C., 433.

SAMUEL SIMPSON v. JAMES S. BLOUNT.

1. Where evidence proper for one purpose was, by the counsel who introduced it, urged to the jury as proof of a fact to which it is incompetent, and the counsel on the other side replied to this argument, but moved for no specific instructions on this head from the bench: *It was held* that the judge committed no error in not noticing it in his charge.
2. A plat, made on an order of survey in one cause, is not evidence on the trial of another between different parties.
3. Actual possession of land consists in exercising that dominion over it, and making that profit from it, of which it is susceptible in its natural situation.
4. But these acts must be characteristic of ownership. If at long intervals, and consistent with the acts of a trespasser, they are not sufficient.

TRESPASS *quare clausum fregit,* tried on the fall circuit of 1829, at BEAUFORT, before his Honor, *Donnell, J.*

The plaintiff claimed under a grant issued in 1770, and deduced a regular title from the grantee to himself. He then, upon the point of possession, proved that the *locus in quo* was a swamp, entirely uncultivated, and that in the years 1774, 1814, and 1822 three several persons had, under a license from him, cut timber on the land.

The defendant claimed under a grant, dated in the year 1743, to one Samuel Boatwell, and one question in the cause was whether this grant covered the *locus in quo.* Upon this point the defendant (35) offered a deed, dated in 1748, whereby Samuel Boatwell conveyed to one Godley a tract of land patented by Edward Salter, and calling for

the lines of Samuel Boatwell, Sr., and Samuel Boatwell, Jr., as two of its boundaries. The plaintiff objected to this deed as not being evidence in relation to the boundaries of Boatwell's grant of 1743. But the defendant insisting that it was one of the *mesne* conveyances under which he claimed, his Honor permitted it to be read. It was in proof that there were two Samuel Boatwells, who had been long dead, but no evidence was given as to which of them was the vendor in that deed.

The plaintiff examined one Cherry, a surveyor, who had surveyed the adjacent lands about twenty years before, in consequence of a suit then pending between him and one Bryan Blount, who testified to the beginning corner upon the plat made under a survey ordered in this cause. He also offered to the jury the plat made by the witness in the suit with Bryan Blount. This testimony was objected to by the defendant, and rejected by the presiding judge.

In addressing the jury upon the question of boundary, the defendant's counsel adverted to the fact that the deed of Boatwell to Godley called for the lines of Samuel Boatwell, Jr. The plaintiff's counsel, in his reply, insisted that the calls of this deed were not evidence on the question of boundary, contending that the vendor was the same Samuel Boatwell to whom the grant of 1743 issued, and in urging that the deed was not evidence as to the question of boundary, he stated that he affirmed this under the correction of the court. Upon this observation of the counsel, no remark was made by the judge.

His Honor charged the jury that if the plaintiff had title to the *locus in quo,* that title gave him a constructive possession, which was sufficient to enable him to sustain this action, but that if they believed the defendant had succeeded in showing that the plaintiff had no title, but
(36) the title was in another, although the defendant could not deduce it to himself, that then, in order to entitle himself to recover, the plaintiff ought to show an actual possession, and that his having, at the times above mentioned, permitted others to cut timber on the land was not evidence from which they could infer an actual possession. Nothing was said to the jury respecting the deed of Boatwell, neither was his Honor requested to instruct them upon any particular point.

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

Gaston for plaintiff.
Hogg for defendant.

RUFFIN, J. The plat made by Cherry was not evidence at all. If it was necessary and competent to prove the beginning of the line run by him, that had been done by the witness himself, and the point designated, in his testimony to the jury, on the plat then before them, and made in

this cause. The only purpose for which admission of the other plat was sought must have been to mislead the jury, by letting them see how Cherry ran the line from that beginning, in the hope that they would regard that as the true line. This conclusion they could not properly draw, either from the fact that Cherry had run it or that one of the parties for whom he was then surveying had insisted on it as the line.

The instruction upon the point of possession was also correct. I do not accord with the counsel for the defendant that in the absence of title actual possession—that is, by residence or enclosure and cultivation—must be shown to support trespass. The argument is that though swamp, the land is susceptible of draining and cultivation, and nothing short of that should be taken to be a possession, when, from the nature of the subject, *that can* be done. I think the rule is that exercising that dominion over the thing, and taking that use and profit which it is capable of yielding *in its present state,* is a possession. It is all that can be done until the subject itself shall be changed. It is like the case stated in the books of cutting rushes from marsh. This is sufficient, though it might appear that dikes and banks would make (37) the marsh arable. But acts of this description must partake of the character of ownership, and of a continued assertion of right and exercise of it. Occasional acts, with long intervals between them, do not denote title, nor the claim of dominion; at least, they are very ambiguous evidences, and may as well be taken for the wrongs of a trespasser as the assertion of a rightful dominion. Here there has been a cutting of timber on three occasions only in sixty years—since 1770—and the last time was seven or eight years before this suit. They create neither a presumption of title nor present possession.

Without entering into the inquiry, whether the deed from Boatwell was, under the circumstances, evidence of boundary, the Court thinks the judge below committed no error touching it. When offered for that purpose, it was not admitted by the court. When offered as a link in the chain of title, it was properly received. It was uncandid in the counsel, when he failed to make out a title, to draw it to the aid of his cause upon another point, to which the court had held it not to be evidence. The court might properly have stopped him, and reprehended the unrespectful demeanor. But it is not error in law not to have done it. The opposite counsel might also have called upon the court to correct a course of argument not founded upon legal evidence, and injurious to the side with the care of which he was charged. If he would not move the court to interpose, but chose to rely on his own reply to the jury, he cannot complain that the judge did not of his own accord do it. The party must move the court before he can impute error in a case of this sort. The counsel did reply, and properly, to the argument. The

judge gave the reply his sanction—for his silence under the circumstances was a sanction. But if it were not, the court is not bound, in summing up to the jury, to notice every position discussed between the counsel, which would lead to most inconvenient prolixity. If any
(38) thing deemed material be omitted, the counsel can call the attention of the court to it, and pray an instruction. A refusal would constitute error when an omission would not. Many cases do not require a charge from the court, and few a full one. Something must be left to the discretion and sense of propriety of the presiding judge. And at all events it is not error for the court not to be active when the party has not moved it.

PER CURIAM. Judgment affirmed.

Cited: Green v. Harman, 15 N. C., 161; *Brown v. Morris,* 20 N. C., 567; *Tredwell v. Reddick,* 23 N. C., 58; *Cook v. Norris,* 29 N. C., 215; *S. v. Rash,* 34 N. C., 386; *S. v. Cardwell,* 44 N. C., 249; *Loftin v. Cobb,* 46 N. C., 412; *S. v. Caviness,* 78 N. C., 487; *Brown v. Calloway,* 90 N. C., 119; *Staton v. Mullis,* 92 N. C., 632; *Baum v. Shooting Club,* 96 N. C., 316; *S. v. Bailey,* 100 N. C., 534; *McKinnon v. Morrison,* 104 N. C., 363; *Berry v. McPherson,* 153 N. C., 6; *Coxe v. Carpenter,* 157 N. C., 561; *Locklear v. Savage,* 159 N. C., 238; *McCaskill v. Lumber Co.,* 169 N. C., 26; *Cross v. R. R.,* 172 N. C., 125; *Alexander v. Cedar Works,* 177 N. C., 145.

THOMAS SANDERSON v. NEHEMIAH ROGERS.

1. An execution is an entire thing, and must be completed by the hand which begins it. Where a *fi. fa.* was levied by one sheriff, and a *venditioni exponas* issued to his successor: *It was held* that the latter could do no official act under the writ, and was not entitled to commissions.
2. A levy vests a property in personals in the sheriff, to which his executor succeeds. Upon his death or resignation, a *distringas* against him or his executor is the proper process.
3. But the successor, upon the death of a sheriff, must, at his peril, take notice of a prisoner in custody upon a *ca. sa.*

ASSUMPSIT, in which the plaintiff declared for the sum of $253, due him as sheriff of the county of Washington, for commissions upon an execution, which came to his hands in favor of the defendant against one Ely.

The defendant pleaded the general issue, and upon the trial, before his Honor, *Daniel, J.*, a verdict was entered for the plaintiff, subject to the opinion of the court upon the following case.

A *fi. fa.* upon the judgment in favor of the defendant against Ely, first issued to one Garrett, then sheriff of Washington, who levied it upon the property of Ely, and shortly thereafter died, having appointed an executor. Upon the death of Garrett, the plaintiff was appointed his successor, and a writ of *venditioni exponas* issued to him, directing him to sell the property levied upon by his predecessor. The plaintiff having this writ in his possession, demanded of Ely a bond for the forthcoming of the property levied on by Garrett. This bond Ely refused to give, and insisted that the writ was improperly issued to the plaintiff, and that the duty of collecting the money due upon the judgment (39) on the death of Garrett devolved upon his executor. Upon the plaintiff's threatening to seize the property, Ely complied with the demand, and gave the bond. The plaintiff neither levied the execution nor collected the amount of it. He, however, advertised the property for sale, which was prevented by an injunction obtained by Ely, pending which the defendant received his debt directly from Ely. Upon these facts, his Honor set the verdict aside and entered a nonsuit, and the plaintiff appealed.

No counsel for either party.

RUFFIN, J. The writ directed to the plaintiff gave him no authority to seize. Neither could it properly issue to him to command him to sell that which had been seized by his predecessor, because that could not be done without a seizure previously made by himself. A *venditioni exponas* is predicated upon the effects being in the hands of the officer to whom it is directed. *Washington v. Sanders,* 13 N. C., 343. This results from the maxim that an execution is an entire thing, and must be completed by the hand which begins it. A *fieri facias* vests a property in the sheriff who seizes, which satisfies the debt and makes the sheriff himself liable. Hence, he may sell after the return of the writ, and after he is out of office. *Clark v. Withers,* Ld. Raym., 1072; *S. c.,* Salk., 322. And the process to the new sheriff is a *distringas.* It follows that upon the death of the old sheriff the property is in his executors; that they become responsible for the debt, and that they may sell the chattels. It is different indeed with a *ca. sa.,* but from necessity, and no farther than necessity carries the difference. Upon the coming in of the new sheriff, the old one must deliver the prisoners, and give notice of the executions wherewith they were charged, or he remains liable. But upon his death the new one must, at his peril, take notice

and the custody of them, because he is the keeper of the gaol, and there is nobody except him entitled to keep them there. *Westby's case,* (40) 3 Rep., 71, 72. But the law has provided no rule for the delivery over of property in the hands of the old sheriff. We must conclude, then, from the reason of the thing, that it devolves on the representatives of the deceased sheriff, who are responsible for it. And to that effect it is pointedly laid down by *Lord Mansfield,* in *Cooper v. Chitty et al.,* 1 Wm. Bl. Rep., 65.

We think, therefore, that the plaintiff is not entitled to commissions, because he did nothing, and could do nothing officially, upon which kind of acts alone his commissions arise.

There is no count on a *quantum meruit* which would have let in evidence of a request from the defendant, and entitled the plaintiff to the worth of his actual labor. But the declaration is for commissions, as fees of office, and to them there is no right.

PER CURIAM. Judgment affirmed.

Cited: Tarkington v. Alexander, 19 N. C., 89.

WILLIAM YARBOROUGH, ADMINISTRATOR OF JOHN HARRIS, v. ROBERT HARRIS.

1. A special administrator, in an action by the general administrator, may show that property which he received and inventoried as belonging to the intestate is, in fact, the property of a lunatic, of whom the special administrator was appointed guardian after the repeal of his letters of administration.
2. Estoppels which arise from the mere act of a party, and from which a conclusion of law is inferred, are not favored.
3. The rule that a tenant or bailee cannot dispute the title of his landlord or bailor without surrendering the possession, is founded in a principle of morality which does not permit possession to be retained in violation of the faith upon which it was acquired.
4. But if, during possession under a bailment, the bailee is, by act of law, vested with an office, the duties of which require him to dispute the title of his bailor, he is remitted to the title thus acquired, and may, without a breach of faith, retain the possession.

DETINUE, for sundry slaves, tried on the fall circuit of 1830, before his Honor, *Strange, J.* The plaintiff proved that his intestate died possessed of the slaves in question. That after his death, upon a contro-

versy respecting a supposed will of the intestate, administration *pendente lite* was committed to the defendant, who returned an inventory, in which the slaves were mentioned as a part of the personal estate of the intestate. That after the supposed will had been pronounced against, the limited administration to the defendant was revoked, and general letters issued to the plaintiff, who had demanded the negroes of the defendant.

The defendant proved that after the revocation of the letters of (41) administration to him, he had been appointed guardian to a son of the intestate, who was of full age, but had, upon inquisition, been pronounced a lunatic—and he offered proof of a gift by the intestate of the slaves in dispute to his lunatic ward. This testimony was objected to by the plaintiff, who contended that the defendant was estopped to show title to the slaves out of John Harris, the intestate. But his Honor, holding that although the facts above stated formed a strong *prima facie* case for the plaintiff they did not conclude the defendant from showing the real state of the title, admitted the evidence, and the defendant obtaining a verdict, the plaintiff appealed.

Nash and Winston for plaintiff.
Badger and W. H. Haywood for defendant.

HENDERSON, C. J. An executor or administrator is not estopped by his inventory. It affords strong evidence against him, but he is not concluded, and may show the truth. Estoppels are not to be favored, particularly those arising from the mere acts of the party, where the fact admitted requires skill and judgment to determine on, as who has title. In such cases it is a mere conclusion of law, in which any person, and more particularly a layman, may be deceived. There is no estoppel upon a tenant or bailee longer than the tenancy or bailment continues. If it was an estoppel, it would continue after the premises or property had been surrendered up, which was never even contended. The rule under which this case falls, if it falls under any of the kind, that a tenant or bailee, after the determination of his interest, is bound to surrender up the property, is founded on high grounds of morality and good faith, and at all times ought rigidly to be adhered to, where circumstances require its application. That the tenant should not hold for himself, or even for another, whose rights it is not his peculiar duty to guard and protect, certainly falls within the rule, nor should he seek a relation or connection with another, the necessary effect of which would be to make it his duty to guard and protect that (42) property against his landlord or bailor. It would seem as if the relation was sought with that view only. But neither policy nor morals

require that the rule should be extended to cases where an office or authority, involving various other duties, is conferred on him by law, even with his own consent. For then the presumption is weak that the office was sought or obtained with an intent injurious to the rights of the bailor. As in the present case, where there are so many *good* motives to which to ascribe the act, it is uncharitable to ascribe it to a bad one. If the rule was founded solely on the rights of the landlord or bailor, and not also as a punishment to the immorality of the tenant or bailee, it would put an end to the doctrine of remitter, to which this bears some analogy. I do not concur with the defendant's counsel that the special administrator is not the bailee of the general administrator, because the general administrator was not in being whilst he was the special administrator, for that the latter ceased before the other commenced. For in spirit he received the property, to hold during the contest, and was bound, if it belonged to the estate, absolutely to deliver it to the general administrator. Nor could he retain possession against the general administrator under a claim for himself, or a mere stranger. But if an office is conferred on him by law, to which the title to the bailed property is attached, he may then retain possession, for this is no breach of faith, at least, from a bad or selfish motive. Even if he seeks an office, such as the present, where various other duties are imposed, it shall not be presumed that he sought it as a pretext for not restoring the property. If it is the property of his ward, he ought to have possession of it, and to retain that possession is in law no breach of faith.

PER CURIAM. Judgment affirmed.

Cited: *Burnett v. Roberts,* 15 N. C., 84; *Foscue v. Foscue,* 37 N. C., 325; *Fanshaw v. Fanshaw,* 44 N. C., 169; *Sain v. Gaither,* 72 N. C., 235; *Pate v. Turner,* 94 N. C., 55; *Grant v. Reese, ibid.,* 724; *Lumber Co. v. Lumber Co.,* 140 N. C., 443; *Nance v. Rouark,* 161 N. C., 648.

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(43)

PETER DOWELL, QUI TAM, ETC., v. JOEL VANNOY.

1. A sheriff who had collected money upon an execution, and had neglected to pay it to the plaintiff, and was thereby subject to damages at the rate of twelve per cent per annum, having lent the money thus collected to a third person at the same rate of interest, was held guilty of usury, and liable to the penalty imposed by the Act of 1741 (Rev., ch. 28).

2. *It seems* that an agent who lends money at an usurious rate of interest is liable to the penalty, notwithstanding he discloses his character.

3. A pure contract of indemnity against a doubtful claim is not within the statute against usury.

4. But an agreement whereby the borrower agrees to pay the lender the same rate of interest which the latter is bound to pay a third person, and which exceeds the legal rate, is not a contract of indemnity, within the meaning of the rule; and this, whether the obligation of the lender be created by an act of law or by stipulation.

5. The payment of usurious interest to the sheriff, or to an assignee, and much more to an agent, completes the offense.

6. The omission to date a writ can only be taken advantage of by plea in abatement.

7. A verdict that "the statute of limitation does not bar" is not responsive to the issue, and is erroneous.

8. But it is such a minute of the verdict as to enable the Superior Court to correct the entry; and although the Supreme Court cannot make this correction, but if it proceeds to judgment, must award a *venire facias de novo*, yet it will stay the judgment till the correction is made in the court below.

9. In popular actions, under *nil debet*, the plaintiff must prove his action to have been brought within the period of litigation, and when that plea is entered, a special plea of the statute of limitation presents an immaterial issue.

DEBT, upon the Act of 1741 (Rev., ch. 28), "for restraining the taking of excessive usury."

The writ was in the usual form, but was tested "the second Monday of September, in the 53d year of our Independence, A.D. 182," and by a memorandum at the foot, was stated to have issued 12 September, 1828.

The defendant pleaded *nil debet,* and the Act of 1808 (Rev., ch. 743), limiting the time of bringing penal actions to three years after the cause of action had accrued.

On the trial, before his Honor, *Daniel, J.,* at WILKES, on the spring circuit of 1830, the plaintiff proved that the defendant, being sheriff of Wilkes, had an execution for $600 against the plaintiff, at the suit of one Crissman, returnable to the Fall Term, 1825, of Surry Superior Court; that upon this execution the defendant had made but $400, which he sent, together with the writ, at the return day, with directions to pay it to Crissman, only upon condition that the latter would not amerce him for not making the whole amount of the execution. Crissman refused to receive the money upon these terms, and not only amerced the defendant, but took steps to subject him under the Act of 1819 (Rev., ch. 1002), to the payment of the sum actually received, together with damages at the rate of 12 per cent per annum. The defendant then loaned part of the money he had thus collected to one Thurmond, and took from him the following bond:

"We, M. Thurmond, principal, etc., promise to pay to Joel Vannoy three hundred and twelve dollars, forty cents, money lent, to be paid by March Superior Court of Surry, 1826—the same is money collected for C. L. Crissman. We agree to pay to Joel Vannoy the interest which he may be liable to pay for failing to pay the above money into
(44) office at September Term, 1825, of Surry Court. 15 September, 1825."

Thurmond paid the amount of this note, together with interest at the rate of 12 per cent per annum, to an agent of the defendant, who immediately took the same money, together with the balance due upon the execution, to Surry courthouse and paid it to Crissman, with interest at the same rate on $400. At the time of this payment, the defendant was present, and then surrendered to Thurmond the note above set forth.

His Honor instructed the jury that although by law the defendant was bound to pay Crissman interest upon the money he had collected and failed to pay over at the rate of 12 per cent per annum, yet that the law which imposed so high a rate of interest upon him did not authorize him to exact the same of others, and that if the defendant had received more than 6 per cent per annum of Thurmond, they ought to find a verdict for the plaintiff. The jury found "that the defendant does owe the sum of $624, and that the statute of limitations does not bar."

A rule for a new trial being discharged, and judgment rendered on the verdict, the defendant appealed.

Badger for plaintiff.
Gaston for defendant.

(45) RUFFIN, J. It is argued for the appellant that the court erred in two respects. The first, in not leaving it to the jury whether the defendant was not merely the medium or instrument of Thurmond to pay to Crissman the interest to which the latter was entitled, and so Vannoy did not receive it for himself. The second, that the contract is not one for usurious interest, as such, but merely for an indemnity, which is lawful, and, at all events, that the character of the transaction ought to have been left to the jury.

In relation to the first, it may be observed, in passing, that it is far from clear that an agent, in lending money upon an usurious contract, shall be excused, either by the fact of the agency or by a disclosure of it. It is a criminal act, and upon principle it would seem that all who participate in it were liable to its penalties. And although Crissman might properly exact from the defaulting sheriff the increased interest, given against him by law, he could not, under color of that right, loan,

the money to a third person, through the instrumentality of the sheriff, at such greater rate of interest.

But here there was no such agency. No contract with Crissman, direct or indirect, can be inferred. He gave no assent to the loan to Thurmond. He did not know it, and was at the time actually pursuing Vannoy by suit for the money. The fact, then, contradicts the position assumed.

The force of the second objection depends altogether upon the sense in which the term *indemnity* is used, and the fallacy of the argument lies in the equivocal use of that word. How was this a contract of indemnity? If it be meant that for a certain sum Thurmond agreed to save harmless Vannoy against a doubtful demand of Crissman, or one which the parties thought doubtful, it covers a case of mere wager; and, in that point of view, it is immaterial whether the demand to which the risk related were one for interest or for any other cause. But, then, it must appear upon the obligation, by a fair construction, (46) that such was the nature of the contract; or, if the contrary there appear, it must be shown by other proof that such was in fact the agreement, and that the writing, as framed, does not express the truth, and was so framed by mistake—not as to the effect, in law, of the contract as stated, but as to the terms of the agreement itself. No such proof is offered here, and the case is left on the bond itself. By the terms of that instrument the agreement is not shown to have been for an indemnity of the kind alluded to; but, on the contrary, it is shown that it was not for such an indemnity. It is express that the debt is for "money lent," and that Thurmond is to pay "the interest" which Vannoy was liable to pay to Crissman. There is nothing which can lead us to suspect that Crissman's right was doubtful, or that any one of the parties thought it so. If, then, an indemnity was contemplated, of what sort was it? Simply that which consists in one person paying to another *as interest upon a loan,* whatever this last had agreed or was bound to pay as interest to a third person. The bare stating it thus goes far towards understanding and answering the objection. In such a case, the notion of indemnity cannot give a color to the transaction. The reference to the interest for which the obligee was liable was only to ascertain that which the obligor was to pay. And if the parties thought that the obligee might lawfully reserve that rate of interest, because he was paying it, that would not help the defendant, provided the obligation to pay was absolute upon the borrower. It would be a mere misconstruction of the statute, which cannot be heard as an excuse. If the interest reserved exceed 6 per cent, at all events the bargain is corrupt in the sense of the statute; that is, it is a violation of the

statute. If the term *indemnity* be understood in this last sense, there was no error in leaving it to the jury. For it is no excuse for the defendant that this was an effort to save himself from loss by reason of a previous liability of his own, and, therefore, he gains nothing.
(47) It is like selling out stock at a loss and charging the borrower with the loss. *Moore v. Beatie,* Amb., 371. Indeed, the avoiding of a loss is a gain. But if it were not, the true inquiry is whether he reserved as interest on the loan made *by him* a higher rate than 6 per cent, and received it as and for the interest reserved. The reference to his own liability upon a distinct matter is nothing. If that liability arose from his agreement to pay 12 per cent to a third person, it is manifest that he cannot rightfully make himself whole by the loan of a like sum to another at the same rate. The interest payable by him does not make that to be received by him legal. It makes no difference, to this purpose, whether the liability of the lender for the excessive interest be created by stipulation or arise by act of law. As against him the rate of interest may be lawful, but as between him and the person to whom he lends the money it is unlawful.

Such is precisely this case. For, I repeat, the bond explicitly declares that the money was lent by Vannoy to Thurmond, and adjusts the rate of interest *as such,* and it was afterwards paid as such. The rate fixed on is illegal. This is done by referring to the liability of Vannoy to Crissman, and that liability was certain according to the case. Indeed, the bond is not even that Thurmond should pay to Vannoy what the latter should pay to Crissman, or what Crissman should recover, but what Vannoy was liable to pay, which the case states was 12 per cent. If this defense were sustained, one of the most effective securities for the performance of their duties by sheriffs would be destroyed, and at the same time needy men exposed to the most inordinate exactions on the part of those persons whose official situations give them the best means of discovering and profiting by the necessities of the distressed.

The next position is, that as the act is highly penal, the case must be brought strictly within it; and, therefore, that the receipt of the money must be by the defendant personally. To this there are two answers. It has often been decided that payment to the sheriff on an execution, or to an assignee completed the offense—much more, to an agent.
(48) But here the defendant was present when the money was counted to his agent. He then recognized it, and surrendered the bond as thereby paid. This was a payment to himself.

Two objections are then taken as arising out of the record. The first is, that the writ is without date. If this were true, it is too late, after an appearance and a plea in chief to make it. It ought to have been

pleaded in abatement. But it is not true. Though the year of the Christian era is not given in the *teste,* yet that of American independence is; and the former is stated in the memorandum of the clerk, at the foot, of the day of issuing the writ.

The other ground for arresting the judgment is, for the defect of the verdict upon the issue on the plea of the statute of limitations. The words are: "The jury find that the statute of limitations does not bar." The authorities cited for the defendant very satisfactorily prove that the verdict in this form is bad. It is not a direct response to the issue upon the point of fact, and upon that alone. The fact is to be collected by inference only, and then is not certainly separated from matter of law. If, therefore, the judgment of the court necessarily turned on the finding of the time as thus stated, it is very uncertain what might be the determination. The truth is, that regular *entries* are seldom made in our courts. This is owing mainly to the want of capacity in the clerks, which is likely never to be remedied until increased business and adequate compensation shall induce competent persons to accept the office. But the Court cannot but take notice that this state of things, and perhaps also their own ease, have given rise to an almost unlimited confidence of the bar in each other, that all necessary amendments of form in the acts of the clerk shall be made or intended when the occasion shall call for them. The Court would, therefore, very reluctantly yield definitely to this objection. But we could resist it no further, probably, than by considering the entry not so much the verdict as the minute for it, and staying the judgment here until the plaintiff could move the Superior Court to amend the record consistently (49) with the minute, and bring up the transcript as amended. That court can mould the verdict into due form; there is no such power here. I mention this, that counsel may be aware of the difficulty arising out of the constitution of this Court, and be more attentive to the making up of the record where it is to be revised. If brought to judgment upon a defective verdict, this Court has no discretion, and must of necessity award a *venire facias de novo.*

That such is not the judgment in this case is owing to the uncommon circumstance that the fact, intended to be found upon that issue, is found upon another. In popular actions the statute of limitations need not be pleaded if *if nil debet* be. It is a part of the plaintiff's title or right that he hath sued and hath sued in due time. The burden of proof is on the plaintiff, and if his action be not brought within time, he is upon the general issue nonsuited. (2 Saun., 63a, note.) If the same matter be put twice in issue by several pleas, there is no authority that the verdict must refer to each issue. If the act itself be affirmed that is

enough. Here the jury do find that the defendant owes *the plaintiff* the debt demanded, which cannot be unless the plaintiff brought suit within the three years limited by the Act of 1808.

PER CURIAM. Judgment affirmed.

Cited: Grist v. Hodges, post, 205; *Cherry v. Woolard,* 23 N. C., 440.

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(50)

JAMES J. TREDWELL v. WILLIAM D. RASCOE.

1. The purchaser of partnership effects, under a *fi. fa.* against one copartner, takes them subject to the accounts of the partnership, and can only claim a share of the surplus after payment of the debts. But the sheriff is in no way affected by this equity between the purchaser and the other partners.

2. Actual possession is not necessary to the validity of a sheriff's sale. It is sufficient if the goods are subject to his control.

TRESPASS against the defendant for seizing a quantity of salt, the property of the plaintiff.

The case of the plaintiff was, that the salt arrived at Edenton in February, 1828, from Turk's Island, consigned to the order of the shipper, Lewis Leroy, who was a copartner of one Blair, residing at Edenton; that the bill of lading had been indorsed by Blair to the plaintiff, and that the latter had secured the duties upon the salt and had taken out a permit for the landing of it; that before the whole of it was landed the defendant took possession of it and sold it; that at the time of the sale none of the salt was present, except one bag as a sample, part of it being then in a storehouse of which the defendant had the key, and the residue was on board the vessel in which it arrived, the captain of the vessel declaring that he would deliver it upon being paid his demurrage and having the duties secured.

The defendant justified under a *fi. fa.* issued to him as sheriff of Chowan, upon a judgment against Blair, tested of the December Term, 1827, of Chowan County Court, and returnable to the succeeding March Term. He proved that upon the arrival of the salt Blair and the plaintiff went to the custom-house together; that Blair said he wished to enter the salt and secure the duties; that he commenced writing the oath preparatory to making the entry, but before he had completed it he told the plaintiff he would not enter the salt for fear some of his creditors should seize it or give him trouble about it, and asked the plaintiff

to enter it for him; that the plaintiff consenting, Blair, under a power of attorney from Leroy, indorsed the bill of lading to him, whereupon he secured the duties.

His Honor, Judge Norwood, instructed the jury that if Leroy (51) and Blair owned the salt in partnership, the share of Blair in it was nevertheless liable to seizure under an execution against him, and that the purchaser would be a tenant in common with Leroy, although in a court of equity he would be bound by the state of the partnership accounts; that the indorsement of the bill of lading would enable the plaintiff to maintain this action without actual possession; that the indorsement was also *prima facie* evidence of a consideration paid by the plaintiff, but might be explained by parol testimony, and if without value, or made to defraud creditors, was void. And further, that when the lien of the United States for the duties was removed the lien of the execution attached upon the salt, and prevented Blair from transferring his interest in it so as to defeat that lien.

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

Gaston for plaintiff.
Hogg for defendant.

HENDERSON, C. J. I cannot perceive the least objection to the instructions given by the presiding judge, that partnership property is liable to the separate debts of individual partners; that a consignment without value will not transfer the property; that an assignment of the consignee without value has no greater effect; that a transfer by or for a debtor after the *teste* of a *fi. fa.* is fraudulent and void against the creditor; that goods afloat, before duties paid or secured, are liable to seizure under a *fi. fa.*, saving nevertheless the rights of the government, are all propositions, I think, which cannot be contradicted. It is true that the purchaser of partnership property, under a *fi. fa.* against one of the partners, stands in the place of such partner, and can only claim, so far as the article purchased extends, what that partner could claim; that is, a share in the profits, or rather surplus, after payment of the debts of the firm. But what are the rights of the purchaser, or his relation to the other partners, affects not the creditor in the (52) *fi. fa.* or the sheriff who has seized the partnership effects.

I have considered this case divested of the imputations of fraud, which appear to be justly ascribable to it. But if they are considered, I cannot perceive even the shadow of a doubt. Blair, the debtor, when about to enter the goods, either in his own name or in that of Leroy, or in that of Leroy and Blair, requests the plaintiff to permit them to be

entered, or to have them entered in his, the plaintiff's, name, and this with an avowed intent to hinder or delay his creditors or to save himself from trouble in regard to them, meaning no doubt a contest with his creditors. The plaintiff assents, and becomes his instrument for such purposes. The whole transaction, if these be the facts, is fraudulent and void, not only by a legal inference as being done after the *teste* of the *fieri facias,* but by an actual, express and designed fraud, to wit, fraud in fact, and deserves no countenance either in law or morals.

As to the sheriff's not taking actual possession, not having the property present at the sale, and not delivering it to the purchaser, if these were wrongs they were wrongs to others and not to the plaintiff. If he seized not the goods, then even the allegation of the plaintiff fails and this action, for that reason, fall to the ground. If he had not the goods present at the sale, and the sale should thereby be void, in this also the plaintiff is not concerned or injured. If he did not deliver the salt to the purchaser, how is the plaintiff affected thereby? But it requires not an actual seizure—a manucaption—to make a seizure or arrest in law. A submission to the dominion, power, will or control of the officer is sufficient—is a potential possession. And I apprehend here all was done that the law required. The captain declared that he would deliver the salt to the purchaser upon the duties being paid, and the purchaser accepted it on these terms. The salt being afloat, could not in that state be brought on land without a permit from the custom-house officer,

(53) which he would not grant until the duties were secured, which the sheriff was not bound to do. Nor was he bound to take notice that the plaintiff had then secured them; or if he did, he secured them apparently for himself and not for Blair, and he did not apprise the sheriff of what he had done and require him to have the salt present at the sale. Under these circumstances the sheriff sold by a sample, and I think the law required nothing more of him. But the case needs not this protection. The plaintiff cannot complain of these acts as omissions, for as to him they are immaterial.

PER CURIAM. Judgment affirmed.

Cited: Blevins v. Baker, 33 N. C., 292; *Vann v. Hussey,* 46 N. C., 382; *Flanner v. Moore,* 47 N. C., 122; *Latham v. Simmons,* 48 N. C., 28; *Watt v. Johnson,* 49 N. C., 194; *Ross v. Henderson,* 77 N. C., 173; *Clifton v. Owens,* 170 N. C., 611.

HENRY GARDNER v. ISAAC LANE.

1. A writ signed by an attorney, under a verbal authority of the clerk, is a nullity; and its subsequent recognition by the clerk or sheriff will not render it valid.

2. The case of *Shepherd v. Lane*, 13 N. C., 148, approved.

THIS was a special action on the case tried before his Honor, *Swain, J.*, at RANDOLPH, on the last circuit. The plaintiff declared against the defendant, as sheriff, in two counts; first, in neglecting to execute a writ of *capias ad respondendum*, sued out by the plaintiff in 1824 against one Shubal Gardner; and, second, for making a false return to the writ. Upon the trial, on the plea of not guilty, the plaintiff proved the issuing of the writ; that it came to the hands of the defendant, who failed to execute it, and made a false return thereon.

The defendant proved that the paper, which purported to be a writ in that cause, was not signed by the clerk of the county court, but by an attorney. But it appeared that all the attorneys practicing at that court had been verbally authorized by the clerk to fill up and sign writs of *subpœna* and *capias ad respondendum*, which had always been recognized by the clerk as valid, and that the writ in question was, upon its return by the sheriff, put upon the files of the court by the clerk, who ratified and confirmed the act of the attorney.

The plaintiff also proved that the defendant had received the (54) same authority from the clerk and was in the habit of signing the clerk's name to writs, and that he, the defendant, was well acquainted with the handwriting of the attorney who signed the writ against Gardner.

Upon this testimony the plaintiff's counsel prayed the court to instruct the jury that if they believed the defendant knew the writ to be in the handwriting of the attorney, and that the attorney had authority from the clerk to sign his name, and had, as sheriff, recognized the paper as a valid writ, he was liable to the plaintiff for neglecting to execute it. The court refused the instructions prayed for, and upon the authority of *Shepherd v. Lane*, 13 N. C., 148, directed the jury that a writ signed by an attorney, who was neither clerk nor deputy, was a nullity, and the sheriff was not liable for neglecting to act under it nor for making a false return.

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

The Court refused to hear Winston for plaintiff.
Gaston and Nash were to have argued for defendant.

RUFFIN, J. The case of *Shepherd v. Lane, supra,* is decisive of the present. The new matter shown here, that the defendant knew the writ was not signed by the clerk himself, but by the attorney in the clerk's name, does not distinguish it. For the Court say that the recognition by the sheriff could not give a character to the instrument which it did not in itself possess. And whether this recognition was given under a mistake of the fact, or in disregard of the law, the plaintiff can take no advantage of it.

The direct authority of *Shepherd v. Lane* is imperative upon the Court. It would be so with me did I, as an individual, retain ever so strongly the opinion given by me upon the trial of that cause on the circuit. A point of this sort must be considered as settled by a
(55) decision of this Court upon full argument.

PER CURIAM. Judgment affirmed.

JOSHUA YOUNG v. PETER HAIRSTON.

1. When there are several counts in the declaration, and on one of them improper evidence was received, if the party against whom the evidence was offered obtained a verdict on that count, he has no right to a new trial on the other, on which the verdict was against him.
2. Upon a rule for a new trial on the ground of excessive damages, the decision of the Superior Court is conclusive.

THIS was an action on the case in which the plaintiff declared in two counts: First, for slanderous words in accusing the plaintiff of stealing sheep; second, for maliciously prosecuting the plaintiff for stealing sheep.

The defendant pleaded not guilty, and the statute of limitations. The cause was tried before his Honor, *Swain, J.,* at GUILFORD, on the last circuit. The plaintiff proved the speaking of the slanderous words charged in the declaration, and to support his second count produced the original record of his acquittal in Stokes County Court, where a charge of stealing sheep was preferred against him by the defendant. He also proved that the slanderous words were spoken by the defendant immediately after the verdict of not guilty was returned, and relied upon the date of the verdict to rebut the plea of the statute of limitations. The defendant objected to the introduction of the original record of Stokes County Court, and insisted that by an act of Assembly the plaintiff could only use a certified copy. The objection was overruled and, under the instructions of his Honor, the jury found a verdict for

the plaintiff on the first count in his declaration, and assessed his damages to $1,250, and on the second count a verdict was returned for the defendant.

A rule for a new trial was obtained: First, because the original record had been improperly read to the jury; and, second, because the damages were excessive.

His Honor being satisfied with the verdict as to the damages, (56) and thinking if there had been any error in permitting the original record to be read, it had not prejudiced the defendant, as the jury had found for him on the second count, discharged the rule, and the defendant appealed.

Nash for plaintiff.
No counsel for defendant.

HALL, J. The case states that the plaintiff introduced the original record of the trial for the purpose of supporting the second count in his declaration, which was for a malicious prosecution, and that this evidence was objected to by the defendant's counsel on the ground that an act of Assembly required the production of a certified copy, and not of the original record in such a case. The act of Assembly relied upon has not been pointed out, and the regret is the less, as the plaintiff has failed upon that count in his declaration, and the defendant can have no interest in further examining the question.

With respect to the testimony introduced by the plaintiff, in reference to the plea of the statute of limitations, the objection taken cannot be sustained. The witness stated that the words were spoken after the trial of the indictment in the county court. It was surely competent for the plaintiff to prove by the record when the trial took place, and the record for that purpose was entirely sufficient.

With respect to the claim which the defendant may have for a new trial, on account of the damages being excessive, it is sufficient to say that the judge of the Superior Court, who tried the cause, was the sole judge of that question. He has stated that he was satisfied with the verdict. This Court did not hear the evidence, and of course ought not, and cannot, control any opinion of the judge below formed upon that evidence.

PER CURIAM. Judgment affirmed.

Cited: Brown v. Morris, 20 N. C., 566; *Benton v. R. R.,* 122 N. C., 1010.

(57)

WILLIAM B. WILSON v. MORGAN HUDSPETH ET AL.

Sureties for the prosecution of a suit are bound for the costs accruing before as well as after the execution of the bond.

THIS was an action of debt, upon a bond given for the prosecution of a suit brought by the defendant Hudspeth against the plaintiff, which was "to be void if in case of failure in the said suit the said Morgan Hudspeth pay and satisfy all the costs and charges that may accrue therein." After *oyer,* the defendants pleaded *non infregerunt conventionem.*

Upon the trial, before his Honor, *Martin, J.,* it was admitted by the defendants that Hudspeth had failed in his suit, and had not paid the costs, and that the whole costs amounted to $117, but they contended that at the execution of the bond the costs of the plaintiff amounted only to $58.

The jury, under the instructions of his Honor, returned a verdict for the plaintiff for all the costs of the suit, and the defendants appealed.

Attorney-General for plaintiff.
No counsel for defendant.

HALL, J., after stating the case as above, proceeded: The doubts which have brought the case before us are not readily discerned. The condition is that Morgan Hudspeth shall pay all the costs that shall or may accrue upon a contingency that may happen after that time, namely, a *failure* faithfully to prosecute the suit against Wilson. Such failure has taken place, and Hudspeth has failed to pay the costs. The defendants are therefore bound to pay all the costs accruing therein. All the costs are the costs which accrued before as well as the costs which accrued after the date of the prosecution bond given by the defendants.

PER CURIAM. Judgment affirmed.

Cited: *Revel v. Pearson,* 34 N. C., 246.

(58)

JAMES MILLS v. LUKE HUGGINS.

Tender and refusal are equivalent to a performance. But proof of ability to perform is necessary. As where upon a contract to deliver promissory notes, the defense was that the plaintiff refused to receive them, and insisted upon a part payment in money, and no evidence was offered of the defendant's ability to deliver the notes, it was held that the plaintiff was entitled to recover.

MILLS *v.* HUGGINS.

ASSUMPSIT, upon an express contract by the defendant to receive a quantity of pork from the plaintiff, and to pay the stipulated price in good promissory notes.

Plea—*non assumpsit.*

The plaintiff having made out his case, the defendant proved that after the delivery of the pork he offered to pay the price in notes, which the plaintiff refused, insisting upon having some cash with them.

His Honor, *Strange, J.*, charged the jury that ability as well as willingness in the defendant at the time of making the offer was essential to his defense, and that unless they were satisfied that at the time of making the offer the defendant had the notes in his possession, and was willing and ready to deliver them, they ought to return a verdict for the plaintiff.

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

No counsel for plaintiff.
J. H. Bryan for defendant.

HENDERSON, C. J. Ordinarily, nothing less than actual performance satisfies an engagement to do an act. But in acts which require the concurrence of both parties, if one party does all he can to perform his engagement, and the act remains undone, merely for the want of the concurrence of the other party, the party doing all in his power is entitled to the benefit of an actual performance. I speak not now of the *semper paratus,* and the *profert hic in curia.* They are incidental to some and not to all engagements. It must therefore be the non-concurrence of the other party which discharges the defendant (59) from the actual performance. If one person is bound to pay money, or deliver a horse to another, and that other will not receive it *when offered,* the party making the offer is excused *ex necessitate* from an actual performance. As one party may by acts, such as a refusal to receive, prevent the other from performing, so he may, by words, discharge him; as by saying, when a tender is about being made, "it is needless to offer, for I will not receive it," or similar expressions. There, if performance was prevented by such declarations, it will be excused. But in order to this, an actual ability at the time must appear. For otherwise, the performance was not prevented by the declaration. In this light it was viewed by the presiding judge. Therefore there is no error in the case. The defendant was not *hindered* by the plaintiff.

PER CURIAM. Judgment affirmed.

Cited: Cole v. Fair, 46 N. C., 174.

WILLIAM INGRAM v. HULL THREADGILL.

1. Although by the Acts of 1715 and 1777 (Rev., chs. 6 and 114), the beds of rivers and creeks are not subject to entry, yet, where the river or creek is not navigable in the ordinary meaning of the term, the owners of the banks have a several fishery opposite their land, to the middle of the stream.
2. The ebb and flow of the tide is not a proper criterion to determine whether a river of this State is navigable.
3. *It seems* that a fishery in a river which is not affected by the ebb and flow of the tide, but which is in fact navigable, belongs to the riparian proprietor.

TRESPASS, for fishing in the plaintiff's several fishery.

Upon not guilty pleaded, the jury returned the following special verdict:

"That the plaintiff had title to and was in possession of a tract of land, bounded by the Pee Dee River; that the defendant had title to and possession of a tract of land adjoining the plaintiff's immediately below, and also bounded by the Pee Dee; that the defendant, at the time alleged by the plaintiff in his declaration, drew his seine, and did fish with the seine in the channel of the river, and between the channel and the
(60) shore, and near the shore where it formed the boundary of the plaintiff's land on that side; that the *locus in quo* is the main Pee Dee River, about thirty-five miles above the point to which the river is navigable for steamboats; that at the *locus in quo* the river is about three hundred yards wide and about four and a half feet deep; that heretofore the river has been navigated with batteaux and flats to a point above the plaintiff's land, but that there has been no navigation of that kind for the last twenty years; that about fourteen miles below the *locus in quo* the river is nearly a mile wide, and is never navigable for batteaux, except in time of high water, and then with difficulty."

Upon this verdict, his Honor, *Martin, J.*, rendered judgment for the defendant, from which the plaintiff appealed.

Badger for plaintiff.
Devereux for defendant.

HALL, J. The Act of 1715 (Rev., ch. 6) declares that where a survey is to be made upon a navigable river or creek, the surveyor 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 people's lines,

or rivers or creeks. It is provided, also, that not more than six hundred and forty acres shall be laid out in one tract. The Act of 1777 (Rev., ch. 114, sec. 10) declares that where any survey shall be made upon any navigable water, the water shall form one side of the survey. The same act provides the mode of entering and surveying islands in navigable waters. It appears from these acts that the beds of navigable waters, and of navigable rivers and creeks, cannot be the subject of entry and survey. Therefore, the plaintiff in the present case cannot derive title to the fishery in question by grant from the State, as he might do for lands, under those acts of Assembly. And if he has title, it must (61) be derived by some other mode of acquisition.

In England a river is said to be navigable where the tide flows and reflows. Where that is not the case, they are said not to be navigable. In the latter case, the proprietors of the land on the river have the right of fishing on their respective sides, to the middle of the stream—*ad filum medium aquæ. Carter v. Murcot,* 4 Bur., 2162; *Rex v. Smith,* Doug., 441.

This definition of a navigable river seems not to be applicable to rivers in this State. They are in fact navigable for all the purposes of public convenience, in many places beyond the influence of the tide. But perhaps, at a point beyond the purposes of navigation, they may not be so considered; that is, to be free fisheries. In England, the reason why the king has an interest in a navigable river, as far as the sea ebbs and flows in it, is because such a river participates of the nature of the sea, and it is said to be a branch of the sea as far as it flows, and consequently he is entitled to the fishery in it. For it is said the king hath dominion over the sea, and that every subject hath a right to fish in the sea, and in a navigable river belonging to the king. Davis Rep., 252; *Warren v. Matthews,* 6 Mod., 73. From these premises it would result that the fishery in a river which was navigable, but which was not identified with the sea, by being subject to the ebbing and flowing of the tides, would belong to the riparian proprietor. On such a case, however, it would be improper to give an opinion. Such is not the case before the Court. The Pee Dee River, at the place where the trespass is alleged to have been committed, is not a navigable river, but a private one. And the owners of the land on each side of it have a right to the middle of it. The same may be said of rivers which divide nations. *Handly v. Anthony,* 5 Wheat., 374.

Although these franchises or fisheries are not granted by the State as lands are by law granted, yet when the lands adjoining such rivers are granted, the right of fishing vests in such grantees, and gives them the

right of fishing to the middle of the stream, in the water opposite their land, but not the right of fishing in water above or below the
(62) banks which belong to them.

PER CURIAM. Judgment reversed.

Cited: Williams v. Buchanan, 23 N. C., 540; *S. v. Glen,* 52 N. C., 334; *Hodges v. Williams,* 95 N. C., 338; *S. v. Twiford,* 136 N. C., 606; *Wall v. Wall,* 142 N. C., 389; *Council v. Sanderlin,* 183 N. C., 258.

JOHN GRICE v. JETHRO RICKS.

1. Ordinarily, the act of an attorney in a cause is taken to be the act of the party whom he represents. But where the assignor of a note stipulated that it should be placed by the assignee in the hands of a particular attorney for collection, and by the act of that attorney the interest of the assignor was injured: *It was held,* in a question between the assignor and the assignee, that the former was bound by the act of the attorney, and the fact that he had no redress against the attorney did not discharge him.
2. Where a party, against whom a judge expresses an opinion, refuses to submit to it, but puts his cause to the jury and is unsuccessful, although the judge may have erred, yet the judgment is not to be reversed if upon the whole case it is correct.
3. Where the liability of a party is not direct, but collateral, and dependent upon the default of another, he must be notified of a default before he can be charged.
4. A guarantor is entitled to notice, although to charge him the same strictness in giving it is not required as in the case of an endorser.

ASSUMPSIT, upon a special contract, tried before *Martin, J.,* at NASH, on the spring circuit of 1830.

Upon *non assumpsit* pleaded, the case was that the defendant had assigned to the plaintiff a note, made by one Lemon, payable to the defendant, and had written over his endorsement the following words: "I assign the within to John Grice, until paid." The plaintiff then proved that when this endorsement was made it was agreed between him and the defendant that the note should be placed immediately in the hands of an attorney named by the defendant, for suit, and that if the amount due on it was not collected, he, the defendant, would be answerable; that suit was immediately commenced by the attorney designated by the

defendant, who was retained by the plaintiff. The writ was in *assumpsit,* and was returnable to the ensuing November Term of the county court; that at February Term the writ was amended, so as to be in *debt,* and judgment entered up, with a stay of execution until May Term following. The defendant proved that if execution had issued from February Term, the amount of the judgment would have been realized.

There was no evidence offered by the plaintiff that notice had been given to the defendant of Lemon's default in making pay- (63) ment of the note.

His Honor instructed the jury that to enable the plaintiff to recover, it was necessary for him to show that there had been due diligence used by him to collect the amount of the note from Lemon. That granting a stay of execution for three months was evidence of a want of that diligence, and that if the neglect was the act either of the plaintiff or of his attorney, he could not recover. That the attorney was the agent of the plaintiff, and was responsible for misconduct to him only. That the defendant had no redress against the attorney.

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

Attorney-General and Seawell for plaintiff.
Gaston, Badger, and Devereux for defendant.

RUFFIN, J. It is not disputed that the giving of time, whereby the debt was lost by the insolvency of the debtor, discharged the defendant as an endorser or guarantor, provided it was the act of the plaintiff himself, or of one for whose acts the plaintiff was responsible.

Ordinarily, an agreed entry in a cause is taken to be the act of the parties. And, also, ordinarily, the act of an attorney is taken to be the act of the party to the suit whom he represents. If, therefore, the case stood simply upon the effect of the contract, as written in the endorsement, the charge of the court would have been correct. But it was part of the agreement, as was proved *viva voce,* that the note transferred should be put in suit immediately, under the management of a particular attorney. He might have possessed the especial confidence of the defendant, and upon that his willingness to guaranty might have been founded. Indeed, the attorney might have been selected by the defendant himself, and that provision introduced at his instance and for his benefit. In that case, the defendant must be considered as contracting for his skill and diligence. That he could not sue the attorney for willful or negligent mismanagement does not determine this point, for one (64) may bind himself that a stranger shall do a particular act. At

most, it would be a circumstance which might incline a jury to think that the attorney was selected by the plaintiff and not by the defendant. In the opinion of the Court, therefore, it ought to have been left to the jury to say whether the plaintiff or the attorney gave the stay of execution; and if the latter, whether the plaintiff or defendant selected the particular attorney, and agreed to be responsible for his conduct, as between themselves. And if the cause depended on that, there would be a new trial.

But the case further states that the plaintiff gave no evidence of notice to the defendant of nonpayment, or that he was looked to. If such notice was necessary, the judgment must stand, although the court may have erred in other respects. The plaintiff would not submit to a nonsuit under the opinion of the court adverse to him on one point. But he put his cause to the jury, choosing to run his chances for a verdict upon the whole case. If upon the *whole* case *the verdict was right,* it must stand. The point of notice was made by the defendant; and if, under any circumstances, the plaintiff could not recover upon the proof made by him, there is no ground to disturb the verdict, since the error of the court upon a different matter did him no harm.

Was notice necessary? We think it was. It is a general rule of law, founded in sound reason, that where the liability of one party is not absolute and direct, but is upon a collateral obligation, dependent upon and arising from certain things to be done by the other party, and lying peculiarly within his knowledge, he who is to take benefit by the engagement must give the other notice of what has been done, and that he is held liable. From the nature of things, notice is part of the agreement, and the debt does not arise before notice. It is of the nature of a special request, and must be alleged in the declaration, and proved. Such is the contract of an endorser, under the law merchant, which is only one species of guaranty well defined indeed, and settled by long usage.
(65) The doctrine has been applied to guaranties for goods sold. *Russel v. Clark,* 7 Cranch., 69. It has also been applied to a guaranty of a note or bill. It is true that as to the time of giving notice the rule is not so strict as it is between endorser and endorsee. But notice in a reasonable time and before suit is indispensable. *Phillips v. Astling,* 2 Taunt., 206. What duty existed on the part of Ricks until Grice gave him notice that the principal debtor had not paid the debt? How was Ricks otherwise to knew that Grice had not received the money? Was he bound to volunteer payment? We think not, but that upon the authorities, notice to the defendant formed a necessary part of the plaintiff's case.

PER CURIAM. Judgment affirmed.

Cited: Atkinson v. Clark, post, 174; *Adcock v. Fleming,* 19 N. C., 226; *Reynolds v. Magness,* 24 N. C., 31; *Lewis v. Bradley, ibid.,* 305; *Beeker v. Saunders,* 28 N. C., 381; *Irions v. Cook,* 33 N. C., 208; *Greenlee v. McDowell,* 39 N. C., 485; *Spencer v. Carter,* 49 N. C., 289; *Cox v. Brown,* 51 N. C., 101; *Brewer v. Ring and Valk,* 177 N. C., 485; *Cauble v. Express Co.,* 182 N. C., 451; *Rierson v. Iron Co.,* 184 N. C., 370.

DEN EX DEM. SARAH REED ET AL. V. MICHAEL SHENCK.

The terminus of a line must be either the distance called for in the deed, or some permanent monument, which will endure for years, the erection of which was cotemporaneous with the execution of the deed. A stake is not such a monument, and evidence of its erection when the land was surveyed is not admissible, to control the course and distance.

AFTER the new trial granted in this case (13 N. C., 415), it was tried again at LINCOLN, on the last circuit, before his Honor, *Martin, J.*

The lessors of the plaintiff claimed title:

1. Under a grant to James Dickson, dated in 1785.

2. By a deed of bargain and sale, dated in 1791, from Dickson to Wallace Alexander, for lot number 3, in the town of Lincolnton, which had been laid off on the land covered by the grant to Dickson. The lot was described as beginning at a stake, the northeast corner of lot number 2, running thence six poles northeast, along the main street to a stake, thence running so as to form an oblong.

3. By a deed from Alexander to Henry Cline. (66)

4. By a deed from Cline to Jacob Summey, dated in 1800, for a part of lot number 3, beginning at the northeast corner of a house standing on the main street, thence southeast twelve poles to a stake, thence four poles and three feet southwest to a stake; thence northwest twelve poles to a stake, and thence to the beginning.

5. By another deed from Cline to Summey, dated in 1800, and also for a part of lot number 3, beginning at the northeast corner of the house standing on the lot, and mentioned in the last deed, running thence southeast twelve poles to a stake; thence northeast one pole and thirteen feet to a stake; thence northwest twelve poles to a stake; thence to the beginning, being the northeast corner of the original lot number 3.

6. By a deed from Summey, also dated in 1800, to Martin Shuford, one of the lessors of the plaintiff, for the whole of the lot number 3, in which it was described as beginning at the northeast corner of lot num-

ber 2, running thence along the main street six poles to a stake, thence so as to form an oblong.

The defendant claimed lot number 2, which adjoined number 3, under a deed from Dickson, dated in 1787, which described it as measuring in front six poles.

The premises in dispute consisted of a piece of land seventeen feet wide in front, and the only question was whether the defendant's deed covered it; for if it did, his possession had been such as to protect him under the Act of 1715. If the front of each lot was six poles only, then the defendant's deed did not cover the land in dispute. If, on the contrary, a front of six poles and six feet was allowed to each lot, then it was clearly within the bounds of his deed. The defendant offered to prove that although his deed called for six poles only, in truth a front of six poles and six feet was intended, and that when the town was originally laid off posts or stakes were set up at the corner of every lot, and the distance between these posts or stakes in every instance was six poles and six feet. The lessors of the plaintiff objected to the introduction of parol evidence to vary the description contained in the deed, but his
(67) Honor overruled the objection for the reasons stated by him in his charge given below.

The defendant then proved by a witness, who purchased lot number 4 in the year 1787, that there was an old house standing on it, and at the corner of the house was a stake, which was pointed out to him as the corner of his lot; that the stake was a piece of split pine wood. This lot number 4 adjoined lot number 3, owned by the lessors of the plaintiff, on the side opposite to that where the latter joined lot number 2. The witness also proved that by measuring from the centre of the public square (which was the beginning of the survey of the town) in a straight line to the point where the stake he spoke of was placed, and allowing six poles only to each lot, the distance would not reach that point by about nineteen feet, but allowing six poles and six feet to each lot, the distance would only fall short one foot. The same witness proved that twenty-five years ago Shuford, one of the lessors of the plaintiff, and himself, dug a well and erected a wash-house, so as to be upon the line between them, on the supposition that six poles and six feet was the front of each lot.

The defendant also proved that a stake was standing on one of the corners of the public square in the year 1799, which was said to be the corner of it, and that measuring from that stake, and comparing the measurement with the erection of all the buildings on the square, six poles and six feet was the front of each lot.

The plaintiff, to rebut this testimony, proved by the original plan of the town, and the declarations of the surveyor who made it, who was

dead, and of other old persons also dead, that six poles only was the front of each lot.

On the other hand, the defendant proved declarations of Dickson, the original proprietor, and of a purchaser from him, both of whom were dead, that in laying off the town six poles and six feet was the front of each lot.

His Honor instructed the jury that if from the evidence before them they were satisfied that lots numbers 1, 2 and 3 had been originally run and staked off, or posts set up for the corners, and that the width thus allotted to them was six poles and six feet, they should be (68) governed by the lines actually run and marked; that if they were not satisfied by the evidence that the boundaries had been thus run and marked, they should be governed by the description of the boundaries contained in the deed; that the question presented by the case was, whether parol evidence was admissible to control or vary the calls in the deeds; that it was believed that a series of decisions authorized the introduction of parol evidence, but as the Supreme Court had declared that they were not aware of any such series of decisions, it was necessary to examine the cases to see how the matter was; that the case of *Standen v. Bains* (1 Hay., 238) was decided in 1795. The plaintiff claimed to a *dotted line* on the plat of the survey made in the cause. The course and distance did not extend so far, but only to a *black line.* The court permitted evidence to be given; that the dotted line was *marked,* and had for a long time, since 1740, been reputed to be the line of Arkill's tract, which was the land claimed by the plaintiff, the court in that case saying the jury may consider whether there is sufficient evidence to satisfy them that this dotted line is the real boundary, though not truly described in the patent; that the case of *Rountree v. Person* was approved by the Court; that the case of *Blount v. Benbury* (2 Hay., 353), decided in 1805, was where the calls of the grant were for "Beasley's line, south 85 east," and the court permitted evidence to be offered to prove that at the end of Beasley's line the true boundary was a marked line running parallel to Beasley's, and fifty-one poles be offered to prove that at the end of *Beasley's* line the true boundary *decisions* had been made, where the line described in the deed had been disregarded to follow a marked line; that in the case of *Loftin v. Heath* (2 Hay., 347) the grant called for a beginning "at a cypress, and thence round to a pine at the creek," and evidence as admitted to show that the beginning was at the pine and not the cypress, and *Taylor, J.,* remarked, "it must now be taken for law in this country that, notwithstanding any wrong description in the plat or patent, the (69) party who is likely to suffer may show the mistake." That in *Slade v. Green* (2 Hawks, 218) *Henderson, J.,* remarked that "parol

evidence had been admitted to vary the course and distance called for in the deed by showing marked lines and corners, and where the deed refers to no such marks as boundaries there is no ambiguity, and it is admitting parol evidence to control the deed. It is now too late to vary the rule." That in *McNeil v. Massey* (3 Hawks, 91) it was decided that where a patent calls for a tree as the beginning, and also calls for stakes for the other corners, that the course and distance will be controlled by a marked boundary, and that such a marked boundary may be proved to have been made by adducing as evidence other grants calling for it, *Henderson, J.,* remarking "such a boundary, like all other facts, may be inferred from other facts, if the fact proved be relevant to the fact to be inferred," and alluding to other conterminous grants calling for the boundary in dispute, he says, "These facts pointed to something that controlled the courses and distances in the grants. Whether they proved that marked trees were once there is an inference of fact for the jury. All the Court can say is that they are relevant."

That it was believed those decisions established the following principles, to wit:

1. That where the grant calls for course and distance, and also some particular object as the boundary, parol evidence is admissible to show the position of this object, although it differs from the course and distance.

2. That where the grant calls for course and distance, and also for a stake as the particular object, parol evidence is admissible to show that a tree and not a stake is the object marked by the surveyor as the boundary, although it varies in all respects from the description in the grant.

3. That where two different trees are marked, and it is apparent that they were marked at the same time, parol evidence is admissible to show that one of them was designated as the beginning when the
(70) survey was made, although it varies wholly from the description in the deed, and the same kind of evidence is admissible to show a line running in an opposite direction from the course in the grant, and running, too, in such a way as would cause the beginning thus established to be in the middle of such a line and not one of the corners. Such was the case in *Loftin v. Heath,* where it was pronounced to be settled law by *Chief Justice Taylor.*

4. That boundaries contained in other grants where relevant, and likewise common reputation, are admissible as evidence to establish boundaries.

That such were the principles which were believed to be applicable to the case under consideration; that the defendant alleged that the lines of the town of Lincolnton had been run and that the corners of the

lots had been designated by stakes or posts set up when the lines were run and before the sale of the lots and the conveyances before set forth, and that he offered to prove by parol the points at which those stakes or posts were placed, and that those points were at the distance of six poles and six feet; that there was an entire uniformity in the decisions of those cases where the grant calls for course and distance, and it was proposed to be shown that a marked line was made which varied from them; that it made no difference whether the marks be still in existence, provided they were originally made as the boundary. Could it make any difference in principle whether the marks consisted of a chop on a tree, a stone, a stake, or a post? That trees bear the marks where the lines are run in wood lands, but the boundaries of lots in towns are designated by posts, stakes or stones; that in the latter mode it was proposed to be shown that the town of Lincolnton had been laid off, and the facts before set forth were offered in proof of it. The stake standing in 1789, as the corner of number 4, another stake standing in 1799, both of them reputed to be corners; the well dug and the wash-house erected between twenty and thirty years ago, then and since acknowledged by the parties as upon their lines; common repu- (71) tation, the declaration of Dickson in 1792 or 1793; the present width of the public square, that such were the facts offered. That the question was not whether they were full proof, but whether they were relevant; that it was believed they were, and that the introduction of such testimony was authorized by a series of decisions; that the *Chief Justice* of the Supreme Court, however, was not aware of any such series, and says that "for many years the Supreme Court have, in all cases except one, adhered to the description in the deed"; that the case to which he alluded was 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 course and distance 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." That if this is to be the rule, it was believed that many decisions will be overruled, the settled law altered, and consequently titles rendered insecure. That by it, where description is by course and distance, no boundary will be permitted to vary from it, except it be made by chops on trees, for they are the only marks that can correspond in age with the date of old grants, by the distinct *laminæ* formed by the growth each year—a post, stake or stone would be wholly unavailable; that the decisions have been that it was the line run or marked that was to govern if it could be ascertained; that this rule would restrict it to marks on growing timber, but a corner tree may be destroyed; that then it may be shown

where it stood, and should it not also be shown where a corner-stone or a corner-post or a corner-stake stood? That in another part of the opinion it was said that "marked *termini*" may control course and distance, but that this will not authorize the admission of the parol evidence above set forth. "For such acts or marks were not made to describe the calls of the deed, for the deed was made already."
(72) That this seemed to him to be forming an opinion of the kind of evidence legally admissible, from the effects it produced upon the mind of the judge; that the facts adduced were admitted as relevant circumstances from which the jury might infer that the lines of the lots were run and stakes set up at six poles and six feet before the deeds were made; that as to the stakes proved to have been standing in 1789 and 1799, it was a matter for the jury to say whether they were "monuments of description, erected when the lots were separated from other lands." That it was not thought that the title could pass by parol, nor that the well and wash-house were placed there when the lots were run. But they were relevant circumstances to show what was originally done. That the opinion of the Supreme Court admitted that "such acknowledgments are evidence of the place where the marks or *termini* once were; but they are only evidence where it has been shown that there were *some marks* to which such acknowledgments pointed." That in this case a stake was proved to have been standing as a corner in 1789 and another in 1799; that from that and other facts proven it was left to the jury to decide whether these posts or stakes and others had been set up as monuments of description when the lots were laid off; that the grant of the land was in 1785; that when the town was laid out did not appear, but in 1789 the stake is described as an old piece of split pine then standing; that it surely could not be meant that the mark must be in existence when the controversy arises, but it seemed to be decided that some witness must have seen it, for it states "that there were some marks to which such acknowledgments pointed." That by this rule it was not perceived how the corner could be established that had been destroyed time out of mind, although there might have been a uniform tradition where it stood, both by common reputation and the acknowledgments of the parties, accompanied too by very expensive improvements upon the land as claimed by each; that it was stated that the law as laid down by the Superior Court was an abstract proposition,
(73) true in itself, but wholly inapplicable to the case. That it was hoped that the Supreme Court would perceive in the foregoing reasoning enough to show that it was deemed to contain the principles on which the rights of the parties rested. His Honor in conclusion said he believed with confidence that whatever disposition might be made of the case, nothing in his opinion could be supposed disrespectful to the

Supreme Court, and that it would be a matter of sincere regret to him should such an inference be drawn, as he believed it most respectful to that Court to give it an opportunity of reviewing its own decisions, where they were supposed by the judges of the Superior Court to violate what the late *Chief Justice Taylor* declared to be *"settled law."*

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

Gaston for plaintiff.
Devereux for defendant.

HENDERSON, C. J. I am glad that this cause has returned upon us; not that I am desirious of unsaying what I said upon the former occasion; for with that opinion, so far at least as it had a bearing upon the case, I am satisfied. But it affords me an opportunity of expressing myself fully upon what may be called stake boundaries. That stakes may be real boundaries, and so intended by the parties, and not mere imaginary points, I mean not to controvert. But I said before, and now think, that where they are given with course and distance, and no further description given of them; for example, "to a stake," or "thence to a stake in a line," they were intended by the parties, and so should be understood to designate imaginary points; that is, where the line terminates or intersects another line. And this, I say, is founded on universal practice and the nature of man. For having at hand a more certain and definite means of pointing out the objects, as a (74) cedar, a pine, or an oak—or a stake standing in a field, a wood, a pond, or near the road, creek, river, or some other additional means of description, and not using them, and having given the course and distance, they intended to rest on that, and that alone to point out the location of the stake, or rather where they intended should be the spot represented by the description of a stake. To permit parol evidence to show that a stake was put up, or was seen at or near the spot, is to permit proof in opposition to the intention of the parties. For if one was actually set up, it was designed for some temporary purpose, and not as a landmark whereby the boundaries should be established. For the parties designed a more certain description. The court *should not* have heard the evidence, or having heard it, should have instructed the jury that such evidence did not vary the description given by the course and distance in the deed. For it is the province of the court to declare what are the calls of a deed, and where there are more than one call, which is the controlling one. What may be the proper rule, where the court can rationally perceive, that the parties intended by the word *stake* something more than an imaginary point, by superadding a fur-

ther description in the deed, this case does not render necessary to say. But I suppose a court would be bound to say, if that intent was collected from the deed, however frail it might be, and however likely to produce mistake, fraud and perjury; yet as the parties had thought proper to make it their boundary, the court could not interfere. But even there the proofs controlling course and distance, I think, should be of the most satisfactory kind, and such intent should appear in the deed. Prima facie where course and distance are given, nothing more than an imaginary point is presumed to be intended.

Judge Hall has with much force given reasons why a stake should not in any case control the course and distance. So far as policy is concerned, his argument is unanswerable.

(75) HALL, J. Deeds for land, without location, are nullities. To be of any avail they must in fact, or by way of reference, be fixed to the earth. They must be fixed to immovable objects. They may call for water courses, rocks, trees, or any thing immovable, that may be identified. Marked trees, the most common, are partly natural and partly artificial boundaries. They are however immovable, and the marks are made for the purpose of identifying them. So long as these last, the location of the land is certain; it cannot be varied. When they become effaced and destroyed by length of time there can, from the nature of things, be no written evidence to show the spots of ground on which they grew. Hence, necessity permits the introduction of parol evidence for that purpose. But if a deed for land is originally made without a location, and without a name, parol evidence has never yet been permitted to give it either.

Movable things may become the boundaries of land, when they become immovable, as a wall or a pillar of stones, or any other fixed, stable substance. I consider stakes to be only imaginary points. They bespeak more of locality, to be sure, than floating feathers on the water, but they are as unfit to be boundaries of land. Ordinary accidents may draw them from the earth and destroy them. But deeds, impelled by all the force of wickedness and fraud, cannot pull up trees by the roots. Stakes would not answer the ordinary purpose of common honesty and prove nothing in a contest for boundary.

Deeds must call for boundaries of the kind I have mentioned, and the furthest the common law has been departed from is to connect deeds with such boundaries by parol evidence, where it appears they have been marked for that purpose, although the deed does not call for them, provided it is in part located as by calling for some corner or place not disputed or to be disputed. If a half acre of land is sold, beginning at a particular corner, and the lines run accordingly, the half acre only

passes, although the surveyor surveyed more than half an acre, because the lines were not properly marked. But if he surveyed (76) more than half an acre, and marked the lines in a proper manner, the whole that he surveyed would pass. I concur altogether in the opinion of the *Chief Justice.*

RUFFIN, J. I concur with the senior members of the Court. The judge of the Superior Court, in the exposition of the reasons of his opinion, which he has given with ability, places the question upon the ground of the departure, which has been allowed in this State, from *the calls* of a deed. That he is correct in saying that such a departure has been allowed, is beyond a doubt. There is no error in that. But he seems also to think, because parol evidence is heard, and upon it the deed is controlled, that therefore the sufficiency of proof is for the jury to determine. In that I conceive is the mistake. The truth of parol evidence is for the jury; so also its sufficiency, where it does not refer to some question of law. The stating of a few plain principles will set this question in a clear light. A deed is construed by the court, not by the jury. What land by its terms it was intended to cover is just as much matter of law as what estate it conveys. I do not mean that the location of the *termini* is decided by the court, for that is to be learned only from witnesses. But *what* are the *termini,* wherever found by the jury, must be ruled by the court. Where a deed therefore is read, the court says, it covers the land only between such and such points. If any of the particular rules of construction, made necessary by our situation and adopted by our courts, are then resorted to, for the purpose of showing that it covers other and more land than by its words it would, the evidence offered to that point, except as to its veracity, is still addressed to the court. It must be so, else the construction is with the jury. If a stake is called for, it is not to be proved to the jury, that there was a stake, and they told that if they are satisfied it was set up for a boundary, and are also satisfied that the boundary thus designated was made upon actual survey, they may carry the deed to it, because in law an object thus perishable, and so easily destroyed or removed, (77) is not sufficient to control the deed; and it would be just as reasonable to control it, upon mere proof of a survey to a particular spot, not at all designated by a call in the deed, nor marked by any erection whatever. The jury are not to hear this evidence as a ground of inference by them that particular land was actually surveyed, because if it was surveyed it was not conveyed by the deed. All matter is indeed subject to decay, but that portion of it which must by nature be decomposed in a very short time cannot be deemed a *landmark* sufficiently obvious and durable to alter the construction of a deed. It is

going far enough to admit such an influence for objects longer lived than one or two generations of men. If then, after giving full credence to testimony, it does not establish a fact sufficient in law to alter the construction, the court must pronounce it. In other words, the court must pass upon the sufficiency of the proof. There is no difficulty in understanding this, if we suppose the court, as regularly they might and perhaps ought to call on the counsel to state the purport of his evidence, when he offered the witness. If it did not establish a case for going off from the deed, no part of it could be heard. It would be irrelevant, because insufficient for the purpose designed.

Stakes have never yet varied the construction. *Marked trees,* though *not called for,* have, where they were proved by the annual growth to have been marked for the particular tract. To relax the rule still further would be to let in an inundation of fraud, perjury and alteration of landmarks. Difficulties enough have been experienced in expounding and locating deeds under the established rules, and the safety of titles requires that the doctrine should stand at what it is.

PER CURIAM. Judgment reversed.

Cited: Icehour v. Rives, 32 N. C., 258; *Safret v. Hartman,* 52 N. C., 204; *Clark v. Moore,* 126 N. C., 5; *Tucker v. Satterthwaite, ibid.,* 959; *Lumber Co. v. Lumber Co.,* 169 N. C., 103; *Nelson v. Lineker,* 172 N. C., 281.

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(78)

JOHN MINGUS v. EDLEY PRITCHET.

A bond for the delivery of specific articles can be discharged only by a delivery or a tender on the day specified. If they are cumbrous, the obligor may notify the obligee to appoint a place for their delivery, and if the latter neglects to attend, upon the plea of tender, the obligor must prove that he was there ready and able to make the delivery.

THIS was a warrant upon the following instrument:

"On or against the 1st of March, 1829, I promise to pay John Mingus forty-two dollars seventy-five cents, to be discharged in good trade for value received. Witness my hand and seal," etc.

Upon the trial before his Honor, *Martin, J.,* at MACON, on the last circuit, the defendant relied upon the plea of tender, and proved that the 1st of March, 1829, was Sunday; that on the Friday preceding he gave the plaintiff notice to attend on the next day at the plantation of

the defendant; that the plaintiff refused to attend on Saturday, and proposed Monday for making the payment, which was refused by the defendant. He then offered to prove that he had written the plaintiff that payment should be made on Monday. But the judge refused to admit evidence of the contents of the letter, unless notice to produce the letter itself was proved. The defendant then proved that on Monday, the 2nd of March, he called upon two of his neighbors to value corn and bacon to the amount of his obligation, and that on the same day he notified the plaintiff of that valuation, who refused to receive the articles at the price at which they were valued.

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

No counsel for either party.

RUFFIN, J. The tender proved in the case is too late, according to the covenant, being the day after it fell due. If an agreement of the parties to that effect would have enlarged the time, yet there is no such agreement here. The plaintiff proposed to take payment on Monday, but the defendant objected. He says he afterwards assented and (79) wrote to the plaintiff. But there is no proof of that, as the evidence offered upon that point was properly rejected for the reason given by the judge.

If, however, the defendant was prevented by the act of the plaintiff from making the tender at the proper time, or discharged from it, then he shall be excused and considered as having duly made it, provided he shows that he was able *and* ready to make it. Although the covenant does not specify the kind of *trade,* it may be taken in favor of the defendant that the articles were to be cumbrous. In that case he would not be bound to carry them and tender them to the plaintiff personally wherever he might be able to find him, but he is bound to give notice of his readiness and request the creditor to name a place where he will receive them, and when a reasonable place is designated, the debtor is further bound to have the articles there, and if the creditor does not attend to receive them he, the debtor, must show that he was there ready to deliver at the day. (Co. Litt., 210.)

Here the plaintiff may be considered as appointing the defendant's plantation as the place because he did not object to it when proposed. But nothing occurred to discharge the defendant from a tender at that place on the day specified in the contract. It is true the plaintiff did not attend on Saturday nor Sunday, or fix upon any other time; but that does not dispense with a tender then and there by the debtor, or

rather with proof of his ability and willingness to tender. Here there is no evidence that the defendant was himself at home on either of those days, or had any of the articles, which were afterwards valued and set apart for the plaintiff, or indeed any other sufficient thing to satisfy his bond.

PER CURIAM. Judgment affirmed.

Cited: Terrell v. Walker, 65 N. C., 94; *Weill v. Bank,* 106 N. C., 8.

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(80)

CALEB SPENCER, ADMINISTRATOR OF JEREMIAH GIBBS, v. WILLIAM CAHOON.

1. In an action by an administrator for an injury done to his intestate, after a plea in bar, the defendant cannot impeach the grant of administration.
2. Where an administrator seeks to revive a suit commenced by his intestate, the defendant may, by motion, put the administration in issue.
3. It cannot, however, be impeached as a ground of nonsuit at the trial.
4. But where the defendant claims title by a grant of administration previous to that of the plaintiff, or relies on his possession against the first administrator, he may, upon the general issue, prove the first grant of administration; because this is in avoidance of the plaintiff's title.

DETINUE for sundry slaves, originally brought by William R. Gibbs, as the administrator of Jeremiah Gibbs. The defendant, at the return day of the original writ, entered his appearance and pleaded *non detinet* and the statute of limitations, upon which issue was joined. At a subsequent term the death of William R. Gibbs was suggested, and the plaintiff came into court and was made a party under the Act of 1824 (Taylor's Rev., ch. 1247) as administrator *de bonis non* of Jeremiah Gibbs.

On the trial, before his Honor, *Strange, J.,* at HYDE, on the last circuit it was objected by the defendant that neither William R. Gibbs nor the plaintiff ever were administrators of Jeremiah Gibbs, and he produced the record of the county court at November Term, 1816, appointing Stephen Gibbs administrator of Jeremiah.

The plaintiff proved that Stephen Gibbs and his sureties, upon his appointment, had only signed and sealed a bond in blank; he also proved his own appointment and qualification at August Term, 1830, of the county court. His Honor, upon these facts, nonsuited the plaintiff, who appealed.

No counsel for plaintiff.
Gaston for defendant.

RUFFIN, J. The plaintiff was nonsuited because "he was not the *true* administrator" of Jeremiah Gibbs, and it has been argued here as if that was the only point in the case, and as if it depended on the validity of the previous administration granted to Stephen. Such would have been the case had issue been taken on the plaintiff's character by plea in abatement, or demurrer, instead of the defendant pleading in bar. Where indeed an administrator sues on his own (81) possession, he does not make *profert* of his letters, but shows them on the trial as his title. Their validity may then be disputed, because that is the first opportunity of contesting them given to the defendant. But this suit is brought by the administrator in that character, and is revived by the administrator *de bonis non,* and must be taken to be on the intestate's possession. The plea of *non detinet* admits the administration and that it was duly taken. It can never afterwards be brought into dispute in that action. This goes to the character of William B. Gibbs who brought the suit. But the same principle applies equally to the character of the present plaintiff, who is made a party under the Act of 1824. It is true that when a plaintiff dies no process is necessary to make his representative a party, nor is any plea given to the defendant to put the administration in issue. The party is admitted on motion. He must then show his right and the defendant, who is kept in court two terms, must then state his objections. When the administrator is once made a party, the defendant is concluded. (Anonymous, 1 Hay., 455; *McNair v. Ragland,* 1 Devereux Equity Cases, 533.) If indeed the court has been surprised or deceived the power, not less than the disposition, exists to correct it. But it cannot be done by a nonsuit on the trial of an issue in bar. A motion, founded on a proper case, brings it directly before the court. And here there seems to be no ground for it, because there seems to be no dispute about the issuing of the letters to Spencer, founded on those admitted by the plea to have been granted to William B. Gibbs who instituted the suit which, I repeat, must here be taken to have been on a detention from the first intestate.

If indeed the question was upon the title of the defendant, as being derived from Stephen, or as being good under the Act of 1820 (Rev., ch. 1055) by reason of an adverse possession without suit by Stephen, then the validity of the administration of Stephen would be a material question. And this would certainly be a competent inquiry, so far as it did not conflict with the admission of the plaintiff's (82) character stated in the declaration and admitted by the plea in

bar, namely, that he was duly administrator at the bringing of the suit, or when he became a party. If the defendant could show a previous administrator, though he was irregularly appointed, and though for that cause his letters had been repealed, under whom the defendant claimed by purchase, or against whom he held while he could sue, that would be admissible. For this is not a denial of the plaintiff's character, but admitting it, shows a distinct bar. Such, however, does not appear to be the case here, for no connection is stated between the defendant and Stephen, nor any possession against him. The only question seems to have been upon the validity of the plaintiff's letters, which were taken to be invalid because others had been granted to Stephen Gibbs. That was a point into which the defendant had precluded himself from inquiring. The nonsuit must be set aside and a new trial granted.

PER CURIAM. Judgment reversed.

DEN EX DEM. OF JAMES W. MORGAN v. WILLIAM MCLELLAND.

A voluntary conveyance to a child, made by an insolvent, is *ipso facto* void as to preëxisting debts.

EJECTMENT, in which the lessor of the plaintiff claimed as purchaser at a sheriff's sale, under an execution against John McLelland, for a default in the discharge of his duty in the office of sheriff of Cabarrus, which he resigned in April, 1823. The defendant claimed title under a deed from the same John McLelland, who was his father, executed in July, 1823.

There was contradictory evidence as to the consideration, upon which the deed to the defendant had been executed. It was proved that McLelland, the elder, died in the year 1824, insolvent.

(83) His Honor, *Martin, J.*, at CABARRUS, on the last circuit, left the question of the consideration paid by the defendant to his father to the jury, and instructed them that if the deed was voluntary it was of itself a fraud upon creditors. A verdict was returned for the plaintiff, and the defendant appealed.

No counsel for either party.

RUFFIN, J. The instruction that the deed from the father to the son, if voluntary, was fraudulent and void as against the creditor, under whose execution the lessor of the plaintiff purchased, is the only point in the charge of the court to which exception is taken.

The debt was antecedent to the settlements, being for a default in the office of sheriff, which was resigned in April, 1823, and the deed being executed in July following.

The position thus laid down by the judge, in a case like this, cannot admit of a question. It ought not to be brought into doubt for a moment. Under statute, 13 Eliz., debts subsequently contracted by one who had made himself insolvent by a previous voluntary conveyance immediately before have been protected, upon the ground that the deed was made with the view to become indebted. But the common law always preserved existing rights. *Upton v. Bassett,* Cro. Eliz., 444. And it has always been true that a conveyance by one indebted at the time to the extent of insolvency, even to a child who pays no price, or one altogether inadequate and colorable, was void as against preëxisting debts. Every eminent judge who has sat either in courts of law or equity for more than two hundred years past has had occasion to say so, and has said so. A gift by a person unable to pay his debts so directly and inevitably tends to delay and hinder the creditor, and so plainly violates the first moral duty—honesty—that the least regard to fair dealing and integrity imposes it upon the Court to pronounce it void. It must be so, if creditors are to have any security for their debts beyond the mere will of the debtor. Such a transaction is not to be looked on only as a means by which the intent to defraud may be inferred by a jury; (84) it *must* be. The act is altogether incompatible, and irreconcilable with a contrary intent. It is an act of fraud in itself. Whether the deed was, in point of fact, voluntary or not was properly left to the jury.

PER CURIAM. Judgment affirmed.

Cited: O'Daniel v. Crawford, 15 N. C., 203; *Parish v. Sloan,* 38 N. C., 611; *Clements v. Cozart,* 109 N. C., 180.

SETH SUMNER, EXECUTOR OF JAMES SUMNER, v. JAMES WHEDBEE.

1. Counsel fees paid by an executor in a suit brought against him, in which he was successful, cannot be recovered in an action on a bond conditioned to exonerate him from liability on account of his executorship.
2. The costs of a suit brought against the executor, which was decided in his favor, cannot be recovered in an action on such a bond. To constitute a breach there must be a recovery against the executor.

DEBT on a bond, executed by one John Sutton as principal and the defendant as surety. The plaintiff, in his declaration, assigned a breach

of the following condition: "that if the said John Sutton, etc., do release, exonerate and discharge, in every way, manner and form, the said James Sumner, his heirs, executors and administrators, from the executorship to the will of Granbury Sutton, deceased, in as full and ample a manner as if he had never qualified thereto, then this obligation to be void, otherwise, etc." It appeared in proof that after the execution of the bond, one of the legatees of Granbury Sutton filed a bill in equity against Seth Sumner, executor of James Sumner, for an account of the estate of Granbury Sutton, which was finally decided in favor of the defendant (1 Dev. Eq. Cases, 338). It was admitted on the trial that the legal costs of the suit had been paid by the present defendant; but it further appeared that the plaintiff had paid, in addition to the taxed fees, $215 to counsel, for services rendered in that cause. *Norwood, J.,* charged the jury that if the fees paid to the counsel were reasonable and customary, the facts in proof amounted to a breach of the condition. A ver-
(85) dict was returned for the plaintiff, and the defendant appealed.

Hogg for plaintiff.
Gaston for defendant.

HALL, J. It does not appear to me that the suit brought by the legatee of Granbury Sutton against James Sumner's executors, which was decided against the plaintiff, was any breach of the condition of the bond on which the present suit is brought. The condition is, that "the plaintiff's testator should be released, exonerated and discharged, in every manner and form, from the executorship of Granbury Sutton, deceased, in as full and ample a manner as if he had never qualified thereto." I should not think that a breach of that condition would be committed if a third person should bring a wrongful action against James Sumner, as executor of Sutton, and have the suit decided against him, but that the condition was only intended to protect the executor, James, against any recoveries which might be made against him. It is unnecessary, however, to decide this part of the case. The parties seem to have given it a more liberal construction, because it appears that the costs of the suit of the legatee against James Sumner's executor were paid by the defendant in the present suit. And how that happened does not appear, as that suit was dismissed at the plaintiff's costs. Be that as it may, the present suit is brought for two hundred and fifteen dollars, extra fees, paid to counsel by the defendant in the same suit. If, according to the construction which the parties seem to have given to the condition of the bond, the condition extended to wrongful suits which might

be brought against the executor, and also to costs which he might be bound to pay, it surely cannot extend to voluntary costs of his own creating. When the defendant in this suit paid the legal costs, he went as far as by any fair construction of the condition of the bond he was bound to go.

PER CURIAM. Judgment reversed.

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(86)

JOHN BRANCH, FOR THE USE OF THE BANK OF CAPE FEAR, v. ALEXANDER ELLIOT ET AL.

1. Bonds given by officers for the faithful discharge of their duty, which do not conform to the act requiring them, can only be enforced according to the rules of the common law; and a bond given by a sheriff, in a penalty greater than that required by the Act of 1777 (Rev., ch. 118), is not within the provision of that act, authorizing successive suits on sheriff's bonds, and is extinguished by the first judgment thereon.

2. In debt on a bond the verdict need not state its amount.

3. The rule adopted in this Court respecting official bonds which do not conform to the act requiring them, disapproved, but followed by RUFFIN, J.

4. But although a judgment upon such bonds is a bar to a second suit, if the bond is within the statute, 8 and 9 Wm. III, the relator may have a *sci. fa.* suggesting other breaches—or, if not within that statute, execution may issue at his risk, leaving the defendant to seek relief in equity.

The cases of *The Governor v. Witherspoon*, 10 N. C., 42; *Governor v. Matlock*, 9 N. C., 366, and *McRae v. Evans*, 13 N. C., 383, approved by RUFFIN, J.

DEBT, upon a penal bond, executed by the defendants, as sureties for one John McRae, sheriff of CUMBERLAND, tried before his Honor, *Norwood, J.*, in that county, on the spring circuit of 1830.

The only plea relied on by the defendants was that of a former recovery, and a verdict was taken for the plaintiff, subject to the opinion of the Court on the following case:

The bond was for £5,000, payable to "his Excellency, John Branch, Esquire, Governor, etc.," but not being taken according to the directions of the Act of 1777 (Rev., ch. 118), the writ was "to answer John Branch, Esquire," and not in the name of his successor. A suit had been brought on the same bond in Cumberland County Court, a copy of the record of which was attached to the case. The writ was "to answer John Branch, Esquire, Governor, etc., to the use of Edward McKay," and a verdict was returned for the plaintiff, but no formal judgment had been rendered. A suit had also been instituted on the same bond in Cumberland Superior Court, in the name of "John Branch, Governor, etc., to the use of

Cameron and Baker," in which the case stated that judgment had been rendered for the plaintiff—the jury did not expressly find the amount of the penalty, but only assessed the damages sustained by the relators.

Upon these facts, his Honor set the verdict aside, and directed (87) a nonsuit to be entered, and the relators appealed.

Hogg for relators.
Badger for defendant.

RUFFIN, J. Repeated decisions of this Court have established that such bonds as that sued on here, not being taken in conformity to the Act of 1777 (Rev., ch. 118), cannot be proceeded on in the manner prescribed by that statute. The *State Bank v. Twitty,* 2 Hawks, 1, is a leading case; and that has been followed by others. Those decisions relate emphatically to the remedies on such bonds. It shall not be summary; it shall not be by the successor, nor by an assignee. By consequence, *successive actions* (given by the Act of 1777, on bonds taken according to it) cannot be sustained. Were it *res integra,* the Court would at this day be much disposed, and probably would hold, that since the bond imposes no duty on the officer which the law itself did not, and was voluntarily entered into, it might be enforced by the remedies of the statute, though made for a larger sum than required by law. But the question is considered as closed, and this the more especially because it does not affect rights, but only the method of proceeding.

The remedy being at common law, or rather under the general law, and not under the particular statute of 1777, it is perfectly certain that the present action is barred, if judgment has been rendered on the bond in a former suit. For Mr. Branch alone can be taken (88) notice of, as the plaintiff, without reference to those for whose use he sues.

It seems this bond has, in point of fact, been sued on twice before: once in the county court, and a transcript of the record of that suit forms a part of this case, and again in the Superior Court.

Various objections are taken to the record from the county court, to show that there was no judgment in that proceeding. It is unnecessary to consider them, because the case states that "a *judgment was rendered* in the Superior Court on the same bond, at the suit of John Branch, to the use, etc., against these defendants."

The effect of that judgment there was an attempt to repel, upon the ground that the penalty of the bond was not expressly found by the jury, and so there was no judgment *therefor.* The objection is untenable. If *non est factum* be not pleaded, the execution of the bond, *as described in the declaration,* is admitted; and so the amount appears on the record.

If it be pleaded, the verdict, that *the bond declared on* is the deed of the defendant, finds the amount. The penalty need not be otherwise found, for it enters into, and can enter into no other issue.

The bar to the present action, then, is complete, and the judgment below must be affirmed.

Inconveniences may arise out of the doctrine heretofore established, which may require the interposition of the Legislature, such as the refusal of the obligee to put, or suffer the bond to be put in suit, or a collusive verdict for the obligors. Those inconveniences this Court cannot correct. It is for the wisdom and power of the General Assembly to do it, by extending the statute remedies to such bonds, if thought right. Happily, for the purposes of justice, the bar to this action is not destructive of the relator's rights, and does not extend beyond the costs of this suit. For while the cases before alluded to determine that the remedies cannot be under the statute, they have also determined the bond itself to be good at common law. It is available, not only for damages sustained by the obligee himself, by a breach of duty within (89) the condition, but also for similar damages sustained by any other person; in fine, the obligee is a trustee for persons injured. There can, then, be no difficulty touching the remedy in this case. If the bond be without the statute, 8 and 9 Wm. III, ch. 11, execution may be taken out at the risk of the party on the old judgment, and the defendants forced to seek relief, as before that statute, in equity. If the statute extends to such bonds, then a *scire facias,* suggesting other breaches, may be sued out and prosecuted, as in other cases. For this general doctrine, I refer to the cases of the *Governor v. Matlock,* 2 Hawks, 366; *Governor v. Witherspoon,* 6 Hawks, 42, and particularly to the *Governor v. Evans,* 13 N. C., 383.

PER CURIAM. Judgment affirmed.

Cited: Williams v. Ehringhaus, post, 298; *Machine Co. v. Seago,* 128 N. C., 161.

JOHN COX ET AL. v. BENJAMIN DELANO.

1. An agreement between the owner of a vessel and the captain, that each party should pay certain expenses and divide the freight, with a power to the captain to invest it on joint account, constitutes a copartnership.

2. One who receives a portion of the profits, as his property, is a partner; but it is otherwise if the amount of profits is referred to only to ascertain the amount of a debt due him.

COX *v.* DELANO.

ASSUMPSIT, tried before *Norwood, J.*, at CHOWAN, on the last fall circuit.

The only question necessary to present was whether the following agreement made the defendant a partner of Samuel Whelden: "Memorandum of an agreement by and between Benjamin Delano, of, etc., and Samuel Whelden, of, etc. The said Delano agrees to let a schooner to him belonging, called, etc., of the burden, etc., to the said Whelden, upon condition as follows: Said Whelden to pay all charges of victualing and manning, together with all other charges which may arise on said schooner, as long as he shall have possession of her, excepting such as are hereafter enumerated, which are to be paid by the said Delano, (90) viz.: one-half the expenses of port charges, one-half the expense of lights used on board, and the wages of one seaman. The said Whelden is to return the schooner at the expiration of six months, in like good order as delivered, excepting, etc. The said Whelden is hereby empowered to invest the proceeds of freight in such merchandise as he may think for mutual interest. All profit, over and above the expenses above mentioned, to be equally divided."

The presiding judge, thinking that this agreement constituted a partnership between the defendant and Whelden, a verdict was returned for the plaintiffs, and the defendant appealed.

Gaston for plaintiffs.
Hogg for defendant.

HENDERSON, C. J. He who shares in the profits, which are nothing but the net earnings, should also share in the losses, if there be any. The moral right of making gains is based upon this principle. The rule is easily laid down, the difficulty is in its application. Where a part of the profits themselves *is the property* of the party, he is then a partner. Where their amount merely ascertains the amount of a debt or duty, but they themselves do not *belong* to the party, there it is not a partnership. Were there no special contract, but the case rested on the facts, part of the earnings would be the property of the defendant. The vessel was his; he bore part of the expense of navigating her. Whelden gave his services, and the residue of the expense. Independent of express agreement, the profits would go according to the value of that which produced them; that is, according to the productive value of the stock. In what particulars has the agreement of the parties varied the case? It has only fixed the ratio of division, by declaring that each party shall (91) have one-half of the profits; that is, that Whelden, who was to act as master of the vessel, was to pay over one-half of the freight she carried to the owner. These expressions, although in form somewhat

like making it a debt, do not vary the case, for they arise from the fact that the freight was in the first instance to be received by him who acted as master. In truth, he was to receive and divide, and even pay.

But there is in this contract a clause which I think puts the matter to rest, to wit, "the said Whelden is hereby empowered to invest the proceeds of freight in such merchandise as he may think proper for mutual interest." If a part of the freight was not the property of Delano, why was his consent necessary to invest it in merchandise? Or why should he direct about it if the whole was a mere contract of hiring, and the earnings referred to merely to fix the price to be paid? It is nothing more than this: Delano furnished the vessel, and was to pay part of the expense of navigating her. Whelden was to act as master, and pay the balance of the expenses. Freight was to be sought, and profits made with this combined stock. A loss has been incurred. They who were to reap the profits must bear the loss.

PER CURIAM. Judgment affirmed.

Cited: *Fertilizer Co. v. Reams,* 105 N. C., 297; *Sawyer v. Bank,* 114 N. C., 16.

JONATHAN HAINES, UPON THE RELATION OF THOMAS D. KELLY, v. DAVID DALTON, EXECUTOR OF ISAAC DALTON, ET AL.

1. In a warrant against an administrator, judgment was rendered that the plaintiff recover his debt and costs, and then an entry made that the defendant "pleads retainer, fully administered," etc.: *It was held* that the justice had power to try those pleas—that he had negatived them—that the judgment was absolute, and that the nonpayment thereof might be assigned as a breach of the administration bond.
2. In reviewing a judgment rendered by a justice of the peace, every fact necessary to support it is to be taken as found, unless the contrary appears.
3. A justice of the peace can try the truth of any plea which, if sustained, would bar an action within his jurisdiction.

DEBT, upon an administration bond, executed by the defendant's testator, upon a grant to him of administration upon the estate of Jonathan Dalton. The bond was in the usual form, and after *oyer,* the defendants pleaded *non infregerunt conventionem*—and perform- (92) ance.

On the last circuit, at SURRY, the case was submitted to his Honor, *Martin, J.,* upon the following facts in the form of a case agreed.

The day the defendant's testator took out administration upon the effects of Jonathan Dalton, the relator, Thomas D. Kelly, sued out several warrants against him, which were all brought either upon notes of the intestate or upon former judgments rendered by justices of the peace against him. On the day after, the justice before whom the warrants were returned gave judgment upon them, and entered up those judgments in the following manner: "The plaintiff, on a note proven by W. C. B., obtains judgment for fifty dollars, and interest from, etc., and costs. Before me.

"The defendant pleads retainer for his own debt, former judgments, fully administered, no assets to satisfy the plaintiff's demand.

"J. W. JUSTICE."

About twenty days after the date of these judgments, the defendant's testator sold personal property of his intestate, to the amount of $10,000, which he disbursed in satisfaction of judgments subsequently rendered against him, and upon notes of his intestate.

Upon these facts, his Honor entered up judgment for the relator, and the defendant appealed.

Nash for defendant.
No counsel for relator.

HENDERSON, C. J., after stating the case as above, proceeded: The question submitted is, Was the administrator guilty of a *devastavit* in paying the judgments subsequently rendered against him? We think that he was.

If justices were bound to state the facts, which they find to be true or false, and on which they render their judgments, very few of them
(93) could be sustained. We therefore take it for granted that everything is found by them which is necessary to support their judgments, unless the contrary appear. The justice having rendered judgment on these warrants, the legal presumption, then, is that he found every fact necessary to support him, and that he negatived every plea which was a bar to the plaintiff. We therefore conclude that he found all the pleas in relation to the assets to be false, or enough of them to be so to warrant the judgments. For the practice of not inquiring into the truth of those pleas appears to me to be very strange, notwithstanding it is said to have prevailed in New York, and in some parts of this State. It is very strange that a court should possess the power to hear and to decide on the matter of charge, and have no power also to hear and decide on the defense. The proposition, to my mind, borders on the absurd; with much deference I speak it. I must therefore conclude that

in law, whatever may be the fact, the pleas were then passed on by the justice, and found to be untrue; that it was found that the defendant's testator had assets, and the judgment not having been paid, the condition of the bond is therefore broken.

But take it in the most liberal manner. Suppose that the pleas were not passed on; that by law it was beyond the power of the justice to pass on them, they must be passed on by some tribunal, and the plaintiff must have the benefit of the fact, if the defendant had assets; and, suppose further, there was no tribunal appointed by law to try that fact—and I presume the parties knew there was none, unless it was the justice of the peace—the plaintiff should have the right in the present action of showing it. In this point of view, he is clearly entitled to charge the defendant now, unless it can be shown that the judgments are judgments *quando,* and they bear no resemblance to such judgments. The facts are against such presumption, for it cannot be readily supposed that the plaintiff would exonerate the $10,000, then in hand, and look out for the future assets, when he commenced his suit on the very day on which administration was granted, and there was sold in twenty days $10,000 worth of assets. So take it either way, there is a breach (94) of the bond.

PER CURIAM. Judgment affirmed.

Cited: Hardee v. Williams, 65 N. C., 60; *Spillman v. Williams,* 91 N. C., 489.

DEN EX DEM. OF JAMES McK. ONEAL ET AL. v. JOHN E. BUTLER.

If an action of ejectment be referred to arbitrators, an award, stating the cause to be pending between the lessor of the plaintiff and the tenant in possession, without noticing the fictitious parties, is sufficient.

EJECTMENT, and after not guilty pleaded, the cause was referred to arbitrators, who made the following award:

"We, the undersigned, to whom was referred the several matters of controversy now pending in the court of law and court of equity, for BURKE, between James McK. Oneal, etc. (the other lessor of the plaintiff), and John E. Butler, do award that John E. Butler hold the tract of land, as set forth in the declaration in ejectment. And likewise, etc." The award then disposed of a suit in equity between the same parties.

The lessors of the plaintiff excepted to this award:

1. Because it did not set forth the parties to the suit, they being *den* on the demise of James McK. Oneal and others v. John E. Butler.

2. Because the award did not conform to the submission or the rule of reference.

3. Because the award was void for uncertainty.

His Honor, *Martin, J.*, on the last circuit, set aside the award, and the defendant appealed.

No counsel for either party.

HENDERSON, C. J. The first exception goes to a mere matter of form. We think it should be disallowed, for we cannot but know that the (95) lessor of John Den is the party complaining, and that John Den is a fictitious person, used for the purpose of bringing the merits before the court; we must also know that the tenant in possession is the substantial defendant, and that Richard Fen is likewise a fictitious person, introduced as the defendant, for the same reasons that John Den is made plaintiff. We think the award is made in the suit submitted. This disposes of the first and second exceptions, for they are substantially the same, presented in different forms.

We cannot perceive any uncertainty in the award, to sustain the third exception.

The judgment must be reversed, and judgment according to the award entered for the defendants. We should also confirm the award in the suit in equity between the same parties, but the papers are not sent up, or not a sufficiency of them to enable us to form a decree.

PER CURIAM. Judgment according to award.

PETER ARRINGTON v. GIDEON BASS ET AL.

1. The defendant in a *ca. sa.* bond, given under the Act of 1822 (Rev., ch. 1131), is bound to attend at every term until the cause is finally disposed of.

2. A judgment *nunc pro tunc* is not erroneous, although it appear that it should have been as of the present term.

The defendant Bass was arrested upon a *ca. sa.*, and gave bond under the Act of 1822 (Taylor's Rev., ch. 1131) for his appearance at the August Term, 1829, of Nash County Court. At that term the following entry was made in the cause: "Continued, upon cause shown by the defendant." At the ensuing term, upon a default by Bass, judgment was

rendered against the defendant and his sureties, "now as of the last term," from which the defendants appealed.

On the last circuit, his Honor, *Martin, J.,* reversed the judgment of the county court, and the plaintiff appealed.

Devereux for plaintiff. (96)
Badger contra.

HALL, J. The first notice we have of this case is at August Term, 1829. At that term the case was continued upon cause shown by the defendant Bass, and the court, by the Act of 1822 (Rev., ch. 1131), had the power to continue it upon sufficient cause shown. Suppose, for instance, that owing to some unavoidable accident, the defendant had it not in his power to prove that he had given ten days notice to his creditors or their agents, or attorneys, of his intention to avail himself of the benefit of the act, the court could not do otherwise than grant a continuance. At November Term judgment was given against the defendant, and nothing illegal appears in that. The reason why it was entered *nunc pro tunc* is not obvious. But certainly they ought to have given judgment, because it does not appear that the defendant Bass then made his appearance, or caused it to be entered. The bond which he gave for his appearance was as obligatory on him to attend then as at the preceding term, when the continuance was granted at his instance. *Mooring v. James,* 13 N. C., 254. And as he did not enter his appearance at the subsequent term, judgment against him was the legal consequence.

PER CURIAM. Judgment reversed.

Cited: *Wilkings v. Baughan,* 25 N. C., 89.

JOSIAH COWLES v. THOMAS J. OAKS, ADMINISTRATOR.

In a proceeding on a garnishment under the Act of 1793 (Rev., ch. 389), it is unnecessary for the plaintiff to reply to the answer of the garnishee on oath, where the garnishment admits the possession of property received from the defendant, but sets up a distinct title.

The plaintiff sued out an attachment in the county court against one Alexander Rea, and summoned as garnishee the defendant's intestate, who stated in his affidavit that he had no effects in his hands belonging to Rea, but that he had received of Rea several articles of property,

(97) specifying them and their value, in discharge of a debt due to himself. The plaintiff replied, and an issue was made up, which was found in favor of the plaintiff, and the defendant appealed to the Superior Court, where a verdict was again returned for the plaintiff, before his Honor, *Swain, J.*, at ROWAN, on the last circuit. After verdict, the defendant's counsel moved to dismiss the proceeding, upon the ground that the plaintiff had filed no affidavit, denying the truth of the defendant's answer, and also in arrest of judgment. Both motions were overruled, and the defendant appealed.

Gaston for plaintiff.
Nash for defendant.

HALL, J. The first objection in this case is that the plaintiff filed no affidavit denying the truth of the answer of the defendant's intestate upon his garnishment. The Act of 1793 (Rev., ch. 389), which governs this case, declares that when the garnishee shall deny that he or she owes to or has property in his or her hands belonging to the defendant, and the plaintiff in the attachment shall, on oath, suggest that the garnishee owes to or has in his or her hands property belonging to the defendant, then, etc. The act further declares that when the garnishee makes such a statement of facts, that the court before whom such garnishment shall be made cannot proceed to give judgment thereon, then the court shall order an issue to be made up. The plaintiff's oath seems to be necessary, in order to induce the court to proceed further, when the garnishee either positively denies that he owes the defendant anything or has in his hands any property belonging to him. The garnishment in the present case was not of that precise kind. The garnishee states that he owed the defendant nothing, but that he had property in his possession which he received from the defendant, but which he received in discharge of a debt due to himself. So that the plaintiff's affidavit was not necessary to induce the court to go farther. The only question was, Who had a right to the property, the defendant or the garnishee? It was such a statement of facts made by the garnishee that the court could not (98) proceed to give judgment without the intervention of a jury; and they proceeded to empanel one, as the act directs. But suppose the plaintiff's affidavit was necessary, no objection for the want of it was made, when issue on the garnishment was joined. And after the verdict in the Superior Court, for the first time exception is taken to the proceedings for want of that affidavit. I think there was nothing in it either to induce the Court to dismiss the proceedings or arrest the judgment.

PER CURIAM. Judgment affirmed.

OWEN HOLMES ET AL. v. JOHN H. HALL ET AL.

1. A mortgagor of a chattel, having the right of possession for a stipulated period, cannot, after the expiration of that period, dispute the title of the mortgagee, and the same rule applies to his vendee.
2. Courts of law afford no remedy for a distributive share, because their forms were fixed before the right to distribution was given.
3. But the right being now given by statute, it is recognized in courts of law.

DETINUE for a negro, tried on the last circuit, at NEW HANOVER, before his Honor, *Daniel, J.* The plaintiff's claimed title as follows: The slave in dispute had belonged to one James Saltar, who had died intestate, and administration upon his estate had been committed to one Locke; David J. Melvin, who married a daughter of Saltar, had mortgaged the whole of his interest in the estate of Saltar to the plaintiffs. The mortgage deed contained a stipulation that Melvin should retain possession for five years, which was the period limited in which the mortgage debt was to be repaid. This mortgage was duly proved and registered. The defendants claimed under Melvin by a subsequent purchase, and proved that after the execution of the mortgage to the plaintiffs, by an order of the county court of Bladen, where Saltar lived, a division of his slaves took place, when the slave in dispute was assigned to Melvin, and was delivered to him by Locke. This order was made without filing a petition, and there was no judgment of the court confirming the division. After the expiration of the five years, during which, by the terms of the mortgage deed, the slave was to (99) remain in Melvin's possession, he being then in that of the defendant, the plaintiffs made a demand of him, and upon a refusal, instituted this suit. For the defendants it was contended that at the execution of the mortgage, Melvin and wife had only an equitable interest in the estate of Saltar, and consequently that the plaintiffs acquired no legal title thereby, and that the division being irregular, did not vest a legal title either in the plaintiffs or Melvin. But the presiding judge, thinking that as the slave was delivered to Melvin as a part of his distributive share in the estate of Saltar, Melvin must be considered as holding him by the permission of the plaintiffs; and as he, after the expiration of the time limited for the payment of the mortgage debt, could not dispute the title of the plaintiffs, so neither could the defendants.

A verdict was returned for the plaintiffs, and the defendants appealed.

No counsel for either party.

HENDERSON, C. J. What would be the effect of a payment by the administrator to a distributee, after an assignment by the distributee, and notice thereof to the administrator does not arise in this case. For this action affirms the delivery of the slave in question to the distributee, and claims the benefit thereof. Nor need we examine the regularity of the proceedings of the county court in ordering a division of the intestate's estate, for both the plaintiffs and defendant claim under it. In fact, the delivery of the slave by the administrator, no matter whether the court had jurisdiction or not, or whether the petition and order for a division were regular or irregular, passes the property. It is true a case might arise where a delivery was made in pursuance of an irregular or invalid order for a division, and under an impression that such order was compulsory on the administrator, which might afford grounds to set aside and annul the delivery as being made under a mistake. But (100) that is not this case. For these reasons, we deem it unnecessary to enter into the question whether the court had jurisdiction, or whether the proceedings were regular, but found our opinion upon the effect of the delivery of the slave in question to Melvin, as his wife's portion, in whole or in part of her father's estate. The only remaining question is, What was the effect of that delivery on the then state of facts, with the subsequent demand of the slave, and the commencement of this suit?

We are all of opinion with the presiding judge, that Melvin, the husband, received the slave in question as mortgagor, for himself and his mortgagees, according to their respective rights; and that he continued to the time of his sale to hold him in that character; and that the defendants coming in under him, with notice of the mortgage, either express or implied (for the mortgage was duly registered), held the slave until the demand in the same manner. We do not fully understand what is meant in the argument appearing in the case that a distributive share of an intestate's estate is a mere equity, and that the defendants are purchasers for a valuable consideration. If by it is meant that a court of equity, or a court proceeding by its forms, is resorted to, to enforce payment or delivery of a distributive share, the position is admitted. For it is true that the forms of a court of law do not afford an adequate redress, because the right to distribution is of modern date, and was introduced after those forms were settled. But if it is meant that it is not a right recognized by and as binding at law, as it once was, in conscience only, the position is denied. It is a right given by statute, its extent and nature defined, and must therefore be known to and recognized in courts of law as a legal right. But if it is a mere equity, binding in conscience, the defendants cannot protect themselves from its obligation in the hands of mortgagees. For although they allege themselves to be

purchasers for value, yet they do not allege that they had no notice of the mortgage. And if they did, it would be disproved by its registration, which is notice to the world. As to the right of the husband to sell or mortgage his wife's distributive share *for value,* I presume (101) that will not be denied.

PER CURIAM. Judgment affirmed.

WAUGH & ISBELL v. NATHAN CHAFFIN.

1. A judgment entered up as follows: "Former judgments and retainer admitted; judgment confessed for, etc., to be satisfied when the money is collected, or in notes beforehand," is a judgment *quando.*
2. An action cannot be sustained against an administrator to subject him personally, unless he has been fixed with assets.
3. In *debt* the plaintiff may recover less than he demands, but the proof must agree with his allegations.

DEBT, upon three judgments entered up against the defendant as the administrator of William W. Chaffin. The writ demanded "$282.10, which the defendant owes and detains," etc.

Upon *nil debet* pleaded, a verdict was taken for the plaintiff for $125.75 principal, besides damages, subject to the opinion of the presiding judge upon the following facts:

The plaintiffs commenced actions upon three several bonds against the defendant, as the administrator of William W. Chaffin, returnable to November session, 1822, of Surry County Court, to which the defendant pleaded *non est factum,* payment and a set-off, retainer, former judgments, debts of higher dignity, and fully administered. At the next August sessions the following entry was made in the cause standing first on the docket: *"Non est factum* withdrawn, former judgments and retainer admitted. Judgment confessed for, etc., to be satisfied when the money is collected, or in notes beforehand if the plaintiffs choose, plaintiffs to pay all costs."

The same entry was made in the other causes, by a reference to that above given, as to the pleas which were admitted, but there was no entry or memorandum as to the time when the judgments were to be satisfied, and no option given the plaintiffs of receiving payment in notes before they were due.

Afterwards, viz., at November sessions, 1826, three writs of *scire facias* issued upon those judgments, in which, after reciting the judgment, and the fact that it had become dormant, the writ directed the defendant "to appear, etc., and show cause, if any he hath, why the (102)

said judgment should not be revived, and execution issue thereon." To these writs the defendant pleaded *nul tiel record,* and the same pleas to protect the assets which he had entered to the original suit. In the county court the following entry was made: "Judgment revived according to *scire facias,*" and upon an appeal to the Superior Court this judgment was affirmed. There was no evidence offered of assets in the hands of the defendants liable to the plaintiffs' action.

His Honor, *Mangum, J.,* at SURRY, on the last fall circuit, upon these facts set aside the verdict and entered a nonsuit, and the plaintiff appealed.

Gaston for plaintiff.
Attorney-General and Badger for defendant.

HENDERSON, C. J., after stating the case, as above, proceeded: On these judgments, declaring on them in the *debet and detinet,* the present action is brought to charge the defendant personally, without any evidence of assets, and this depends on the question whether they are absolute or *quando* judgments. The whole entry must be taken together, and if so it is impossible to make them absolute judgments or to reconcile the admission of former judgments and retainer with an absolute judgment. I say nothing of the entry "to be paid when the money is collected," for that entry is made in the first judgment only, and in the other two the entries in the first are referred to. But I lay it out of the case. As I said before, the admission of the pleas renders it impossible for them to be understood as absolute judgments. If they were not so at first, the revival by *sci. fa.* did not make them so. The revival only authorized execution on them, as their terms originally imported. It simply gave an execution. It is therefore impossible, without evidence of assets afterwards coming to hand, more than sufficient to satisfy the defendant's retainer, and the other judgments referred to in the pleas, to sustain the action. Even with such evidence, I think that the
(103) action cannot be sustained until the defendant is fixed with assets in this cause, either by *sci. fa.* suggesting them, or by some other mode. I speak from recollection only, or rather upon principle, as I have not examined the authorities. But most certainly it cannot be done, as said above, without evidence to charge the defendant with additional assets; in other words, with assets subject to these judgments. As to the objection taken by the defendant, there is nothing in it. The rule is not that in debt the plaintiff must recover the sum demanded, or not at all, but that the proofs must agree with his allegations. The plaintiff may recover less.

PER CURIAM. Judgment affirmed.

ISHAM A. DUMAS v. ROBERT POWELL ET AL., ADMINISTRATORS.

To let in secondary evidence, the best evidence of the loss of the original document that the nature of the case admits of must be produced.

DEBT, tried before his Honor, *Daniel, J.*, at RICHMOND, on the last circuit. The plaintiff declared upon a lost bond, alleged to have been executed by the defendant's intestate. A witness, one Mask, testified that he once had a bond in his possession, as assignee, corresponding in date and amount with that declared on; that he received it from the plaintiff as genuine, and believed it to have been executed by the defendant's intestate, with whose handwriting he was acquainted; that while the bond was in his possession he presented it to one of the defendants as a claim which he held against the estate of his intestate; that the defendant was also well acquainted with the handwriting of his intestate, and made no objection, but took a memorandum of the amount; that the witness afterwards, at the request of the plaintiff, returned the bond to him, and also a note executed by the plaintiff, and received instead the plaintiff's own note for the amount (104) of both. Another witness, who was present, testified that the plaintiff, on receiving the bond, put it in his pocket, and on their leaving Mask's house in company, took out a paper and tore it up. On the part of the plaintiff it was contended that from this testimony the jury might infer that the bond was torn up by mistake. But his Honor being of opinion that there was not such proof of the loss of the bond, as entitled the plaintiff to put his case to the jury, directed a nonsuit to be entered, and the plaintiff appealed.

No counsel for either party.

HALL, J. It is a rule of evidence that the best which the nature of the case will admit of, must be produced. When that cannot be produced, and the nonproduction of it is accounted for, the next best evidence in the party's power is required. It is that rule of evidence which required the production of the bond upon the trial.

In order to dispense with the production of it, it was incumbent on the plaintiff to give all the evidence reasonably in his power to prove the loss of it. It appears to me that he is chargeable with two omissions: In the first place, in not having gone to the house of Mask, where he tore up the paper the day before, as soon as he discovered the loss of the bond. He might perhaps have discovered some remnants of the paper torn up. In the second place, he might have produced his own

note taken up from Mask. It would then appear that he had not torn up that paper, and tend to a belief that he had destroyed the lost bond, through mistake, instead of his own. It does not now appear but that he destroyed his own note when he took it from Mask.

PER CURIAM. Judgment affirmed.

Cited: Cowles v. Hardin, 91 N. C., 233; *Gillis v. R. R.,* 108 N. C., 447; *Avery v. Stewart,* 134 N. C., 291.

(105)

DEN EX DEM. OF RICHARD WALL v. ISAAC WHITE AND ZACHARIAH WHITE.

1. A *bona fide* vendee who pays his purchase money to satisfy an outstanding fraudulent mortgage, and takes a deed from both the mortgagor and mortgagee, is not affected by the fraud.
2. Per HENDERSON, C. J., *arguendo.* Where the mortgagor and mortgagee join in a bargain and sale before the estate of the latter has become absolute, the bargainee is in under the mortgagor.
3. Where the mortgage debt is paid within the period limited by the deed, the estate of the mortgagee is thereby divested, and he has nothing but a possession, which is defeated by the entry of the mortgagor or its vendee.
4. In that case, upon an entry by the bargainee of the mortgagee and mortgagor, the bargain and sale becomes the deed of the mortgagor, and the confirmation of the mortgagee.
5. In expounding the statutes against fraudulent conveyances, the mortgagor is considered the owner of the estate, and the mortgagee but an incumbrancer.

EJECTMENT, tried on the last circuit, at ROCKINGHAM, before *Swain, J.* The lessor of the plaintiff claimed title under a judgment against the defendant, Zachariah, obtained in 1825, and produced a sheriff's deed for the premises in dispute.

The defendant, Isaac, claimed under the defendant, Zachariah, as follows: First, under a mortgage made by the defendant, Zachariah, to one Bostick, dated 15 September, 1823, to secure $500, with a covenant for a reconveyance upon payment of the mortgage debt within five years; second, by a deed of bargain and sale dated 9 October, 1824, by Zachariah White and Bostick to himself, reciting the mortgage of the latter. Both these deeds were impeached as fraudulent, but it is unnecessary to state the testimony. The defendant, Isaac, was in possession.

The presiding judge charged the jury that if they believed the deeds under which the defendant, Isaac, claimed, or either of them, were fraudulent, the plaintiff was entitled to a verdict. A verdict was returned for the plaintiff, and the defendant appealed.

Gaston for plaintiff.
No counsel for defendant.

HENDERSON, C. J. Both the mortgage to Bostick and the deed to the defendant, Isaac, were so evidently fraudulent upon the evidence, and therefore void as to creditors, that we hear the proposition of the judge without any startling effect. But if true, it appears to me it may produce the most ruinous consequences. The proposition of the judge in effect is this: A. fraudulently mortgages to B. C. without any notice or suspicion that the mortgage was fraudulent, nay, without any knowledge that there was a mortgage at all, purchases the estate (106) from A. Fairly and bona fide, and within the time of redemption, as in this case. He is then informed of the mortgage, but not of its unfairness, and at the request of A. pays off the mortgage debt, pays the balance of the purchase money to A., and A. and B., the mortgagor and mortgagee, join in a deed to him. If this deed be affected with fraud, it must be upon some technical reasoning, beside the merits of the case, which I cannot perceive. The only plausible ground is, that the estate *passed* from the fraudulent mortgagee, and is therefore infected with the fraud in the hands of a bona fide holder. If the premises were correct, I think that the conclusion does not follow. But I believe, upon the strict and technical principles of conveyancing, the estate does not pass from the mortgagee, but from the mortgagor, as I am inclined to believe that upon payment of the mortgage money within the prescribed time the estate ceased in the mortgagee and revested in the mortgagor. For where there is a seizin in one person, to the use of *another* (I say to *the use of another*, because if a person is seized to his own use, a bare declaration will not change that use) the use may, by the terms of the conveyance fixing the seizin, change or shift from one person to another, and the seizin, that is the estate, will follow it. By the bargain and sale, the bargainor is seized to the use of the bargainee by virtue, it is said, of the consideration; but to what extent, whether for years, for life, or in fee, depends upon the declaration of the bargainor made in the deed; all the use not disposed of remains in the bargainor. For example, if a bargain and sale be made for life or years, the reversion of the use remains in the bargainor. The use for years or life is declared to the bargainee, and the statute carries to it the possession. When, therefore, the term for which the use was declared expires, the

estate expires, certainly upon an entry, if not *ipso facto* without an entry. If in this case an entry was necessary, and the acknowledging satisfaction of the mortgage debt, and joining with the mortgagor (107) in a conveyance, do not amount to a waiver of an entry and a surrender of the estate, most certainly the entry of Isaac White under Zachariah's deed was sufficient. Because if we resort to the terms of the deed, the mortgage money being paid, and that within the limited period, the mortgagee's estate had expired. He had nothing but a possession which the entry of Isaac put an end to. And the latter having entered, is in according to his estate and having a joint deed from the mortgagor and mortgagee, and the mortgage debt having been paid before the expiration of the time for repayment, his estate is from Zachariah White and not from Bostick, even if the estate had been in Bostick when the deed was made, for want of an entry to defeat it, and therefore it was the deed of Bostick, and only the confirmation of Zachariah White, as to passing the estate. When by the entry of Isaac, under their joint deed, Bostick's estate was put an end to, it then, for the same purpose, became the deed of Zachariah and the confirmation of Bostick. To come to a conclusion at once, even if Isaac took the estate from Bostick under the deed, for want of an entry to defeat Bostick's estate, as soon as he did enter under Zachariah, the mortgagee's estate vanished and he then held under Zachariah. And I am much deceived if Isaac could support an action, declaring in a seizin under Bostick, for his (Bostick's) estate no longer existed. If I am right, Isaac claims no estate from Bostick, and therefore that estate which he now holds is not infected with the fraud of Bostick, if he was not a privy nor party thereto; that is, he is not affected merely by having a deed from Bostick; for the interest derived from it, if any, has passed away and ceased.

But however this may be, on strict principles of conveyancing, I think that when we are expounding the contract in reference to the statutes against fraudulent conveyances, we should look upon a mortgage as a bare security for money, and that the mortgagee has an interest or estate for that purpose only; or to speak more properly, an incumbrance to that amount; and that if mortgagor and mortgagee join in a convey- (108) ance, when the mortgage money is paid within the time limited, it is the deed of the mortgagor, and the confirmation of the mortgage; at least it becomes so immediately upon the entry of the grantee. If the mortgagee purchases the equity of redemption, most commonly he intends to extinguish it and hold the estate under the mortgagor. When the mortgagor pays off the mortgage debt, he intends most commonly to extinguish the mortgage and hold under his old title. But their deeds may give either character to their acts. I think that in this case the mortgage was put an end to, and that Isaac holds the estate from Zachariah;

and if that transaction was fair and bona fide, he is entitled to hold the land against Zachariah's creditors. I repeat, that both these transactions bear the most evident marks of fraud; yet, for the reasons given, there must be a new trial.

PER CURIAM. Judgment reversed.

Cited: Walker v. Mebane, 90 N. C., 265.

DEN EX DEM. OF JACOB BRINEGAR ET AL. v. GARLAND CHAFFIN.

1. Neither party to a deed of bargain and sale is estopped to show that one of the bargainors was a *feme sole,* although the deed recites that she was *covert.*
2. A party to a deed is not estopped by a recital, unless the fact recited be the moving cause of the execution of the deed.
3. Where the husband sues for an injury to his marital rights, he must prove the solemnization of the marriage.
4. But in those cases in which *ne unques accouple* is not a proper plea, it may be inferred from circumstances.

EJECTMENT, tried at the last circuit, at ROWAN, before his Honor, *Swain, J.*

The lessors of the plaintiff claimed as heirs at law of Mary Brinegar. The defendant, under a deed of bargain and sale from the same Mary Brinegar, which purported to have been executed by her under the name of Mary Jacks, jointly with a second husband, Richard Jacks, and the only question was as to the validity of this deed. No privy examination of the *feme* had been taken, but the defendant offered to prove that in fact no valid marriage subsisted at its execution, between Richard Jacks and Mary Brinegar, as Jacks then had a (109) wife living, to whom he had been married before his pretended marriage with Mary Brinegar. The lessors of the plaintiff objected to this testimony, insisting that if the defendant claimed under a deed, which recited a marriage between Richard Jacks and Mary Brinegar, he was estopped to deny that marriage. His Honor admitted the evidence, and the existence, at the execution of the deed, of the former marriage of Jacks, being clearly established, a verdict was returned for the defendant, and the plaintiff appealed.

Winston for plaintiff.
Nash contra.

HENDERSON, C. J. Recitals in a deed are estoppels when they are of the essence of the contract, that is, where unless the facts recited exist, the contract, it is presumed, would not have been made. As if A. recites that he is seized in fee of certain lands, which he bargains and sells in fee, he is estopped to deny that he is seized in fee, for without such seizin, it is fair to presume that the contract would not have been made. But if the recital be that he is seized in fee by purchase from C., here neither the bargainor nor bargainee is estopped from averring and proving that he is seized by purchase from D., unless it appear (110) that the seizin in fee by purchase from C. was part of the contract, and without which it would not have been made. For ordinarily the seizin only is of the essence of the contract, and how and from whom derived are but circumstances. So of every other recital. And this distinction reconciles the many apparent contradictions in the books, some declaring that recitals are estoppels, and others that they are not. In the case under consideration, that the *feme* was the wife of Jacks was not of the essence of the contract. It formed no part of it. It was a mere circumstance of description, more unfavorable to the defendant, or rather the bargainee, than if she had been *sole*. For if *sole*, the deed was effectual by sealing and delivery. If she was *covert*, her private examination was necessary to make it her deed. In truth, her coverture was a fact, for which the bargainee neither gave nor received anything. Nor did he on that account receive anything by the deed, which he would not have received if she had been *sole*. Neither did it form the basis, nor in any manner move or conduce to the contract. It is, therefore, mere matter of evidence, and like all other evidence, may be rebutted by contrary proof. The evidence, therefore, that Jacks had another wife living at the time of the marriage, disproving the recital, was properly admitted.

But the case does not rest upon general reasoning. If A. S., by her deed, reciting that she is a *feme covert* when in truth she is a *feme sole*, grants an annuity, it is a good grant, for that is but a void recital, although the grantee had not put it in his writ; and it cannot be a conclusion to him when he shows the deed. Viner's Ab. M., s. 8, pl. 11; Perkins, s. 40. So if a *feme covert*, reciting by her deed that she is a *feme sole*, grant an annuity, this is a void grant, and she shall not be concluded by this recital. Perks, 41, note.

The other position taken by the plaintiff's counsel, that a husband *de facto*, embracing the case of Jacks, in the present instance, is entitled to all the rights of a husband *de jure*, and the wife subject to all (111) the disabilities of a *feme covert*, leads, I think, to consequences which make the proposition *felo de se*. It gives all the rights of a husband, both to the person and the property of any woman whom he

may either deceive or persuade to have the marriage ceremony performed between them, and all at the same time, thereby investing him with marital rights over one hundred women. It cannot be so. The cases bear the counsel out only in this (which is reasonable), that in all but a few cases, perhaps only in cases of *crim. con.*, and those which affect the husband in his conjugal rights, an actual legal marriage need not be proven. In those cases it will not do to infer a marriage from circumstances, as long cohabitation, or the like. But in other cases, a marriage may be inferred from those circumstances. In cases of the latter kind, "never united in legal matrimony" is a bad plea, because it draws the question from the courts of common law to the ecclesiastical courts, which require proof of an actual marriage, celebrated according to the forms of the church. Whereas, if left to be tried on the fact of marriage, it will then be tried upon such proofs as the party may offer, viz.: either proof of an actual marriage, or proof of long cohabitation. It is not to be inferred from this distinction that courts of common law will sanction a marriage by giving to the husband the marital rights, where it is shown that he is entirely incapable of contracting marriage, from any cause, as from having a wife living at the time, although the second marriage is attempted to be proven by showing that the marriage ceremony was actually performed, or by showing a cohabitation and leaving it to be inferred. Whatever may be the effects of such a marriage, whether actually proven or inferred from cohabitation and the like, as to the acts of the woman whom the man calls his wife, in regard to the rights of others, I am satisfied it confers on him no rights and imposes on her no disabilities.

PER CURIAM. Judgment affirmed.

Cited: *Gathings v. Williams,* 27 N. C., 494; *Pritchard v. Sanderson,* 84 N. C., 303; *Fort v. Allen,* 110 N. C., 191; *Williams v. Walker,* 111 N. C., 610; *Lumber Co. v. Hudson,* 153 N. C., 100; *Chilton v. Groome,* 168 N. C., 641; *Freeman v. Ramsey,* 189 N. C., 796.

(112)

JOHN JONES v. JAMES COOKE.

1. A count for money paid to B. by A., at the request of and to the use of C., is supported by proof of the sale of a bond by A. to B., and that B. credited C. with the amount.

2. Where the plaintiff declares in two counts, and the attention of the jury is directed by the judge to one of them only, a general verdict found by them is presumed to be on that count.

ASSUMPSIT, tried before his Honor, *Daniel, J.*, at FRANKLIN, on the last fall circuit. The plaintiff declared in two counts: (1) on a special contract, and (2) for money paid to the use of the defendant. Pleas—general issue, and the Act of 1826 (pamphlet, c. 10), requiring a special promise to answer the debt or default of another to be in writing in order to charge the defendant therewith. On the trial it appeared that in May, 1828, one James C. Jones, the father of the plaintiff, conveyed all his property, in trust, to indemnify the defendant and others, who were his sureties to a large amount; that in March, 1828, judgments were obtained against the said James C. Jones, executions upon which were levied upon the negroes conveyed in the deed of trust; that previously to the sale the defendant told the plaintiff that he was apprehensive of some loss on account of his suretyship for James C. Jones, and that to protect himself he intended to purchase the negroes levied upon, and resell them at a more favorable opportunity; and not being able to raise money enough to purchase negroes to the amount of the executions, he promised the plaintiff that if he would advance money upon the execution, he should be reimbursed out of the negroes purchased at the sheriff's sale; that the plaintiff accordingly delivered to the sheriff a bond for $525, which the latter received as cash, and credited upon one of the executions, and the balance was satisfied by a sale of a part of the negroes, which were bid off by the defendant; that the defendant afterwards refused to comply with his contract, alleging that the money paid by the plaintiff was the property of his father, James C. Jones.

His Honor charged the jury that if the plaintiff paid the debt of James C. Jones at the request of the defendant, he was not entitled to recover, unless the request was in writing. But if he paid the money at the request and for the use of the defendant, then he was entitled to a verdict on the last count in the declaration. The jury "found all the issues in favor of the plaintiff," and a new trial being refused, the (113) defendant appealed.

Badger and W. H. Haywood for defendant.
Attorney-General and Seawell contra.

HALL, J. Whether the sum of $525 belonged to James C. Jones or to the plaintiff was properly left to the jury. It was also submitted to them whether it was paid for the use and benefit of the defendant by the plaintiff. If it was, they were instructed that they should find a verdict for the plaintiff. They found so accordingly. Two objections are raised upon the record; the first, to the charge of the judge; the second, that the verdict is general, and it cannot be ascertained upon which of the two counts it was rendered.

As to the first, it appeared in evidence that the sheriff received from the plaintiff a bond as *cash,* and credited one of the executions with the amount, agreeably to the bargain and understanding the plaintiff had with the defendant. It is argued that the count for money paid to the use of the defendant is not sustained by that evidence. It appears to me otherwise. I think the transaction is susceptible of two views. The first is, that the sheriff voluntarily paid the money for the plaintiff, by crediting the executions, for which he had a claim upon the plaintiff. Or it may be taken, secondly, that he purchased the bond for cash, and having the cash in his hands, as belonging to the plaintiff, paid it over for the use of the defendant, as he was requested by the plaintiff to do, in discharge of the executions.

With respect to the second objection, nothing was said by the judge to the jury on the first count, on a breach of special contract. Their attention was called to the second count, which was for money paid to the use of the defendant. It may be fairly inferred, and ought to be so taken, that the verdict was rendered on that count. They were directed to inquire whether the money was paid for the use and (114) benefit of the defendants; if it was, they should find a verdict for the plaintiff. I think the verdict was responsive to the charge, and that the rule for a new trial should be discharged.

PER CURIAM. Judgment affirmed.

Cited: S. v. Long, 52 N. C., 26; *Wilson v. Tatum,* 53 N. C., 302; *Jones v. Palmer,* 83 N. C., 305.

THE STATE v. HIRAM CARLAND.

An indictment for perjury, charging that the defendant "being a wicked and evil person, and unlawfully and unjustly contriving, etc., deposed, etc.," and concluding that the defendant "of his wicked and corrupt mind, did commit willful and corrupt perjury," is defective, even at common law, for not alleging that the defendant *willfully and corruptly* swore falsely.

The defendant was convicted, on the last circuit, at BUNCOMBE, before *Martin, J.,* upon an indictment for perjury. A motion for a new trial was made in the court below, but as that motion was not pressed in this Court, it is unnecessary to state the case sent up with the record.

The indictment, after stating the suit, in which the perjury was charged to have been committed, proceeded as follows: "And the jurors

aforesaid, upon their oath aforesaid, do further present that the said Hiram Carland, being a wicked and evil disposed person, and unlawfully and unjustly contriving and intending, contrary to truth and justice, to, etc." [Setting out the several matters sworn with averments contradicting them], and concluded in these words: "And so the jurors aforesaid, upon their oath aforesaid, do say that the said Hiram Carland, of his own most wicked and corrupt mind and disposition, did commit willful and corrupt perjury, to, etc."

Hogg and Badger for defendant.
(115) *Attorney-General contra.*

RUFFIN, J. The counsel for the defendant, admitting the insufficiency of the objections, stated in the record as having been taken on the trial in the Superior Court, move here in arrest of judgment upon the ground that the indictment does not charge that the defendant *swore willfully and corruptly.*

Under the statute, it is clear the objection is a good one. It seems to be equally so at common law. In our search for precedents, not one has been found, except that in *Cox's case,* Leach, 69, in which those epithets are not both applied to the act of swearing. They enter into the definition of perjury at common law. And whatever evil intent may be alleged in the indictments as moving the defendant to take the false oath, the very taking of it must be stated to have been done deliberately, and with a wicked purpose, at that moment existing. This has been expressed by applying those terms *willful and corrupt* to the act of swearing. *Cox's case* established that one of them might be supplied by *maliciously.* That has been doubted, and never followed, though I suppose it would be in a case precisely in point. But in no instance hath the omission of both been allowed, though *falsely* and *maliciously* were used. And in a very late case, in the King's Bench, in 1826 (*Rex v. Stephens*), this very point came directly before the Court, when the indictment was held bad on a motion in arrest of judgment. This is of the more authority, because the statute 23 George II, ch. 11, provides in that country for simplifying indictments for perjury, as our own does here.

PER CURIAM. Judgment arrested.

Cited: *S. v. Davis,* 84 N. C., 788.

(116)

THE STATE v. WILLIAM HIX.

A retailer of spirituous liquors is not an ordinary keeper within the Act of 1801 (Rev., ch. 581), to prevent excessive gaming, and is not indictable under that act for permitting unlawful games to be played at his house.

The defendant was indicted under the Act of 1801 (Rev., ch. 581), to prevent excessive gaming, in the following words: "The jurors, etc., that William Hix, on, etc., being a keeper of a house of entertainment, unlawfully did permit and suffer certain persons to play in said house an unlawful game, etc., against the form of the statute, etc." On the fall circuit of 1830, at MONTGOMERY, before *Martin, J.*, the jury returned the following special verdict: "That certain persons did play at cards for money at the storehouse of William Hix; and they further find that the said Hix was a retailer of spirituous liquors, under a license granted by the county court; and they further find that the said Hix furnished spirits to the said persons while playing at cards; and they further find that the said Hix did not furnish any other accommodation to travelers or others, except spirits." At the following term, judgment was rendered by *Daniel, J.*, for the State, and the defendant appealed.

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

HALL, J. The acts of Assembly make a difference between ordinary or tavern keepers and retailers of spirituous liquors. The first are obliged by the Act of 1798 (Rev., ch. 501) to enter into bond with surety to provide in his ordinary good and wholesome diet and lodging for travelers, and fodder and corn for horses. The seventh section of the same act (not published in the last revisal) declares that every person who intends to *retail spirituous liquors,* without *applying* to the court for *a license to keep an ordinary house of entertainment,* agreeably to the directions of this act, shall at the time of giving in his list of taxable property, signify the same to the justice of the peace, whose duty it shall be to report the same to the clerk. Iredell's or Martin's (117) Revisal. It is obvious from this provision of the act that the Legislature considered that there was a difference between ordinary or tavern keepers and retailers of spirituous liquors. By the Act of 1816 (Rev., ch. 906), the county court, when seven justices shall be on the bench, are authorized to license persons of good conduct and moral character to retail spirituous liquors by the small measure. No bond is required of them, as is required from ordinary or tavern keepers. By

the Act of 1801 (Rev., ch. 581) it is declared that if any tavern keeper or keeper of a house of entertainment shall suffer any games to be played in his or her dwelling-house, wherein he or she lives, or shall furnish such persons with drink, he shall be fined, etc. This act, in terms, extends to tavern keepers, or keepers of houses of entertainment, but does not extend to retailers of spirituous liquors. The law has made a difference between them, and as the latter act is a penal one, and only extends to one of them, although the other comes within the meaning and mischief of it, we cannot by construction extend it so as to remedy the mischief and include the other.

PER CURIAM. Judgment reversed.

THE STATE v. BENJAMIN COLLINS.

1. Where a cause is removed from one Superior Court to another, the latter has the right to issue a writ of *certiorari* to the former, directing a more perfect transcript to be certified.

2. Evidence that the prosecutor was actuated by malicious motives in preferring an indictment is inadmissible, unless he is examined for the State.

3. Where the defendant in an indictment for *petit* larceny offers no evidence of character, the jury are to weigh the testimony as if they knew nothing against him, except what was disclosed on the trial.

4. The right of issuing writs of *certiorari* is not founded on the circumstance that the court from which it issues is superior to that to which it is directed; but upon the principle that all courts have the right to issue any writ necessary to the exercise of their powers.

5. Where, upon the removal of a cause, two contradictory copies of a record are certified, the contradiction can be reconciled by an inspection of the original record, by the court to which it is removed.

6. But where the transcripts are not contradictory, they form but one copy, and both may be used by the court.

7. An endorsement by the foreman of the grand jury of the initial letter of his first name, where the record of his appointment states his name at length, is not a material variance.

8. Writs, which give jurisdiction to a court, must be returned; and both the writ and the return must appear upon the record; but this is unnecessary where the writ was issued in the progress of a cause, and is merely auxiliary to its determination. A writ of *certiorari*, to certify a more perfect record, is of this latter description.

The defendant was indicted for petit larceny, at JONES, on the spring circuit of 1828. After not guilty pleaded, the cause was removed, upon

the affidavit of the defendant, to LENOIR, and was there tried on the last fall circuit, before his Honor, *Donnell, J.*

On the trial evidence was offered by the defendant that the prosecutor was actuated by malicious motives in preferring the prosecution, but his Honor rejected the testimony, because it was irrelevant, as the prosecutor was not offered or examined as a witness in support of (118) the prosecution.

In arguing to the jury, the defendant's counsel insisted that if the evidence was not of weight sufficient to induce them to find a verdict against the most respectable man of their acquaintance (and the counsel designated a very respectable gentleman known to all the jury, and then in the courthouse), they would not, in law, be justified in finding a verdict upon the same testimony against the defendant.

In summing up, his Honor informed the jury that the case supposed by the defendant's counsel might mislead them. That the defendant not having introduced evidence of his character, the true rule was, that if the evidence would not justify them in returning a verdict against a person of whom they had never before heard, and of whom they knew nothing but what was disclosed by the testimony, then it would not justify a verdict against the defendant. But it did not follow that if they thought the evidence insufficient against a gentleman who brought with him the weight of character they might attach to the very respectable individual designated by the counsel, that it was insufficient against the defendant.

The jury returned a verdict of guilty, and the defendant obtained a rule for a new trial, because the judge rejected the testimony offered by the defendant, and because of error in his instruction to the jury. The rule was discharged. Upon inspecting the transcript of the record of Jones Court, it was found defective in the following particulars:

1. It stated the Superior Court of Jones to have commenced on Wednesday, the ..... day of March, 1828.

2. O. B. Coxe appeared upon the transcript to have been appointed foreman of the grand jury, but his endorsement on the bill was signed O. W. B. Coxe.

3. The entry of the order of the removal to Lenoir was made in these words: "Sent to Lenoir."

4. The certificate of the clerk of Jones Court stated it to be a (119) cause in which R. K. is prosecutor, and Benjamin Collins, defendant.

For these causes, his Honor declined passing sentence, but directed a writ of *certiorari* to issue to the clerk of the Superior Court of Jones, "ordering him to certify a more full and perfect transcript of the record of the cause in his office."

The record certified to this Court stated, that "in obedience to the *certiorari,* issued in pursuance of the order of the preceding term, the clerk of the Superior Court of Law of Jones County returned here into court the following transcript." This transcript corrected the defects above specified as existing in the one first certified, as is stated by his Honor, the *Chief Justice,* in pronouncing the judgment of this Court.

Upon the return of this writ, his Honor, *Strange, J.,* passed sentence on the prisoner, who appealed.

Neither the writ of *certiorari* nor the return on it were incorporated in the record transmitted to this Court.

Gaston for defendant.
Attorney-General contra.

HENDERSON, C. J. It is objected, first, that the Superior Court of Lenoir could not issue a *certiorari* to the Superior Court of Jones to certify to the former a record of the latter court, because they are courts of coördinate powers; that such writ, from its nature, can only issue from a superior to an inferior court. It is true that this is the practical application of the power to issue the writ *in most cases,* because *most commonly* the records of an inferior court are required in the Superior Court, for purposes pointed out by law; the latter court having the power of examining and reviewing the proceedings of the inferior court, by way of appeal or writ of error. But the power to issue the (120) writ does not grow out of the superior grade of the court issuing it, but is based on the principle that such power is necessary and proper to carry into execution the legitimate power and duties of the court. The court of Lenoir being authorized to act upon the records of Jones Court, transmitted to it by that court, where no record, or an imperfect one, is transmitted, the power of obtaining the record grows out of the power and duty to act upon it. And we know of no way more convenient and proper than a *certiorari.* It cannot be by way of request, for then the jurisdiction might be defeated by a refusal. It must be by way of mandate; and if legal, it is the mandate of the law, and must be obeyed. If the record certified was in contradiction to the one on file, the court could act on neither, for each had equal authority. It could not be ascertained which was correct. This point occurred in the case of *S. v. Curry.* In that case, by order of the court to which the cause had been transferred for trial, the clerk of the court from which it was sent attended with the record itself, and the record transmitted was made conformable to it. This Court, after great deliberation, argument, and examination of precedents, affirmed the proceedings. If the records are

not contradictory, but the one only more full than the other, explaining absurdities and contradictions, and filing blanks, they may be proceeded on. And, in fact, they both form but one copy. Such we think is the case in the present instance.

The first objection to the record is, that there is a blank in stating the time when Jones Superior Court was held. It is stated to be on Wednesday, the ..... day of March, 1828. This blank is filled in (what may be called for distinction) the certified copy. We say nothing on the point, whether there was anything in it.

The second is, that in stating the names of the grand jurors upon the record, O. B. Coxe is stated to be foreman. And in his, the foreman's endorsement, he styles himself O. W. B. Coxe. This is amended on the certified record. In that it appears from the record of the appointment of the grand jurors that Owen B. Coxe is appointed foreman; and the indictment is endorsed "a true bill—O. B. Coxe, foreman." (121) This variance cannot in such case be material, and the court, by receiving and ordering the indictment to be docketed, recognize him as the same person. Indeed, I have been much at a loss to see the necessity of any endorsement. The grand jury come into court, and make their return, which the court records, not from that memorandum made out of court, but they pronounce, or are presumed to pronounce, it in court. It is not the endorsement which is the record, but that which is recorded as the jurors' response. The endorsement is a mere minute for making the record. But I believe the law is understood to be otherwise.

The objection that the order of removal is not complete is removed by the certified copy. The clerk sent at first a mere minute of an entry, which I suppose he extended.

The next objection is, that the *certiorari* was not returned. It certainly would have been more regular to do so, and it must have been returned if it was to give the court jurisdiction. But in this case it does not. The only purpose which it could answer would be to show that the record filed was made out and filed in obedience to the writ; that it was not an officious act, or the act of a stranger. The records of Lenoir show that a *certiorari* was awarded, and the certified copy shows that it was made out in obedience to that writ. I think that this is sufficient. I omitted noting the objection that the record first sent states the case to be one wherein Reddin Kent is prosecutor and Benjamin Collins is defendant. This is a mere misnomer of the case, which the clerk himself has given to it. He states it at large, showing what it is, to wit, an indictment, which of course is at the instance of the State, and Benjamin Collins defendant. But be it as it may, it is amended by the certified copy.

The grounds for a new trial, I suppose, were abandoned. They were not urged. But if they were, they would not have availed, for the reasons given by the presiding judge.

PER CURIAM. Judgment affirmed.

Cited: *S. v. Calhoon,* 18 N. C., 376; *S. v. Reid, ibid.,* 383; *S. v. Cox,* 28 N. C., 446; *S. v. O'Neal,* 29 N. C., 252; *S. v. Guilford,* 49 N. C., 85; *S. v. Blackburn,* 80 N. C., 486; *S. v. Voight,* 90 N. C., 746; *S. v. Anderson,* 92 N. C., 755; *S. v. Hunter,* 94 N. C., 834; *S. v. McBroom,* 127 N. C., 530, 536; *S. v. Ledford,* 133 N. C., 715.

(122)

STATE v. BRYANT BRITT.

1. In the Act of 1801 (Rev., ch. 572), to prescribe the punishment for forgery, the words "shall show forth in evidence any forged deed," etc., are confined to the exhibition of it as evidence upon a judicial proceeding, and are not equivalent to the words "utter and publish" in the statutes against counterfeiting.
2. The forging of an order for the delivery of goods is within the act.
3. One found in possession of a forged order in his own favor is presumed either to have forged it or procured it to be forged, until the contrary appear.

THIS was an indictment for forgery, tried before his Honor, *Daniel, J.,* at ROBESON, on the last circuit.

The first count charged the defendant with having forged an order for the delivery of goods, with intent to defraud John H. Powell.

The second count charged him with the forgery of an order for the payment of money, with a similar intent.

The third with having in his possession a forged order for the delivery of goods, and with "uttering and publishing it as true"; also with the intent of defrauding Powell. The fourth count was exactly similar to the last, except that the order was charged to be for the payment of money.

The testimony was that the defendant, having in his possession a forged order directed to John H. Powell, and purporting to be signed by one Jacob Britt, whereby Powell was requested to let him, the defendant, "have the amount of six dollars," presented it to Powell, and received the amount, either in money or in goods. That the defendant,

upon being charged with the forgery, said he intended to have taken up the order before it was discovered.

Upon the defense it was proved that there was another Jacob Britt in the neighborhood, besides the one whose name was alleged to have been forged, but he was only sixteen years of age. No evidence was offered that the order was in the handwriting of the defendant, or that of Jacob Britt, Jr. On the trial many exceptions were taken for the defendant. The only one necessary to state is the following, viz.: That the third and fourth counts of the indictment charged that the defendant did "utter and publish as true" a forged order, which was not an offense within the statute, as the words of the Act of 1801, "to (123) prescribe the punishment of forgery" (Rev., ch. 572), were, *"shall show forth in evidence,"* and the words *"shall utter and publish"* were entirely omitted in it.

Upon this point, his Honor instructed the jury that the words *"utter and publish,"* used in the indictment, were equivalent to the words *"show forth in evidence,"* used in the statute, and that the indictment described the offense sufficiently, without using the very words of the statute. His Honor further informed the jury that the forgery of an order for the delivery of goods was within the Act of 1801, and that it made no difference whether the order was for the payment of money or the delivery of goods.

The defendant was acquitted upon the first and second counts of the indictment, and convicted on the third and fourth, and judgment being rendered on the verdict, he appealed.

Attorney-General for the prosecution.
Badger amicus curiæ.

RUFFIN, J. There seems to be no reason to doubt the correct- (124) ness of any of the opinions pronounced in the Superior Court, except that which relates to the force of the words "utter and publish," in the third and fourth counts. They were held to be synonymous with "show forth in evidence." The former phraseology is that of the statutes relating to counterfeit money; the latter, of the acts for punishing forgery of private instruments. The different subjects may, of themselves, account for the difference of the terms used, and seem to require a different meaning. But there is a decisive argument to be drawn from the statute 5 Eliz., ch. 14, from which ours is taken. The words of that statute are, "shall pronounce, publish or show forth in evidence" (of which this last expression is alone retained by us), "any such false or forged deed, etc., as true, knowing the same to be forged, etc. (*except*

being attorney, lawyer or counsellor, he shall for his client plead, show forth, or give in evidence such false or forged deed, etc., to the forging whereof he was not party or privy), and shall be thereof convicted, etc." This plainly restrains the meaning of "showing forth or giving in evidence" to a giving of the deed in evidence in a court of justice, and is altogether a different thing, from the mere exhibition of it *in pais*. The words "pronounce and publish" in the English act are not found in ours. We are consequently constrained to construe the words in our own act, as the same words are used in that of Elizabeth. And the omission of the other terms must be held to have been intentional in the Legislature; and the more especially as the acts against counterfeiting all have "utter and publish" in them, and omit "show forth in evidence."

(125) A new trial must therefore be granted, although the case seems fully to justify a conviction, upon the two first counts, for the forgery itself, if the testimony was entitled to credit enough to authorize the verdict given upon the other counts. That the order was not in the handwriting of the defendant did not rebut the legal presumption of his guilt. Being in possession of the forged order, drawn in his own favor, were facts constituting complete proof, that either by himself or by false conspiracy with others he forged or assented to the forgery of the instrument—that he either did the act or caused it to be done—until he showed the actual perpetrator, and that he himself was not privy. It is very different from having a counterfeit bank note. That is an instrument current in its nature and use, and may well come innocently to one's hands. But it is next to impossible that the defendant could get possession of such an instrument as this, purporting to be for his own benefit, without having fabricated or aided in the fabrication of it. If the instrument be a forgery, he who holds it under such circumstances is taken to be the forger, unless he shows the contrary.

But for the error already mentioned, the verdict must be set aside, and the case go to another jury.

PER CURIAM. Judgment reversed.

Cited: S. v. Morgan, 19 N. C., 352; *S. v. Stanton,* 23 N. C., 427; *S. v. Barnwell,* 80 N. C., 408; *S. v. Peterson,* 129 N. C., 557; *S. v. Jarvis, ibid.,* 700; *S. v. Jestes,* 185 N. C., 735.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

DECEMBER TERM, 1831

AUGUSTUS MOORE v. JOSIAH COLLINS AND WILLIAM D. RASCOE.

1. An assignment made by an insolvent of all his estate, whereby some of his creditors are preferred, with a stipulation that the property shall remain in his possession, until a sale should be directed by a majority of the creditors named in the deed, is not in law fraudulent upon its face, so as to authorize the court to pronounce it void; but its validity must be submitted to a jury upon proof of the actual fraudulent intent.

2. Where a deed of trust was duly proved, but by reason of the death of the register was not registered within six months, but was registered as soon as a successor was appointed: *It was held*, RUFFIN, J., *dissentiente*, that the deed was available, as if duly registered.

3. Assignments made by insolvents, whereby a preference is given to one class of creditors, are not founded in morality; and were the question *res integra*, would be declared fraudulent.

4. Registration being required by law for the public benefit, and registers being officers of the public, if such officers are not provided, or if by their neglect a deed be not registered within the time prescribed, it is available without registration.

1. Per RUFFIN, J., *dissentiente*. A creditor may, in a general assignment of his property, prefer one debt to another; and although the *effect* of this preference may be to delay a creditor, yet if such delay was not the *intent* of the debtor, the deed is valid.

2. An assignment which conveys property for the purpose of paying specified debts, with an express resulting trust to the assignor, is not on that account fraudulent upon its face.

3. But if the resulting trust is more valuable than the debts secured, it is a circumstance from which the jury may infer a fraudulent intent.

4. An act required by law is not considered as performed, although the performance was prevented by the act of God. *Hence*, where a deed was not duly registered by reason of the death of the register, it passed no title to the vendee.

5. The case of *Ridley v. McGehee*, 13 N. C., 40, doubted.

THIS was an action of trover for a number of slaves, tried before *Norwood, J.*, at CHOWAN, on the last spring circuit, and on *not guilty* pleaded, the case was that the plaintiff claimed title under James R. Creecy, by a deed dated 15 September, 1829, between the plaintiff Creecy and several of his creditors, whereby, after reciting sundry debts of Creecy all his property was assigned to the plaintiff upon the following trusts: "That the said Augustus Moore shall, as soon as may be convenient, or he be requested by the persons interested in the trust hereby created, or a majority of them, expose to public sale the whole of (127) the aforesaid real estate and negroes, and other articles of personal property to public sale at such place or places as the said Thomas Benbury, etc. (the *cestui que trust*), or a majority of them shall require, upon such terms as the majority may agree on, before or at the day of sale, he the said A. M. having first advertised the time and place of such sale for thirty days in the *Edenton Gazette*, and such other newspapers as he may deem necessary, and the funds arising from the sale of said property, and the money or securities which he the said A. M. may receive by virtue of the agency and attorneyship hereby created, after retaining for all necessary and proper expenditures, etc., shall be applied in the following manner, to wit: In the first place, towards the payment of the several bills of exchange hereinbefore described, upon which the said T. B. is endorser, together with all damages, interest, etc., the note given to the president and directors of the State Bank as aforesaid, to which the said T. B. is security, with all interest, etc." The deed then recited other debts of the same kind and proceeded as follows: "After having discharged and paid the said debts due and owing to, etc., should there be a surplus in the hands of the said A. M. by virtue of the trust by these presents created and established, the said A. M. shall in the second place apply such surplus or residue so remaining in his hands as aforesaid, in payment and discharge of the said bill due and owing to the said W. R. N., etc. (setting out sundry other debts of the same kind), and should there not remain in the hands of the said A. M. a sufficient sum, after paying off in the first instance, the debts due, etc. (the first class), and discharge the several debts due, etc. (the second class), the said balance, as aforesaid, shall be applied *pro rata*,

etc. But should there remain a balance in the hands of the said A. M., after paying off, etc., in the order and upon the terms aforesaid, then the said A. M. shall apply the said balance to the payment of the debt due to the said Josiah Collins, as aforesaid, in the third place; and in the fourth place, should there remain a balance in the hands of the said A. M. after paying, etc., such balance shall be applied to the payment of the debt due to the said Thomas C. Whedbee by note as (128) aforesaid, and should there remain a balance after paying, etc., then the said A. M. shall apply such balance to the payment of all such demands due by contract or agreement against the said James R. Creecy, as may be made known to the said A. M. within six months after the sale of the said property hereby conveyed, the amount of said demands to be ascertained by two indifferent persons, one to be chosen by the said A. M. and the other by the claimant, etc. But should there not remain in the hands of the said A. M. a sufficient amount of funds after paying, etc., to pay off and discharge all the debts and demands due and owing by the said James R. Creecy, then the said A. M. shall make a *pro rata* application of the said funds to such debts as shall be made known to the said A. M. within the time, and ascertained in the manner aforesaid: And it is hereby expressly covenanted and agreed upon, by and between the several parties to these presents, their heirs, etc., that the said James R. Creecy, his heirs, etc., shall and may remain in the quiet and peaceable possession of the property hereby conveyed, until the same shall be required for the purpose of effecting a sale, for which said last mentioned purpose the said James R. Creecy doth for himself, his heirs, etc., covenant, promise and agree to and with the second and third parties to these presents, to surrender and deliver up the same, at such time and place as may be required. And the said A. M. doth for himself, etc., covenant and agree to and with the first and second parties to these presents, that he, the said A. M., shall and will execute the trusts hereby created according to the best of his skill and ability, and that he will execute such conveyances of the said property, etc. And it is hereby expressly agreed upon, by and between the parties to these presents, their heirs, etc., that the said A. M. shall not be held responsible for the loss, injury, or destruction of the said property, etc."

To this deed there were two attesting witnesses, one of whom (129) only was examined by the plaintiff. He proved that at the date of the deed he saw it executed by Creecy; that Mr. Norcom, a *cestui que trust,* was present; that it was not then signed by the plaintiff, and that he knew nothing of its execution by the latter, who was not present when it was attested by the witness. The clerk of the county court of Chowan proved that during the term of the court which commenced on the third

Monday of September, 1829, the plaintiff produced the deed in court, when it was proved by the oath of the same attesting witness, who was examined on the trial; that the plaintiff, upon its probate, took possession of the deed, promising to hand it himself to the register; that the register died in December following, and no successor was appointed until March, 1830; that the day after the register's death the deed was found among his papers. It was also proved that the deed was in the possession of the register within five or six weeks of its probate, and that while it was in the hands of the register, the defendant Collins took a copy of it. There was no evidence offered that the creditors named in the deed had ever required the plaintiff to take possession of the property, or to make a sale thereof; but an advertisement was proved by the plaintiff of an intended sale on 21 December, 1829. Creecy remained in possession of the property until it was seized by the defendant Rascoe, as hereafter mentioned.

The defendants produced the record of an attachment returnable to September Term, 1829, of Chowan County Court, at the instance of the defendant Collins, against the effects of Creecy, as an absconding debtor, which had been levied upon the slaves in dispute; from which it appeared that on 10 September, 1829, Creecy replevied the property levied on by giving a bail bond to the sheriff. At the ensuing term of the county court, the third Monday of that month, Creecy was surrendered in discharge of his bail, and judgment by confession was entered up in favor of the plaintiff. This judgment was obtained upon the bond mentioned in the assignment, as due the defendant Collins by Creecy.

(130) Upon this judgment a *fi. fa.*, tested the third Monday in September, issued to the defendant Rascoe, the sheriff of Chowan, and was levied upon the slaves in question, and subsequently they were bought by the defendant Collins. It was admitted that at the date of the assignment Creecy was indebted to an amount greater than the value of his property, and that several judgments against him must remain unsatisfied; that all the debts mentioned in the assignment were *bona fide,* and that the responsibilities therein mentioned had been incurred. There was no evidence that any of the creditors of Creecy accepted the deed of trust or participated in the making thereof, except that one of them, at the sale by the defendant Rascoe, requested a witness to value the slaves in order to subject the defendants to the full amount.

It was insisted for the plaintiff:

1. That the registration of the deed within six months being prevented by the negligence of the register, without the default of the plaintiff, and the registration having been completed as soon as possible after the appointment of a new register as to the plaintiff, it was to be taken as duly registered.

2. That the deed was delivered prior to the *teste* of the execution in favor of the defendant Collins, and thereby the title of the slaves in question vested in the plaintiff, so as to enable him to maintain this action.

3. That the deed was made *bona fide,* and upon a valuable consideration, and that this was a question of intent, and a matter of fact to be tried by the jury.

On the other hand it was urged:

1. That there was no evidence from which the jury could infer a delivery of the deed before the *teste* of the defendant Collins' execution.

2. That the deed not being registered within six months of its date, nor until after the *teste* of the execution and the levy and sale under it, could not prevail.

3. That the deed in its structure and provisions manifested an intent, which the law regarded as fraudulent against creditors not parties, nor assenting thereto, and that as this intent appeared upon the face of the deed, the judge ought to pronounce it fraudulent and void.

4. That the plaintiff could not maintain this action, because at (131) the time of the levy and sale the possession of Creecy and his right, by the terms of the deed, to hold the property had not ceased.

The presiding judge charged the jury that there was evidence from which they might infer that the deed was delivered prior to the *teste* of the execution. That although the registration of the deed, after the expiration of six months, might, under the circumstances of this case, have been deemed effectual, so as to cause it to inure from its delivery, had it, when proved, been left in the office of the county court, yet if it was not so left, but was taken out by the plaintiff, and not delivered by him to the register until five or six weeks after the term of the court, when it was proved, it would not in law avail against Collins' execution. That Creecy being insolvent, the deed was not *bona fide* against a creditor of his dissenting therefrom, and seeking by regular process to subject the property included in it to the payment of his debt, and that the intent to hinder, delay and defraud creditors appeared upon the face of the deed, and made it the duty of the court to pronounce it fraudulent in law.

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

Iredell and Hogg for plaintiff.
Gaston and Badger contra.

HALL, J. It appears from the evidence offered in this case that (133) at the time the subscribing witness attested the deed of trust, Creecy, who executed it, and Norcom, one of the creditors in whose favor the deed was given, were present. The deed must have been delivered

to Norcom, or retained by Creecy. If it was retained by Creecy, until it was offered for probate, it was not executed by him until that time. Therefore it cannot prevail against Collins. But if it was delivered to Norcom, it must be understood that he received it as the agent of Moore. And if Moore has assented to such delivery, the deed must be taken to have been executed when the delivery was made to Norcom. Now which is most reasonable to presume did happen? If the deed was retained by Creecy, the signing and sealing of it by him, and having it attested by a subscribing witness, amounted to nothing. The parties afterwards were in the same situation as they were before the transaction took place. Is it credible that the parties intended this? Norcom was interested in the transfer of the property, more so than Moore, the trustee. Was it not more likely that the deed should be delivered to him for safe keeping, than that it should be left in the hands of Creecy? Why was a witness called, why was anything done at this time if a transfer of the property was not contemplated? I therefore coincide in opinion with the judge of the Superior Court, that the circumstantial evidence was of such a character that it was proper to submit the question to the jury
(134) whether the deed had been delivered prior to the *teste* of Collins' *fi. fa.* If it was so delivered to Moore, there is an end of the question as to its execution. If it was delivered to Norcom as his agent, such delivery was also good. It is laid down in *Whelpdale's case,* 5 Rep., 119, that if an obligation be delivered to another to the use of the obligee, and the same is tendered to him, and he refuses, then the delivery has lost its force, and the obligee can never after agree to it. It follows, of course, that if the obligee assented to the delivery to the stranger, the delivery was good, and it must be considered the act and deed of the obligor. *Newbern Bank v. Pugh,* 1 Hawks, 198; 1 Starkie on Ev., 333; *Johnson v. Baker,* 6 Eng. C. L., 479.

But the judge was also of opinion that the deed was void as to creditors dissenting therefrom, and seeking by regular process of law to subject the same property to the payment of their just demands, and that an intent to defraud such creditors was apparent on the face of the deed, and that it was the duty of the court to pronounce it fraudulent.

Deeds of trust are not often made by debtors that are quite solvent. They are commonly made with a view of better securing some creditors, and in preference of others. And were the question open, and of the first impression, I would probably coincide with the judge in this part of the case also. Because when a debtor has several equally meritorious creditors, and has not wherewith to satisfy them all, and he appropriates what he has to the satisfaction of some of them, to the exclusion of others, it is a step which may gratify his feelings, but it cannot satisfy the

reasonable demands of justice, or be approved of by a correct sense of fair dealing. But the law on this subject has undergone too many editions, and taken too deep root, to admit of judicial remedy. It is a measure of justice, placed in the power of debtors, in all the States of the Union, as far as I am informed. No doubt, in the present case, the object of Creecy was to secure some creditors, and of course injure others. Still, the creditors secured had a right to be paid their debts, and a deed of trust made to effect that end the law will not consider (135) fraudulent. I see nothing in the deed of trust that distinguishes it from the common case of trusts. I am therefore not prepared to say that it carries on its face proof that it is fraudulent.

The next question that arises in this case is whether, as the deed of trust had not been registered in due time on account of the death of the register, it ought to be given in evidence. It will be admitted that where two individuals enter into a contract, and one of them is prevented, by the act of the other, from doing a thing which he stipulated to do for the benefit of the other, the latter can claim no advantage from the failure or omission. It will be admitted, also, that the Legislature may contract with an individual, and that the Legislature is represented by its laws, its officers, and its agents. And as far as such officers and agents act within the sphere of their official duty, they represent, and in fact are the legislative will. When they omit doing a thing which they ought to do, the Legislature, by its agent, has failed on its part. And if the failure was the cause why something stipulated to be done by an individual was not done, no advantage can be taken of the omission by the Legislature. Otherwise, it would do that itself which it will not countenance in an individual.

Generally speaking, when a contract is established each party is entitled to the benefit of it. But to some contracts (and the present deed of trust is one of them) policy has annexed another prerequisite—registration. In other words, a new contract is made between the grantee and the Legislature. The Legislature represents all other persons except the parties to the deed. All other persons are bound by their stipulations. What are the stipulations in this case? They are (in order that no person may be defrauded by the deed of trust, but all may have notice of it) that the Legislature shall appoint a register, whose duty it shall be to register the deed of trust, and the grantee shall in due time furnish the register with it for that purpose. Now as the Legislature has failed in providing an officer, the want of registration is not to be imputed to the grantee. Nor ought the defendant to derive any benefit from the failure, because the Legislature enacted the pro- (136) vision of registration for his benefit. And if through its omis-

sion there was no register, he cannot complain. The grantee is entitled to the benefit of the deed, as if no law for registration had been made. To exact from an individual an impossibility, as the only terms on which he should be entitled to the benefit of a contract, would be to impair and destroy that contract.

I have read of a Roman emperor, who suspended his laws so high that it was with difficulty they could be read, for the purpose of entrapping his subjects and collecting penalties. It would have answered the same purpose to enact that the subject should do a particular thing, and then to have put it out of his power to do it, and claimed the penalty.

I think this action is sustainable. The plaintiff had under the deed of trust the legal title to the property in question, and the possession of Creecy was not adverse to it, but held under it for the trustee.

HENDERSON, C. J., concurred with HALL, J.

RUFFIN, J., *dissentiente:* Upon the question of fraud, I fully concur in the opinion delivered as that of the Court. If the deed was intended to delay or hinder creditors, or for favor to the maker, or for his ease, even for one week or day, I should hold it fraudulent and void. And if those facts appeared on the deed itself, by a fair construction of it, I should likewise hold it to be the province and duty of the court to pronounce it fraudulent. But where the provisions of the deed point to the contrary purposes, namely, the real satisfaction of creditors in a convenient time, and in a convenient manner, or leave it equivocal whether one or the other was its object, it is then a case where the wrong intent is not to be gathered from the acts done, as they appear in the instrument, and the court cannot determine the question. The actual intent is then open to proof *aliunde* and not being declared in the instrument, or plainly to be inferred from it, is to be found by the
(137) jury. And as that may be found to be honest or evil, the court will instruct the jury as to the legal consequences.

Here there seems to be nothing in the deed itself to raise an imputation against it, unless every conveyance, by way of security of some debts in preference to others, be void. There is no benefit reserved to the debtor, which can be supposed to have been the object, or one of the objects of making the deed. Until a sale the possession is to remain with him. But this is obviously not for his ease—not to leave him the enjoyment of an estate protected by this conveyance from his general creditors. It was for the convenience of the trust property and a reasonable accommodation to the trustee, who ought not to be obliged to enter into immediate possession, take the management of the estate and subject himself to an account. The deed was executed in September, when

it is to be supposed the lands were in crop and the slaves engaged for the year. The sale was to be at the will of the trustee, or of a majority of the creditors; and it is to be supposed, unless the contrary be proved, that the creditors would act for their own interest and require the sale in a reasonable time. If they do not, a long continued possession by the creditor would furnish strong evidence of the original fraudulent intent. It is not to be inferred that they will not, because a majority might be under the influence of the debtor and might, to favor him, sacrifice their own interest and those of the minority. If such be the fact it is open to proof. It can be shown that the apparent fairness is illusory; that the debtor had come to an understanding with a majority or a large portion, that the deed should be so used, and upon that footing made the conveyance. The actual intent would frustrate their purposes and place the deed on a level with one having a clause of revocation by the grantor himself, with this difference only, that the latter is so expressly fraudulent that the court does not need a jury to find the intent, but can say directly to the jury the deed is void, while in the former the intent can only be gathered from extrinsic evidence by the jury, and then applied under the advice of the judge. But here there (138) was no proof of that sort. Nor are any hard or unreasonable terms imposed on the creditors. No releases are required from them before they can avail themselves of the trusts in their behalf, but the debtor is to be still left personally responsible for balances due. It is said, however, that the deed obviously delays Collins, under the pretense of securing him. For he was then pursuing an action for his debt, in which he would have a more direct and speedy method of raising the money. True, that effect does follow, and if that was the intent it avoids the deed. But if the intent was bona fide to secure the debts mentioned in the deed, and in the order therein prescribed, then it is not fraudulent, although the effect may be to delay and finaly to defeat Collins. That was not the object of the conveyance, but only a consequence of it. That consequence will not vitiate the instrument, provided it be only incidental to the other and lawful purpose of discharging other debts in preference. That Collins is provided for in the deed does not make it covenous as to him, in reference to his better remedy by judgment and execution then in prospect, more than it would had that provision been left out. It is clear the other creditors might have been preferred to his entire exclusion, although his debt was then in suit. And the question, then, is, Was the preference given to true debts, and for the real purpose of satisfying them, which, to be sure, may and perhaps must produce a loss to Collins, or was that professed purpose feigned and the real and primary one in fact to defeat another creditor? In the one case the intent is allowed by law; in the other is is forbidden.

It has been further contended that this deed is fraudulent because the surplus is reserved to Creecy. That is no more than would have resulted without such reservation. It will denote a fraudulent intent or not, according to the proportions the value of the estate conveyed bears to the debts secured by the deed. If the deed covers a great deal of property as a security for a small debt, so that the resulting interest to the debtor is really the valuable interest, the purpose professed (139) is so obviously a mere pretense as not to conceal the true purpose from the detection of any jury. It is obvious in such a case that the debtor is providing for himself and not for his creditors. But here the whole estate of the debtor is conveyed, and the debts to be raised out of it are so large as probably to absorb the whole and then be unsatisfied. This circumstance, therefore, cannot impugn the fairness of the transaction. Nor do I see anything else in the case that can or ought, except the violation of the sound rule in morals (which the law has not yet incorporated with itself), which would as much constrain a perfectly honest man, unable to pay, to share his substance impartially and equally amongst his creditors, as it would make a man of common honesty scorn to keep back a single stiver for himself.

Upon the question about the delivery of the deed, I confess I doubt extremely. I should hold the deed to be good, though executed in the absence of Mr. Moore, and though it was to be executed by him afterwards, and was so executed in Creecy's absence, if there were evidence to show that it was delivered to or taken by any of the creditors, or by anybody for Mr. Moore, upon the agreement that it was then Creecy's deed, though Moore had not sealed and was to seal. But in the absence of such evidence, I must suppose that Creecy kept the deed himself, because I cannot presume that he intended an absolute execution until Moore should also execute it and come under the obligation imposed by the covenants on his part. Those relate to the application of the proceeds of the sales to the payment of the debts and the surplus to Creecy himself. In the absence of all proof as to the custody of the deed from the time that Creecy signed it, until it as produced in court with Moore's signature and that of a second witness, the presumption is that Creecy himself held it. And this is fortified by the failure of the plaintiff to call the second witness, who probably attested the execution by Moore, and could have stated the time and also the person who produced the deed. But as the case is to go back to a new trial, I do not deem it material further to discuss this point.

(140) But I cannot yield my assent to the proposition that there has been a due registration of this deed. For the want of it, I think it is void as against the defendant by the express words of the Act of 1820. It is said, however, upon the authority of *Ridley v. McGehee*,

13 N. C., 40, that what ought to have been done by a public officer should be considered as done, and that as the party had done his duty he shall have the benefit of that, notwithstanding the officer of the law omitted his. I cannot perceive the force of this reasoning when applied to this case. I admit that if one covenant with me to do a particular act, and I discharge him from it, or hinder the performance, it is to be taken as performed. But there is no instance of this being extended to third persons. In relation to them, an act required by the law, or by contract, must be strictly performed. If one contract to convey me an estate, if A. go to Rome by a particular day, and he prevents A. from going, he shall convey, for he was the cause why the condition was not performed. But if A. die, I cannot claim the estate, although my claim has been defeated by the act of God, because the stipulation was for an act to be done, and he in whose favor that stipulation is did not prevent it. Still less can duties of public officers be thus dispensed with. An expression of *Marshall, C. J.,* in the case of *Marbury v. Madison* (1 Cranch., 161) has been relied on to the contrary. But I think that a perversion of the meaning of the judge. That case was a motion for a *mandamus* to the defendant as Secretary of State, to compel him to deliver to the plaintiff a commission, as justice of the peace for the District of Columbia, which had been made out and signed by the late President Adams and left by the defendant's predecessor in the office. Several objections were made: one, that the commission was a deed and had never been delivered; another, that it was not complete because it had not been enrolled. In answer to this last, the *Chief Justice* says it was the defendant's duty to enroll it, and therefore it will be taken as done. But how? Plainly as against the defendant; not third persons. He means nothing more than this: that the defendant could not justify the nonperformance of one duty by alleging the omission (141) of another. But he does not determine that Marbury was a justice of the peace—*had a title* by virtue of a commission not enrolled and not delivered, because the defendant ought to have performed those completing ceremonies. If that had been the decision it would have been in point here, but I apprehend that no person can suppose that such a decision ever would have been made. If that had been the opinion of the Court, it would have saved all the painful argument in the case and the extra-judicial reasoning of the judge, because the *mandamus* was altogether unnecessary, since the plaintiff already held the office without the possession of the commission.

Nor can I imagine any other case where an officer omits a duty, in which the party entitled to have that duty performed has a right to consider it as performed, as against another person. If I deliver an execution to a sheriff, and a second person does the same, but mine has the

legal preference, and yet the sheriff pay the money to the other, I cannot sue the party for the money, but must take my redress against the officer. But it is said, let the person who is injured by the want of registration sue the register; the law will not visit his neglect upon him who has actively done all he could do. I agree that the party injured ought to sue, and that such suit is deemed in law a competent redress. But who is that person? Surely he who claims under the deed, and not he who claims against it. If it is to be considered as registered, then a third person cannot possibly be injured by not registering it, nor can he to whom it is made, because he loses nothing by the want of registry. Then here is the case of an officer omitting a positive duty expressly enjoined by statute, and he is responsible to no one. The decision seems to me to be a repeal of the registry acts, and to encourage officers in their negligence. The only safeguard, in my opinion, is to give the party who has the immediate and direct interest in the performance of the required act his remedy by action for the nonperformance. (142) And this is particularly true in regard to the registry acts. For how can the creditor show an injury? The law for his benefit requires the deed to be enrolled, that he may know the contents of it and the extent of his debtor's means. If the register omit to do it, and the deed be lost by that cause, the party claiming under it is injured. But he who claims against it, as creditor of the maker cannot be. He loses nothing by the want of registration. For if the omitted act had been performed it would only have made the deed, by the express terms of the law, effectual against the creditor's rights by execution. But suppose a purchaser to be concerned instead of a creditor. The unregistered deed, even with notice, is not valid at law. It does not pass the title, but raises a trust in equity. All the questions upon the effect of notice are in equity, except in Massachusetts, where there is no such court. And the relief in equity is not upon the footing of a construction of the statute, but upon that of fraud *dehors* by reason of the notice. *Le Neve v. Le Neve,* 3 Atk., 646. And *there is no case* even in that court, in which the deed has been set up against a creditor or purchaser upon the score of accident or the act of God. Indeed the unregistered deed is not made good at law, but the subsequent purchaser with notice is decreed to convey. The first purchaser makes out his title at law under the conveyance from the last purchaser. For a deed of bargin and sale must be pleaded at law as *"a deed enrolled within six months,* according to the form of the statute." (1 Saund. Rep., 251, note.) Where the parties are equally innocent, the loss must rest where chance or Providence places it. Purchasing with notice, fraud is the *only* ground of relief. This has been decided in a most remarkable case in New York, after long consideration, and by the unanimous opinion of

the judges. In *Frost v. Beekman* (Johns. C. R., 288), a mortgage for $3,300 was delivered into the registry office for enrollment and was enrolled, but *by mistake* was enrolled as a mortgage for $300 only. The mortgagee did not think of setting this up at law for any purpose. But he filed his bill in equity to have it declared there a good mortgage for $3,300. He did not even claim this, as against a third (143) person, upon the score of accident, but upon that of notice, upon the principle that he who knows of the existence of a document must take care to inform himself truly of all its contents. The Chancellor, *Kent,* held that registry was required to enable the incumbrancer to give notice to all the world of the extent of his incumbrance, and that registry was such notice, but that the registry was not notice of anything but what is therein seen, although the officer, and not the party, is the person to compare the instrument with the registry. The deed was declared to be a mortgage for $300 only. *Beekman v. Frost* (18 Johns. Rep., 544) is the same case on appeal, in the Court of Errors, and the Chancellor's decree on this point is affirmed without a dissenting voice. No case can be more direct or stronger—that even in equity the case at bar could not stand. For (if there was any equity against a creditor) the lien of Collins' execution is anterior to any notice of the deed. But let us carry this a little farther, and suppose the deed not registered even at the trial. Could it then be read in evidence upon the ground that there was no register or that the register had neglected or even refused to register it? The statute says positively it shall not, and I think we cannot say it shall. Besides, it opens the door to most extensive and innumerable frauds. A party has nothing to do but combine with the register, and get the latter to refuse to put the deed upon record, and he may safely keep it concealed in his own pocket ever after. For, if a creditor who is defeated by it sues the register, the latter asks him, How are you hurt by my refusal? For if I had registered the deed you could not have reached the estate, and you are no worse off now. Upon every principle then, and upon authority, I dissent from the reasoning in *Ridley v. McGehee.* But even if that case be right, it is not an authority here, because the deed was there in the custody of the officers of the law for the whole time. Here the party took the deed from the clerk, who was bound by the acts of 1807 and 1814 to deliver it to the register within ten days, in which case it might have been enrolled before the register's death. I admit the party is (144) not obliged to leave the deed with the clerk, but if he does not, he deals with it himself, I think, at his peril.

Upon this ground, therefore, I am of opinion that it was shown the plaintiffs had no title and that the judgment ought to be affirmed.

PER CURIAM. Judgment reversed.

Cited: Burgin v. Burgin, 23 N. C., 458; *Hafner v. Irwin, ibid.,* 497; *Lee v. Flannagan,* 29 N. C., 474; *Hardy v. Skinner,* 31 N. C., 194; *Gibson v. Walker,* 33 N. C., 329; *Dewey v. Littlejohn,* 37 N. C., 507; *Ingram v. Kirkpatrick,* 41 N. C., 476.

Overruled (in part): *Moore v. Collins,* 15 N. C., 394.

ASA LEADMAN v. JOHN W. HARRIS AND WILLIAM JACKSON.

1. A deed made for the purpose of indemnifying a surety against a responsibility, created as a pretense for making the deed, and thereby to secure the use of the property to the debtor, is fraudulent.
2. *It seems* that a bond, which is retained by the obligee, and subsequently delivered, does not relate beyond the actual delivery.
3. Where the fraudulent intent is made to appear by evidence extrinsic of the deed, it is a question for the jury. But what is a fraudulent intent is a question of law.
4. A deed made to secure a true debt, but for the real purpose of enabling the debtor to continue in the use and enjoyment of the property conveyed, is fraudulent and void.

THIS was an action for trespass, for seizing and taking away sundry articles of personal property, tried before his Honor, *Norwood, J.,* at GUILFORD, on the last circuit. The defendant pleaded *not guilty,* and a special justification under process against one Kirkman, and on the trial the case was, that Levin Kirkman, Jr., was indebted to John Kirkman and James Hendricks, in the sum of $600, and in part satisfaction thereof conveyed to them his land at the price of $550. For the purpose of securing the balance of $50, and as an indemnity to them against the payment of a bond for $200, given by him and those two persons as his sureties to Levin Kirkman, Sr., he executed to the plaintiff a deed of trust for all the residue of his worldly substance, including a great variety of articles, and of much greater value than $50. The deed bore date 9 June, 1829. Levin, Jr., was much indebted at the time, and amongst his debts was one to Harris, the defendant, on a bond for $75, on which a warrant issued on 11 June, 1829, and judgment was given the next day, and execution issued, under which the property sued for in this action was sold. The plaintiff claimed it under the deed of trust, and the defendant insisted that the deed was fraudulent.

(145) Evidence was given that the debtor said he would never pay the debt to Harris if he could help it, and that he was the brother

of John Kirkman and son of Levin Kirkman, Sr. Evidence was also given by the father that his son, Levin, truly owed him $300 and upwards, and that in May, 1829, he applied to him to secure the debt by a deed of trust for his land, which the son refused to give, unless the father would take one to cover all his property, which he said would enable him to save some of it. The bond for $200 was given at the time the deed was executed. It was executed at the house of Levin, Jr., and without the knowledge of the father, to whom the son refused to deliver it on that day, but did deliver it the next. Afterwards John Kirkman paid the bond.

The case stated that the judge explained the law of frauds against creditors to the jury, and instructed them that if the deed were not fraudulent it would be good in law, although the bond was executed without the knowledge of Levin, the father, and was not delivered until the next day, for that the other considerations were sufficient to support it, and as the bond was beneficial to the father, his acceptance was to be presumed, and when made related to the execution of the bond, provided the bond was made with the intention in good faith to deliver it.

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

No counsel for plaintiff.
Winston for defendants.

RUFFIN, J. I do not question the proposition laid down that a debtor may, in the absence of his creditor, execute a bond in his favor, or a deed by way of a security for a debt due by bond or otherwise, and that such bond or deed, if made with an honest purpose, will be effectual when assented to by the creditor, and that such an assent is to be presumed. Yet it is a suspicious circumstance that the deed should be made of all the property, on the debtor's own motion, without (146) being at all sought by the creditor to secure a particular debt. But I more than question whether such an instrument, when kept by the party making it, and subsequently delivered, has relation for any purpose beyond the actual delivery. But I do not think it necessary to discuss that, because I conceive the deed to be plainly fraudulent, in a point of view not explained to the jury, for which I think there must be a new trial.

The whole controversy, as appears from the case, turns upon the question of fraud. Now I do not question the power nor the sole power of the jury to find the intent, when it is to be made to appear by matter extrinsic of the deed. But what intent is in law fraudulent the court must inform the jury, else the law can have no rule upon the doctrine of fraud, and every case must create its own law. I think here is plain

fraud. The deed was not made to secure a debt. I mean that was not the design of it. The debt was created, that is, the responsibility for which the deed is declared to be an indemnity for the sake of a pretense for making the deed, and thereby securing the use and possession of the property to the debtor.

There are various species and various evidences of fraud. A common instance is, where the debt is not a true one, of which the strongest evidence is the possession unreasonably remaining with the pretended debtor. Another instance is, where the debt is a true one, but the possession is left so as to give the debtor a delusive credit and enable him to cheat honest men. And in every case where it is made manifestly to appear that, notwithstanding the deed, the debtor is to have the real use, as it were, the beneficial ownership of the property, it is a presumption of law, to be delivered to the jury, that the deed is fraudulent. This is founded upon both the foregoing principles combined. It is on the one hand evidence that the consideration is feigned, and on the other that it was designed by both parties to hold out to the world a false appearance as to the circumstances of the debtor, and thus en-
(147) trap subsequent creditors, as well as deceive prior ones. These inferences from possession are certainly open to explanation, and are to be drawn by the jury. But the tendency of the evidence and the grounds of the inferences are proper subjects for observation from the bench. There is, however, another principle equally important, which is also connected with this subject. The law intends that no man shall contract a debt *which he does not mean to pay,* and will not uphold any means taken to enable or encourage him to do so. If, therefore, as is mentioned in *Twine's case,* a conveyance be taken for a true debt, upon the understanding that the debtor is to have the use of the property, that although it is apparently conveyed in satisfaction or security for it, yet the beneficial ownership is to be with the debtor, it is void. Why? Because it is taken that in truth it was not taken for the very purpose of satisfying the debt, but under the cover thereof, *for the ease and favor of the debtor,* either generally or for some definite time. What temptations would it not hold out to dishonest men to run up scores, without the smallest intention of making payment, if by finding a friend amongst their creditors they could enjoy their property all their lives against the other creditors? It must be made men's *interest* not to be dishonest in *contracting* a debt, more than in putting away their property from all their creditors. And the only way to do that is by saying that if it appear that the conveyance was truly made, not for the creditor's benefit, but for the debtor's, it is void. It is true that where the debt is a just one, the covenous intent is difficult of proof, and can seldom be proved because prima facie a just debt makes the deed bona

fide. Nevertheless, where the intent can be reached, it is not the less fraudulent, indeed has more moral depravity because it assumes a more specious appearance.

This is a case in which I think it is reached and plainly exhibited. The debtor wished expressly to evade the payment of Harris' debt. To effect it, he had endeavored to make a conveyance of *all* his property to his father, which the latter refused, though he wished a security upon what he deemed enough. In the father's absence, and without his privity, he does not make a deed to secure the payment to his (148) father, but gets two other men to join him in a bond to the father, and then conveys to indemnify them. Why should they volunteer this liability? They knew the debtor's insolvency and had taken a deed for the land in part payment of their debt. Only the small balance of $50 remained due to them. Why did they not secure that on part of the property? Because it would not answer the purpose. The object was to cover *all,* and to enable them to do so with some color, they execute the bond, leave it with the debtor, and take a deed for everything to pay the $50 and repay them what they should pay to the father. That the bond was made with this view is further to be inferred, because there had been no settlement with the father and the debt was assumed at a venture for the occasion. Were this bond and deed made for the security of the creditor (the father), or were they executed for the different purpose of shielding the debtor from the assaults of other creditors, and retaining his effects, his household stuff and provisions on hand, and growing crops, to the use and ease of the debtor himself, or to use his own words, to *save* his property? All may judge, and few can be deceived, I think. For the purposes of this life, the debtor is as well off as if the property were his own, and he owed not a cent, supposing the deed could be made with this intent and could be supported, yet as to his creditors he is not worth a cent, and they are defied.

I do not say that the court ought to have instructed the jury that such conclusions of fact were drawn by the law. Far from it. But I think they ought to have been informed that they might be made from the evidence, if believed, and submitting the case to them on that point, to have been told that if they found the bond and deed were made with that intent, the latter was void. The instruction would then have been given on the *gist* of the controversy. As the case was not so presented to the jury, I think there ought to be a new trial that it may be.

PER CURIAM. Judgment reversed.

Cited: Hafner v. Irwin, 23 N. C., 497; *Isler v. Foy,* 66 N. C., 551; *Rencher v. Wynne,* 86 N. C., 274; *Cannon v. Young,* 89 N. C., 266.

(149)

WILLIAM BENDER v. JOHN ASKEW.

1. Where a judgment has been improperly entered up, the party suing out execution upon it is a trespasser if the court subsequently set aside the judgment and execution.
2. Defects in judgments may be amended even after a writ of error; and executions may also be amended after they have been acted on, so as to render them a justification to the officer where otherwise they would not be.
3. Judgments by default, signed by the attorney without an actual adjudication by the court, may be set aside at any time, even after the term at which they are entered.
4. After a judgment by default has been set aside, another court cannot inquire collaterally, whether it was set aside properly or not.

TRESPASS, for suing out an execution and selling the property of the defendant, under process upon a judgment of the county court which had been set aside.

Plea, *not guilty*, and a special justification under final process.

Upon the trial before his Honor, *Strange, J.*, at LENOIR, on the last spring circuit, a verdict was entered for the plaintiff subject to the opinion of the court, upon the following case:

At the April sessions, 1827, of Lenoir County Court, a writ was returned at the instance of John Tull to the use of the defendant, Askew, against the plaintiff and two others. The return was "executed on all but Bender." An appearance was entered, and pleas filed for those taken, and an *alias* ordered as to the plaintiff. At January Term, 1828, a *nolle prosequi* was entered as to all but Bender, and a judgment final by default entered up against him, upon which a *fi. fa.* issued returnable to the ensuing April Term, which was levied upon his property. And afterwards the same property was sold under a *venditioni exponas,* returnable to July Term, 1829. At that time it was ordered, "That the judgment and execution against Bender be set aside, it not appearing to the court that said Bender had been served with process."

Upon these facts his Honor set the verdict aside and entered a nonsuit, from which the plaintiff appealed.

No counsel for plaintiff.
J. H. Bryan for defendant.

RUFFIN, J. There seems to be no doubt that defects in judgments may be amended as to matters within the statutes, after they are rendered, and even after writ of error brought or appeal had. There seems

to be as little doubt that errors or defects in executions of a (151) similar kind may be amended after they have been acted on so as to make them correspond with the judgment. This is for the purpose of making the writ a good justification, where before it was not, although it thereby may bar an action of him, who has been imprisoned on it, or had his property sold under it, while in an imperfect state. Having this effect, the courts are always careful never to allow such amendments, but to answer the purposes of justice, and upon proper terms, as if the amendment be in the record after error brought, upon the payment of the costs of the writ of error, provided the plaintiff in error do not proceed further after the amendment. Instances of amending writs of execution for the purpose of supporting proceedings under them, are found in *Laroche v. Wasbrough* (2 T. R., 737); *Newman v. Law* (5 *id.*, 577), and *Mowys v. Leake* (8 *id.*, 416, note a).

Correlative to this power is that of setting aside all *irregular* process and proceedings. This has been often done with respect to all parts of the proceedings, from the leading to the final process, the court taking care to exercise the power upon proper cases, and when applied for in due time, and before the irregularity has been cured by other steps taken in the cause. Office judgments, by which I mean those signed by the plaintiff in the course of the court, without any actual adjudication by the court, must necessarily be held to be under the future control of the court, when anything improper is made to appear in them. As to them, the authority of the court is not restricted to the term in which they are rendered, for if it were, it would amount to nothing, since neither the court nor the defendant knows of them at that time. Strong examples of this sort are judgments taken for usurious debts upon warrants of attorney. And many other instances are given in Tidd's Practice, 614, of judgments by default being set aside for irregularity, and among them signing such a judgment before the appearance of the defendant, and before regular service of the process. Courts then have this power. Indeed it seems indispensable to the adminis- (152) tration of justice and the due regulation of the officers of the court.

But it is said here that the defendant appeared, and appearance dispenses with a writ, and much more with the service of it. True, such is the effect of appearance, and if a court of error were passing upon the record of the suit in the county court, in its original state, the judgment could not be reversed, because the defendant Bender did not appear to be in court. But that is not the question here. It is, whether *that* court is precluded from inquiry into the fact, whether he did appear or not, for the purpose of determining whether or not the office

judgment signed against him was regular. And upon that question there can be no doubt, as long as it is conceded that a judgment may be set aside for irregularity, for that necessarily implies the capacity to ascertain whether in fact the irregularity was committed.

It would seem from an inspection of the record of the county court that there was no appearance by Bender, for at the very term at which the attorney enters his appearance for the defendants an *alias capias* is awarded against Bender, which shows that the appearance was for the other two.

But this Court does not enter into that. This is not an appeal from the order setting aside the judgment. In this collateral way the propriety of that order cannot be examined, unless it be absolutely void. It is not void, for in proper cases all courts can and ought to exercise that jurisdiction, and when they have done so another court cannot, collaterally, disregard the act, unless the power be denied in all cases. Here, therefore, we do not inquire whether the county court exercised its discretion properly in this particular case, but whether that court possesses the power in any instance. If it does, then this must be taken to be proper while it stands.

What is the effect upon the present action of the order of the county court? Very clearly it is to prevent the defendant from justifying under the judgment and execution. *(Philips v. Biron,* 1 Strange, 509; *King v. Harrison,* 15 East., 615). It is the same thing as if they (153) never had existed. It is true that it is now usual for the Court of King's Bench to restrain the defendant from bringing an action of trespass, unless a strong case for damages be shown. (Tidd's Pr., 1072.) But this is discretionary, and without an order there is no bar, for the writ is put out of the way. It forms, indeed, a justification for the sheriff, if it be not void upon its face, because he is no wise responsible for irregularity in the proceedings, unless he joins in the plea of the party. It is now usual upon setting aside proceedings for irregularity to make an order of immediate restitution, instead of putting the injured party to his action and to enforce such order by attachment. But the party has his action, unless restrained, and that was formerly the only method of redress. *(Barker v. Norwood et al.,* 3 Wils., 368.) Here the order did not extend to that subject.

PER CURIAM. Judgment reversed.

Cited: Skinner v. Moore, 19 N. C., 156; *Winslow v. Anderson,* 20 N. C., 6; *Purcell v. McFarland,* 23 N. C., 35; *Keaton v. Banks,* 32 N. C., 383; *Bowman v. Foster,* 33 N. C., 48; *Williams v. Beasley,* 35 N. C., 114; *Phillipse v. Higdon,* 44 N. C., 383; *Powell v. Jopling,* 47

N. C., 402; *Griffin v. Henderson,* 51 N. C., 156; *Davis v. Shaver,* 61 N. C., 19; *Stancill v. Branch, ibid.,* 219; *White v. Snow,* 71 N. C., 234; *Turner v. Douglas,* 72 N. C., 134; *Harrell v. Peebles,* 79 N. C., 30; *Moore v. Hinnant,* 90 N. C., 166; *Hinton v. Roach,* 95 N. C., 111; *Brittain v. Mull,* 99 N. C., 492; *Taylor v. Gooch,* 110 N. C., 392; *Stealman v. Greenwood,* 113 N. C., 359.

WILLIE McPHERSON ET AL. v. JOSEPH SEGUINE.

1. Tenants in common cannot maintain trespass against each other, even after they have made a partition by parol.
2. Upon the death of the plaintiff in *trespass quare clausum fregit,* the suit must be revived by his executor, and not by his heir.

The case of *Anders v. Anders,* 13 N. C., 529, approved.

TRESPASS *quare clausum fregit,* originally commenced by the plaintiff, McPherson, and one Samuel Proctor, but upon the death of the latter revived by his heirs at law.

Upon *liberum tenementum* pleaded by the defendant, the cause was tried at GATES, on the last circuit, before his Honor, *Martin, J.,* when the plaintiffs produced:

1. A grant to one John Fontaine for 6,000 acres of land.

2. A deed from one Morris to the plaintiff, McPherson, dated in 1818, calling for 1,500 acres, a part of a tract of 6,000 acres granted to Fontaine, lying in the Dismal Swamp, but without stating any beginning or any particular lines.

3. A deed from McPherson to Sawyer and Proctor, and they (154) proved that Sawyer died, leaving an only daughter, who married Proctor and had issue.

The defendant claimed an undivided part of the 6,000 acres granted to John Fontaine, and deduced his title as follows:

1. By proving Fontaine's death and the descent to his sons, William, John and Patrick.

2. A deed from Patrick to John Cowper for 1,500 acres of the 6,000-acre tract.

3. A partition of John Cowper's estate among his children, and an assignment thereby of the 1,500 acres of the original grant to Fontaine to Willis Cowper, one of the sons of John Cowper.

4. A deed from Willis Cowper to the defendant for 1,580 acres of land, "part of a large tract granted to John Fontaine, being the part allotted, laid off and divided to Patrick Fontaine and Charles Fontaine, heirs of John Fontaine, deceased, by the county court of Gates, at August Term, 1803, and being the lands purchased by John Cowper from said Patrick and Charles."

The plaintiff then proved a partition by parol made between the parties to this suit in 1819, before its commencement.

Upon the case thus appearing, his Honor nonsuited the plaintiff, who appealed.

Kinney for plaintiff.
Iredell for defendant.

RUFFIN, J. The deed under which the plaintiffs claim conveys only an undivided share of the 6,000 acres patented by Fontaine. The defendant's is also an undivided interest in that tract. The deed to him does not in itself describe any boundaries. It says, it is true, that the land thereby conveyed is part of a large tract patented by a certain John Fontaine and contains fifteen hundred and eighty acres, "being the part allotted, laid off and divided to Patrick Fontaine and Charles Fontaine, heirs of John Fontaine, deceased, by the county court of Gates at August Term, 1803, and being the land purchased by (155) John Cowper from said Patrick and Charles." But no such partition is produced as that referred to in the deed, nor is the deed to John Cowper produced. So that it is impossible to say that the deed covers any particular part of the 6,000 acres, but only the shares of Patrick and Charles Fontaine, whatever they may be.

The case states further that upon the death of John Cowper, his estate was divided amongst his heirs at law, and the interest in the Fontaine patent was thereby assigned to Willis Cowper, the vendor of the defendant. But that does not carry us a step further towards the several titles or possessions of the parties to this suit, because it does not seem that there was any partition between the Cowpers and the other claimants of the Fontaine patent, or that any particular specified portion of that was allotted to the Cowpers, or to Willis Cowper. It only amounts to this: that the interest of John Cowper in that patent, whatever it might be, whether in common or in severalty, should be taken as the share of Willis of the estate of John.

The parties, then, are tenants in common, and one cannot maintain trespass against the other. The attempt to make a partition *in pais* in 1819 was nugatory. *Anders v. Anders,* 13 N. C., 529.

Besides, there are other objections which it would be difficult for the plaintiffs to get over. Among them, I may mention that upon the death of Proctor, one of the original plaintiffs, his *heirs* are made parties to revive instead of his executor.

PER CURIAM. Judgment affirmed.

Cited: Dobbs v. Gullidge, 20 N. C., 198; *Gilchrist v. Middleton,* 107 N. C., 682; *Rhea v. Craig,* 141 N. C., 609.

JOSIAH F. GRANBERRY AND JOB PARKER v. JOSHUA A. POOL.

1. No matter can be pleaded in discharge of the liability of bail, except the death or surrender of the principal.
2. If it is unlawful for the principal to come into the State, or if he is imprisoned abroad for a criminal offense, the court will in its discretion relieve the bail.
3. But no relief will be given where the bail is imprisoned abroad for debt.
4. A plea of the death of the principal cannot be received in this Court, because it has no jury to ascertain its truth.

THIS was a *scire facias* against the defendant, as the bail of Asa Rogerson, to which sundry pleas were filed, but on the last circuit, at PASQUOTANK, the defendant withdrew all of them, and pleaded, since the last continuance, "that a certain process, called a warrant (156) of distress, issued from the Treasury Department of the United States against the said Asa Rogerson in the said *scire facias* mentioned, and that upon the said warrant the said Asa was arrested at the instance of the United States, and is now confined in jail upon said process in the State of Tennessee, and therefore that the said Joshua A. Pool cannot surrender his said principal in discharge of himself, and this he is ready to verify, wherefore," etc.

To this the plaintiffs demurred, and assigned for cause of demurrer that the plea did not show in what jail the principal was confined.

His Honor, *Martin, J.,* sustained the demurrer, and rendered judgment for the plaintiffs, from which the defendant appealed.

Hogg for plaintiffs.
Devereux for defendant.

RUFFIN, J. The plea does not state for what matter or cause Rogerson is imprisoned, whether civil or criminal; and is for that reason alone

defective. But supposing we must intend that as it alleges the imprisonment to be on a warrant of distress issued from the Treasury Department of the United States that he is confined for a *debt* due to the United States, the question is, Does that bar this action against his bail? It is clear that it does not. The statute makes the death of the principal or the surrender of him a bar, and nothing else. In England, if he be imprisoned within the realm, so that the bail cannot make a personal surrender, the court will have him brought up by *habeas corpus* for that purpose. Our statute of 1777 (Rev., ch. 115, sec. 22) directs in such case that the court may, upon the motion of the plaintiff or bail, order such principal to be retained a prisoner until the plaintiff's debt be paid, and the service of the order on the jailer shall authorize him to
(157) detain the debtor; and this shall be deemed a surrender of the principal and discharge of the bail. It does not provide for an imprisonment of the principal beyond the jurisdiction of the court. If, indeed, it be unlawful for the principal to remain or to come into the country, or if he be imprisoned abroad for a criminal matter, so that the bail cannot by any means take his body for the purpose of surrendering him, the court may in its discretion relieve the bail as far as justice demands; but even such facts cannot be pleaded in bar of the action against the bail. It would be manifestly wrong that they should constitute a bar, for the bail may be indemnified to the full extent of his responsibility, or may have colluded with the debtor to get him off. Relief is therefore given in such cases, by staying the proceedings against the bail, or by entering an *exoneretur,* upon motions for which the parties may be put to their oaths, and the merits determined. But I do not find any case where any relief has been given upon the mere ground that the principal is imprisoned beyond the jurisdiction for a debt. Such an imprisonment must be taken to be temporary, which must make it fail as a bar, which is the point before us now. And I see no reason why such an imprisonment for a debt should induce the court to enter an *exoneretur,* or stop the proceedings. For the bail must be taken to have undertaken to produce his principal, unless it was unlawful or impossible. This is the case with an alien enemy, one transported for a crime, or imprisoned abroad for like matter. But he may always arrest his principal, who is imprisoned for debt only, by paying that debt. He has engaged to surrender him, without any such exception. The plaintiff must lose the benefit of his recovery, unless the bail be bound to release the debtor from his confinement abroad; for if the plaintiff were to do so, he could not arrest him and bring him within this jurisdiction. The bail alone has that power. But the clear reason is, that the bail contracts to have the debtor forthcoming, and it is no answer to that for

him to say, my principal owes another man as well as you. He ought to have seen to that beforehand.

But it is not necessary to consider whether such a state of facts (158) warrants any relief, since the inquiry here is whether it is a good *bar* to the action of the plaintiff. We all think, for the reasons given, that the imprisonment is temporary, and that the bail may be no loser, because he may have the money of his principal; that the plea is bad, and does not bar the action.

Since the case was argued, a plea has been tendered of the death of Rogerson, subsequent to the rendering the judgment in the Superior Court, supported by an affidavit of the defendant. It is too late. The plea cannot be received here, for there can be no pleading in this Court. We cannot have a jury to try it. The final judgment was that of the Superior Court, which fixed the bail. Our province is only to say whether that judgment was erroneous. If we thought it so, and sent the case back, it would then be open to this defense. But as we see no error, it must abide the decision already made.

PER CURIAM. Judgment affirmed.

Cited: Mabry v. Turrentine, 30 N. C., 208; *Norment v. Alexander,* 32 N. C., 72; *Sedberry v. Carver,* 77 N. C., 323.

DEN EX DEM. OF EDWARD HARDY AND THOMAS J. NEWBERN v. HENRY N. JASPER.

1. Where an original *fi. fa.* issued to one county, and an *alias* issued to another, a sale by the defendant of his property situated in the latter county, made while the first writ was in the hands of the sheriff, is valid.
2. In England lands are bound by the *judgment* upon suing out an *elegit;* and therefore *all* the lands owned by the defendant at its rendition are liable for its satisfaction.
3. But here lands are bound only by the *fi. fa.* from its *teste,* and sales made after that time of land situated where the writ does not run are valid.
4. Per RUFFIN, J. An *elegit* may be sued out in this State.

EJECTMENT, submitted at FRANKLIN, on the last spring circuit, to his Honor, *Norwood, J.,* on the following facts:

A judgment was obtained in Bertie County Court against one William J. Newbern, at August Term, 1828, upon which a *fi. fa.* was made out, tested of that term, but by an agreement between the parties not

delivered to the sheriff. An *alias* issued, tested of the November Term following, which commenced on the second Monday, being the 10th day, directed to the sheriff of Franklin, who returned *nulla bona*. A (159) *pluries* issued, tested of February Term, 1829, also directed to the sheriff of Franklin, who levied the same on the premises mentioned in the declaration, and sold them to the lessors of the plaintiff, to whom he executed a deed. On 8 November, 1828, W. J. Newbern, for a full consideration, and bona fide, conveyed the same land to the defendant.

Upon these facts his Honor gave judgment for the defendant, and the plaintiff appealed.

Seawell for plaintiff.
Badger for defendant.

RUFFIN, J. The Court does not deem it necessary to consider the effect, as against a vendee in Bertie, of the writ which was made out, kept in the office and never issued; because, supposing it to have been delivered to the sheriff of Bertie, it is our opinion that it would not invalidate the title of the defendants to the land in Franklin.

No case has been cited at the bar, or found by the Court, which extends the lien of any writ beyond the territorial limits in which it can be executed. It would seem that in reason it cannot be carried beyond those bounds, but is restrained to them by its terms. It is argued that it embraces all the property of the defendant, wheresoever situate, upon the ground that the party shall not defeat the judgment by any acts of his. I conceive that this is unduly enlarging the rule and the reason. It is not the judgment, but the execution to which the principle is applied. True it is that as to lands in England, the judgment is that to which respect is had; and as that is equally operative in every part of the kingdom, an alienation of the land situate anywhere after judgment is void as against the *elegit*. But in reference to the execution of a *fi. fa.* it binds in England from the delivery, and here from the *teste;* and any alienation is avoided which would defeat the writ. As to chattels then, it is not the judgment, but the execution to which we have regard, and the party is not permitted to defeat *the process*. But how can this be predicated of an act done in a place in which the process does not (160) operate? *That writ* can in nowise be said to be thereby eluded, and that writ alone can be looked to as affecting the property. The party is restrained by the writ from disposing of anything which by the same writ can be taken in satisfaction of the debt. This is carrying it far enough, for often executions by the fictitious relation to the *teste*

overreach honest and bona fide sales. We find the law upon that subject certain and settled, and therefore we cannot change it from any sense of the hardship. In England, however, the mischief produced the provision in stat. 29 Car., 2, ch. 3, in favor of purchasers, that no writ of *fieri facias* should bind the property or the goods of the party, but from the delivery to the sheriff. This goes far to show what was considered in that country to be the law. What was the evil? That people bought goods and lost them by force of a writ afterwards sued, which, by a fiction of law, related to a day beyond the purchase. The remedy provided is, that no such fiction shall hereafter exist, but every man may conveniently know whether he is getting a good title by application to the sheriff, and ascertaining whether he has an execution in his hands against those goods. But this protection is manifestly but a mockery, if he must apply to every sheriff in England to see whether a *fieri facias* has been lodged in his office. It must mean the sheriff of the county in which the goods are; for to him alone can application be made without an inconvenience, which would prevent the making of any, and the statute would in fact have no effectual operation. Now this act of Parliament relates only to the time from which the writ shall bind, and is altogether silent as to the places in which it shall have force. This last is at common law. But I think the very object of the statute would be defeated as to the time, if the place be any other than the one county or bailiwick mentioned in the writ. And, therefore, I take the law to be there understood, as confining the efficacy of the writ to the territory mentioned in it, within which it is to be executed. It is more necessary that it should be so held here, since we have no *market overt,* by sales in which in England the goods may be passed even against an execution in that county. The fraudulent contrivances to evade (161) executions by the removal or sale of property may be easily suppressed either by an *elegit,* or by suing writs of *fieri facias* to several counties at the same time. Since this can be done, it ought to be required as affording to purchasers some opportunity of getting a knowledge of their vendor's power to sell.

I think, therefore, the judgment must be affirmed. I shall of course be understood, when speaking of defeating the particular writ, as not meaning to impeach the efficacy of an *alias,* as such, directed to the sheriff who had the original *fieri facias.*

PER CURIAM. Judgment affirmed.

Cited: Spencer v. Hawkins, 39 N. C., 291; *Watt v. Johnson,* 49 N. C., 193; *Aycock v. Harrison,* 71 N. C., 435.

JOSIAH WATSON v. JOHN H. ORR.

1. The law of the country where a contract is made is the rule by which its validity, its meaning, and its consequences are to be determined.
2. But where a law of Virginia gives *bona fide* purchasers from a bailee, who has had possession more than five years, a good title against the bailor, unless the bailment be registered, if a purchase, pending a suit by the bailor against the bailee would not be valid in Virginia, so neither would it be in this State, although the suit was pending in Virginia, and therefore was not notice to the vendee here.
3. In construing the law of another State, the decisions of that State, if known, are to be followed.
4. Upon questions of legal title notice has no influence; it does not affect a valid one, nor is a defective one aided by want of it.

DETINUE for a slave, tried before his Honor, *Martin, J.*, at MECKLENBURG, on the last spring circuit.

Upon *non detinet* pleaded the case was, that the slave in dispute was the property of the plaintiff, a resident of Virginia; that the plaintiff in the year 1816 loaned the slave to one Greers, his son-in-law, who continued in possession until the year 1824, when the plaintiff instituted a suit for the slave against Greers, and in November, 1825, obtained a final judgment. Pending that suit, Greers brought the slave into this State and sold it to the defendant, who had no notice of the suit in Virginia nor of the claim of the plaintiff.

(162) The defendant offered a certified copy of an act of the Legislature of Virginia, entitled "An act to prevent fraud and perjuries," passed 30 November, 1785, the second section of which is as follows:

"Every gift, grant or conveyance of lands, tenements, hereditaments, goods or chattels, or of any rent, common or profit out of the same, by writing or otherwise, and every bond, suit, judgment or execution had or made and contrived of fraud, malice, covin, collusion or guile, to the intent or purpose to delay, hinder or defraud creditors of their just and lawful actions, suits, debts, accounts, damages, penalties, or forfeitures, or to defraud or deceive those who shall purchase the same lands, tenements or hereditaments, or any rent, profit or commodity out of them, shall be from henceforth deemed and taken (only as against the person or persons, his, her or their heirs, successors, executors, administrators or assigns and every of them, whose debts, suits, demands, estates, interests, by such guileful and covinous devices and practices, as is aforesaid, shall or might be in any wise disturbed or hindered, delayed or defrauded), to be clearly and utterly void, any pretense, color, feigned

consideration, expressing of use, or any other matter or thing to the contrary notwithstanding. And, moreover, if a conveyance be of goods and chattels, and be not, on consideration, deemed valuable in law, it shall be taken to be fraudulent within this act, unless the same be by will duly proved and recorded, or by deed in writing, acknowledged or proved, if the same deed include lands also, in such manner as conveyances of land are by law directed to be acknowledged or proved, or if it be of goods or chattels only, then acknowledged or proved by two witnesses in the general court, or court of the county wherein one of the parties lives, within eight months after the execution thereof, or unless possession shall remain really and bona fide with the donee; and in like manner, where any loan of goods and chattels shall be pretended to have been made to any person with whom or those claiming under him, possession shall have remained by the space of five years without demand made, and pursued by due process of law on the part of the pretended lender, or where any reservation or limitation shall be pretended to have been made of a use or property, by way of a condition, reversion, remainder or otherwise, in goods and chattels, the possession whereof shall have remained in another as aforesaid, the same shall be taken, as to the creditors or purchasers of the persons aforesaid, so remaining in possession, to be fraudulent within this act, and that the absolute property is with the possession, unless such loan, reservation or limitation of use or property were declared by will, or by deed in writing, proved and recorded as aforesaid."

His Honor charged the jury that if the defendant had purchased after the rendition of the judgment in Virginia, it would have altered the relation between him and the plaintiff, but that having purchased before that judgment, a different right had accrued to him under the laws of Virginia. That the question as to him was, whether his purchase was bona fide; that if he had notice of the pendency (163) of that suit his purchase was not bona fide; that a suit pending in another State was not of itself notice to a purchaser in this; that as the loan was made in Virginia, this suit arose out of that contract, and was to be determined by the laws of Virginia; and that by the law of 1785, if there was a loan by the plaintiff to Greers, and possession held under that loan for more than five years, without the registration of any instrument showing the terms of the bailment, the defendant was entitled to a verdict, provided he was a fair purchaser.

The jury returned a verdict for the defendant, and the plaintiff appealed.

Iredell for plaintiff.
Devereux contra.

RUFFIN, J. There cannot be a difference of opinion upon some of the general principles involved in this case. Such as these: that the law of the country where the contract is made is the rule by which the validity of it, its exposition and consequences are to be determined; and that where property in a particular country becomes, by the law of that country, rightfully vested absolutely in the possessor, as against another also in that country, his right is recognized, for his own benefit and that of his assignees, all over the world. The difficulty here is to determine whether the right of property was determined in Virginia by the law of that State; and whether if it were not, the law can follow the thing here for any purposes. In the Superior Court it was admitted that a purchaser *pendente lite* in Virginia would not have a good title, but it was supposed that a purchaser here was not affected by that suit because it was in another State and he was not bound to take notice of it; and, therefore, it was held that the statute of 1785 gave a good title to the defendant, as a purchaser here from the bailee who, as to the defendant, continued to be a bailee, notwithstanding the action against him.

I cannot agree in this reasoning, because it is a contradiction in terms to say that a purchase out of Virginia gives, by force of (164) the law of Virginia, a good title, when by the same law a purchase in that State would confer no property.

It might well be doubted whether the statute of our sister State follows the chattel here at all, unless the whole title be consummated according to it in that State. In other words, whether a purchaser, to be within the act, must not be a purchaser in that State. His title is then consummated under the law, where that law operates, and is therefore sustained wherever that title is discussed. But it is not so easy to see how one can by virtue of a law of a particular place, *acquire* a title at another place, where that law has no obligation, as to the requisites and effects of a contract made at this latter place. If in this case, therefore, I understood the statute of Virginia in the way it is put in one part of the argument for the defendant, as not conferring on him the title, but only the power of conveying a good title to another, I should not hesitate to say that everything must be transacted there, so as to complete the title in that State; for we can only take notice of laws conferring rights there, and not those giving a power there, to be exercised elsewhere. The law of the place where the power is exercised determines the extent and the validity of the title obtained under it. But I do not think *that* the fair meaning of this statute. In putting a construction upon the statute of a sister State, this Court would certainly adopt that of her own tribunals, if known to us. But none such have been furnished to us, and we are therefore obliged to understand the

statute in the sense which its words convey to us. It is in this part of it a remedial statute against fraudulent conveyances; and as against creditors and purchasers from the possessor of a chattel for five years, a loan of such chattel, or reservation of a use therein shall be taken and deemed to be pretended and fraudulent, and the absolute property to be with such possessor, unless such loan or reservation of use be declared by will, or by deed proved and recorded. But the clause has this further and important provision in it: that such possession for five years shall be without demand made and pursued by due process of law on the part of the lender. The inquiry is, what title the (165) bailee gets by this law? It was obviously made for the protection of creditors and purchasers from the holder only, and it is to be taken, fair ones. It is observable and singular that the same policy should in the two states have produced a legislation diametrically opposite. The policy is to suppress fraud. To effect it, our system as contained in the Acts of 1784, 1806, and the proviso in 1820, is to avoid the gift to and title of the bailee, in protection of the first donor or bailor and *his* creditors and purchasers. Virginia avoids the rights of the donor and his creditors, in aid of the creditors and purchasers from the bailee, and for them turns an express loan into a valid gift. But the statute does not profess to interpose between the lender and borrower themselves. Possibly and probably such a possession may endue the latter with a prima facie right, and enable him to maintain *trover* or even *detinue* against a stranger. But as between the parties it remains a loan; and the law gives no rights to the borrower for his own benefit, but only for the benefit of his creditors or purchasers from him. The bailor may at any time, then, after the lapse of the five years, maintain his action against the bailee. For the possession is not to be deemed adverse until there is a refusal by the bailee to redeliver, or until it be set up by a creditor or purchaser, as to whom the bailee is to be taken as having the absolute property. Then what creditor or purchaser is meant? Certainly not one within the five years, unless the two possessions united make that period. And as certainly, I think, not a purchaser (however it may be as to a creditor), who becomes so after the possessor ceases to be a bailee, and has become a trespasser within the act. It cannot be argued that if the bailee at the distance of ten years return the chattel he can afterwards sell it. Why? He ceases to be the possessor under the loan, and the purchaser cannot be imposed on. So if he be made a trespasser by a demand of the lender, followed up by a suit successfully prosecuted, he cannot after judgment make a good title. Why? For the same reason, because he does not rightfully hold under (166) that loan, which is declared in the act to be fraudulent. Can he

sell pending such a suit? It would seem strange if he could, for the demand and consequent action have precisely the same effect upon the character of the possession as the judgment therein rendered has. And there is this absurd consequence to which such a position leads: the law allows the action to the lender against the borrower, but enables the latter to defeat it by a sale posterior to the bringing of the suit. What is the value of such a right of action? There is no middle ground. Either the bailee has, by the five years possession without suit, an absolute title against the bailor, as well as the rest of the world; or he cannot, if I may use the expression, discontinue by alienation. And the former is not even contended; and from the result of the suit in Virginia I presume cannot be. It is true the common doctrine of *lis pendens* does not extend beyond the jurisdiction of the *forum,* and as such does not affect this defendant, unless by force of the Constitution of the United States, and act of Congress, giving to the judicial proceedings of one state full faith and credit in the others. I do not stop to investigate the operation of that principle, because I conceive the case does not depend on it. For the cause turns upon the inquiry, what purchaser is meant by him, *for whom* the possessor shall be said *to have the title?* Is he within the act who becomes so after the borrower has ceased to have the possession, or has ceased to have the forbidden fiduciary possession? If he be then neither a *lis pendens* nor a final judgment can annul the title acquired by him, because he holds above the plaintiff whose title is declared fraudulent and void, as to the purchaser protected by that act. But it has been shown, I think, that such a purchaser is not within the statute. This, then, is not upon the ground of a *lis pendens,* but upon the higher and more general one, extending to persons out of Virginia, as well as those in it, namely, that the nature of the possession is changed, and from a rightful one has become wrongful towards the bailor, and therefore that the possessor is not such a
(167) possessor in whom the title shall be adjudged for the benefit of one claiming by purchase from him. The defect of the defendant's title then does not consist in his having notice that his vendor was a trespasser, but in the fact that he was. He could convey no title here nor there, because in the state of facts existing he had, by the law of Virginia, *no title* in that State. Upon a question of legal title, notice has no influence. The want of it cannot constitute that a right which is not a right, nor can notice of a defective title in another make that better. Legal claims depend upon their intrinsic strength. And the rule is *caveat emptor*—see that your vendor has good right; or, in case he has not, secure yourself by covenants.

I conclude therefore that Greers, under the law of Virginia, had at the time of the sale to the defendant no title in himself for any purposes,

and therefore that the sale set up here passed none. Consequently there must be a new trial.

It will be seen that the opinion of the Court turns entirely upon the construction of the statute of Virginia, which we have reluctantly been compelled unaided to make. A second trial will enable the parties to correct a misconstruction by evidence, or cases showing the construction made in that State, which the Court would feel every inclination and acknowledge the obligation to follow. I entertain much diffidence in saying what is the meaning of that statute. But I cannot but have confidence in the opinion that if the title of a purchaser in Virginia is bad, that of one here is not good.

PER CURIAM. Judgment reversed.

Cited: Blair v. Brady, 19 N. C., 344; *Satterwhite v. Doughty,* 44 N. C., 317; *Taylor v. Sharp,* 108 N. C., 381; *Cannady v. R. R.,* 143 N. C., 443.

PHILIP BRITTAIN v. JAMES ALLEN.

1. Words which in themselves do not import a slanderous meaning must, in declaring on them as slanderous, be rendered so by an *innuendo*, connected with an averment that they were spoken of the plaintiff.
2. But if the words are in themselves slanderous, it is only necessary to aver that they were spoken of the plaintiff.
3. In actions of slander the *quantum* of malice is material in estimating the damages; and to establish that evidence is admissible of words spoken by the defendant, not declared on; but the jury should be instructed as to the purpose for which the evidence is introduced.

AFTER the new trial granted in this case (13 N. C., 120), it was tried again at BUNCOMBE, on the fall circuit of 1830 before his Honor, *Mangum, J.* The declaration was as follows: Philip Brittain complains of James Allen in custody, etc. For that whereas the (168) said Philip now is a just, etc.; and whereas the said Philip hath not been guilty, nor until the committing of the several grievances by the said James, etc., suspected to have been guilty of the infamous crime of feloniously passing counterfeit money, etc., by means of which said premises the said Philip before, etc., had deservedly obtained, etc., yet the said defendant well knowing, etc., and contriving and wickedly and maliciously intending to injure the said Philip in his good name, etc., and also to cause him to be suspected, etc., to be guilty of the felonious offense of passing counterfeit money, and that he had subjected

himself, etc., heretofore, to wit, etc., in the presence, etc., falsely and maliciously spoke of and concerning the said Philip these false, scandalous, malicious and defamatory words, that is to say, "Our former senator" (meaning thereby the said Philip, he the said Philip having been a senator in the Legislature of this State) "used vigilance and diligence in prosecuting Welch for passing counterfeit money" (meaning thereby one William Welch, who was guilty of the crime 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 Welch for passing counterfeit money) "to prosecute him" (meaning the aforesaid William Welch) "to extricate himself" (meaning the said Philip), and that "he" (meaning the said Philip) "was as deep in the mud as Welch" (meaning the aforesaid William Welch) "was in the mire," meaning and intending thereby that the said William Welch was guilty of the scandalous and felonious crime of passing counterfeit money, and that the said Philip was also guilty of the said scandalous and felonious offense of passing counterfeit money, by means of the committing of which said several grievances by the said James, etc.

Plea—*not guilty.*

After proof by the plaintiff of the defendant's speaking the words laid in the declaration, he offered proof of his speaking other (169) words of the same kind, both before and after the commencement of the action. The defendant objected to this testimony, but the objection was overruled by the judge.

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

Gaston & Badger for defendant.
Iredell contra.

HENDERSON, C. J. We can scarcely conceive a case which does not require some introductory matter, if for no other purpose than to show that the plaintiff is the person meant. As if the words are "you are a thief," it must be stated that the words were addressed to the plaintiff to make an application of the word *you.* So if they be, "he is a thief," that the plaintiff was the subject of the conversation; or "A. B. is a thief," that the plaintiff is the A. B. meant. Some words require more introductory matter than others. Where the words are perfectly harmless, as if in this case, the only words had been, "our former senator is as deep in the mud as Welch is in the mire," it must be stated that the defendant imputed to Welch the crime of knowingly passing counterfeit money; also that the plaintiff had been a senator, with an averment

that he was the person meant, and an *innuendo* that he meant to impute to the plaintiff the same crime. But the office of this introductory matter is only to fill up and supply what the words themselves *want* of being a slanderous charge on the plaintiff. In the present case the words are, "our former senator used vigilance and diligence (170) in prosecuting Welch for *passing* counterfeit money, in order to prevent suspicion from falling upon himself; he procured Roadman to prosecute him to extricate himself," and that he was "as deep in the mud as Welch was in the mire," with an averment that the plaintiff had been a senator and was the person described and intended by that appellation, and that the defendant intended to impute to the plaintiff the crime of passing counterfeit money. The jury have affirmed all these averments to be true, and it is the province of the court to see whether the jury have drawn a probable and rational conclusion. For the introductory matter and the *colloquium* are put upon the record for that purpose only, that the jury should not put an arbitrary and capricious construction on the words. And this introductory matter supplies, as was said before, what the words themselves want of imputing a slanderous meaning, with an *innuendo* that they did mean a slanderous charge, stating it. If the case is tested by these rules, which are founded both in law and common sense, we think that with the averment before mentioned the jury were well warranted from the words themselves in concurring with the plaintiff that the defendant intended to impute to him the crime of passing counterfeit money. In fact, there needed no introductory matter to show that the plaintiff was meant by the description, "our former senator," with an averment that he was the person meant. All the words taken together well warranted the *innuendo*. Candor requires us to say that the declaration, when it was before us heretofore, was not supported on these grounds, but on other and perhaps mistaken ones. We are therefore of opinion that the judgment should not be arrested.

As to the motion for a new trial, we see no grounds to grant one. The defendant's argument that the speaking of other malicious words is admissible only in cases where the fact of malice is doubtful, and should not be admitted where the words themselves import malice, or where malice is admitted, is predicated on the supposition that there are no degrees of malice; or if there are, that its quantum is im- (171) material; that in this action any malice, the least, fills the measure. We think the argument unsound, and that there are degrees of malice, and that in all vindictive actions the degree of criminality of the defendant, as well as the injury sustained by the plaintiff, enter into and form a part of the damages. Our nature and feelings require it, and it will be the rule with jurors, even if in theory the law forbids

it. But we do not believe it does. As to the court below informing the jury, for what purpose such evidence is given, and that the damages should be given only for the words sued for, aggravated to be sure by such other evidence of malignity as is before spoken of, we presume that the court did its duty, as upon the record it does not appear that it did not.

PER CURIAM. Judgment affirmed.

BENASHLEY ATKINSON v. JAMES S. CLARKE.

1. A deed of gift for slaves, which is not attested by a subscribing witness, is void.
2. An assignment of slaves, not under seal, is void, unless accompanied by a delivery of possession.
3. *It seems* that a *fi. fa.* not taken out of the office does not amount to a waiver of a previous levy.
4. An objection arising upon the statement of the *ore tenus* incidents at the trial, but not taken in the court below, will not be heard in this Court.
5. Cases stated upon an appeal to this Court are similar to reports upon motions for a new trial, in one respect, namely, that if upon the whole case it is apparent the verdict is correct, the judgment will not be reversed, although there may be error in the point complained of. In other respects they are similar to bills of exceptions.

The case of *Palmer v. Faucett*, 13 N. C., 240, approved.

THIS was an action for trespass, for taking from the possession of the plaintiff two negroes, David and Charlotte. Plea, *not guilty,* and a special justification under final process to the defendant, the sheriff of Pitt, against the property of one Peyton R. Tunstal. At the trial before *Norwood, J.*, at PITT, on the last spring circuit, the plaintiff produced a deed of gift dated 18 April, 1822, whereby Tunstal, in consideration of the love and affection which he bore to his daughter Rebecca, the wife of the plaintiff, conveyed to the latter the slaves in dispute. This deed was signed and sealed by Tunstal, but was not attested by
(172) a witness, and was registered upon proof of the donor's hand-writing, and the plaintiff proved a possession of the slaves conveyed by it up to the year 1827. The defendant gave in evidence the record of a suit against Tunstal in Bertie County Court, in which judgment was entered up for the plaintiff at November Term, 1827, upon which a *fi. fa.* issued to the defendant, tested of that term, and a return made thereon of a levy upon the slaves in question. From August

Term, 1828, a second *fi. fa.* issued, but it did not appear to have come to the hands of the defendant or to have been taken from the clerk's office. From November Term, 1828, a *venditioni exponas* issued, reciting the levy made upon the first *fi. fa.* under which the negroes were sold by the defendant, who returned that the sale amounting to more than the debt and costs, he had applied the residue to the satisfaction of another execution against Tunstal from Halifax County Court.

The plaintiff then offered:

1. A deed from Tunstal to Mark H. Pettaway, dated 22 February, 1826, conveying among other things, "all his, the said Tunstal's, negro slaves, say one hundred and three in number, the names of said slaves being too lengthy to insert in this indenture, said Tunstal will give the name of each slave to said Pettaway when called for." To this deed was annexed a schedule stating that "the names of the negroes contained in the within deed is as follows, viz.," etc., giving the names of a large number, and among them two by the names of David and Charlotte.

2. An assignment and schedule, made and filed by Tunstal, upon taking the benefit of the act for the relief of insolvent debtors, whereby he conveyed all his property not before assigned to Pettaway, to the plaintiff. This was signed, but not sealed, by Tunstal. The defendant objected to this testimony, insisting that it did not affect him, and the objection was sustained by his Honor.

The judge instructed the jury that neither the deed from Tunstal to the plaintiff, nor the possession under it, gave the plaintiff title; that if the deed from Tunstal to Pettaway was valid, it would pass the title of the slaves in dispute to the latter, and the plaintiff (173) could in that event recover of the defendant for the injury done to his possession of the slaves, if the David and Charlotte mentioned in the schedule were the slaves in question. His Honor left this question to the jury, who returned a verdict for the defendant, and the plaintiff appealed.

Gaston for plaintiff.
Hogg & Badger for defendant.

RUFFIN, J. The Superior Court does not seem to have erred upon any of the points made in that court.

The deed from Tunstal to the plaintiff is void. *(Palmer v. Faucett,* 13 N. C., 240.)

The assignment by Tunstal, when he took the oath of insolvency, did not pass the slaves, for it was not by deed, and there was no delivery of possession nor price paid.

The jury have found that these slaves were not included in the schedule annexed to the deed to Pettaway of 22 February, 1826, which is signed by both Tunstal and Pettaway, proved and registered with the deed, and purports to set forth the "names of the negroes contained in the deed of trust."

But it is here contended that the judgment must be reversed because the *fi. fa.* from August Term, 1828, discharged the seizure made in the preceding January, and consequently that there was nothing upon which the *venditioni exponas,* under which the sale was made in January, 1829, could operate.

That *fi. fa.* does not appear ever to have been delivered to the sheriff or taken out of the office. The cases have not yet gone the length that the mere making out of a *fi. fa.* in the office, not acted upon, nor even issued, shall amount to a waiver or discharge of a previous lien. It would seem unreasonable that it should. But however that may be, we all think the point made does not arise in this case.

(174) The objection was not made in the court below, but for the first time here. It is not one arising out of the record itself, but out of the *ore tenus* incidents at the trial. I must repeat what was said on this subject in *Hemphill v. Hemphill,* 13 N. C., 391. Such points of this kind, as were raised below, and those only, can be heard here. This is admitted to be so upon a bill of exceptions. But it is said that our cases are the acts of the court and contain the whole case.

There are, I grant, certain differences between a bill of exceptions and a case stated. The method of correcting the error pointed at in the former, is by writ of error, while in virtue of our statute those specified in the latter are reviewed upon appeal. Each bill of exceptions is confined to a single point, whereas by our practice many and distinct questions may be stated together. And it may be that there is this further difference, that to a limited extent our cases may be regarded as reports on rules for a new trial. I suppose they are so thus far and no farther; that if the cause come here after a motion for a new trial has been overruled, and the case made out appear to contain the whole case made at the trial, and from that it is clear that at all events the verdict *must* have been the same way, notwithstanding some wrong ground taken by the court, it will not be disturbed. This Court is to give judgment as the court below ought to give; and if, upon the whole case, the appellant was not entitled to a verdict, nor to a new trial at the hands of the Superior Court, no more ought he get it here. If he could, it would involve the anomaly that the Superior Court was legally bound to give a judgment, which this Court is legally bound to reverse. An example of this rule is found in *Grice v. Ricks, ante,* 62. It was thought here that the instructions actually given by the judge were erroneous.

But the case likewise stated that another point was made at the trial for the defendant, on which the judge gave no opinion, and the whole case was set out, including the facts relevant as well to the one point as to the other. The jury found for the defendant, and the plaintiff moved for a new trial and appealed. Had the cause rested on the opinion given, this Court must have reversed the judgment. But (175) it appeared from the facts stated that, whether the ground taken by the judge was right or wrong, the verdict was right upon the other point—not that the jury might have found for the defendant on that point, but that they were obliged so to find, because from a defect of proof the plaintiff had not made a case for a verdict under any circumstances, however the law might be upon the facts which he actually proved. If, indeed, wrong instructions be given, and it do not appear that they were necessarily harmless, a new trial must follow, because the revising court cannot know that the jury would or ought to have given the same verdict had the directions been different. Of the application of this principle, the case of *Tate v. Southard,* 1 Hawks, 45, is an instance, besides many others. But that is entirely opposed to a case where obviously the jury ought at any rate give the very verdict they have given, although different instructions had been delivered from the bench. It is a fair presumption that the jury gave a proper verdict upon proper grounds. But were that presumption erroneous, there is yet no reason for disturbing a proper verdict—*which appears upon the whole case to be proper*—because it was rendered upon a bad reason. This comes up to the observation of *Lord Mansfield,* in *Symmers v. Regem* (Cowper, 502). Indeed, I suppose that were this a writ of error upon a technical bill of exceptions, and it appeared in the exception itself, that the *appellant* had *no right,* the court would affirm the judgment, though some error might have been committed for which a reversal would have been awarded had nothing else appeared. Much more may, and will such be the rule in our appeals, in which the case is argued as upon a motion for a new trial in the court below. Thus far, I think, our cases may be considered as reports on rules for a new trial; that the appellee may insist that the verdict ought to stand, notwithstanding the error complained of, because upon the whole it was right, and does the appellant no injustice; and to that end the appellee may ask other points made by him, besides that on which the error is alleged by the appellant to be stated in the case, accompanied by (176) the facts on which they were raised. But in no case, as I conceive, ought points to be heard here, at the instance of either party, which were not by him made below. For it is not true that our *cases* are intended, or have been considered as *generally* setting out the *whole case.* They are not like a special verdict or a case agreed, in the former

of which *all* the facts are found and in the latter *all* admitted. Under the former organization of this Court, only particular points of law came here. They might be stated as abstract questions. The duty, as now enjoined, of giving judgment upon the whole record does not impose the necessity of reversing every judgment to which is not appended a *case* proving it to be right. The case is in the pleadings and the verdict prima facie. The sufficiency of the facts to support the verdict is presumed until the contrary appear. And so of the law: proper instructions and right opinions must be taken as having been given, unless the party specially object to some one given, or the judge refuse to give some one prayed, which must be set down, whether by the counsel or the judge is immaterial, provided it be verified by insertion in the record, accompanied by a statement of such facts as raised the point to which the exception relates. Those facts, and those alone, ought to be inserted at the instance of the party appealing, who must be confined here to his exceptions. Were it otherwise, no party could ever hope to have a judgment affirmed, unless all the proof given in the cause and the whole charge of the court be spread on the record, a task the labor and difficulty of which would be intolerable to the judge and bar and an obstruction to the progress of business, amounting almost to a denial of justice. No facts are necessary, but those which are material to a question made in the course of the trial, or upon the judge's charge. If facts irrelevant to those points be inserted, they cannot be attended to here. They cannot be used for any purpose but that for which they were stated, namely, the point appearing to have been made. (177) This Court cannot tell what other facts might have been proved which would repel their force as applicable to a point made here for the first time. As regards the appellant, at least, the whole case is not opened anew upon the appeal to this Court, but in general our *cases* for appeals must be regarded as of the nature of bills of exceptions for specified errors.

This reasoning will of course be correctly confined to the *ore tenus* proceedings of the trial. All those arising upon the pleadings, verdict and judgment—upon the record rightly speaking—may be taken anew here, for but one language and one meaning can be found in them by all courts.

In the case now before us the question on the discharge or the continuing of the lien, created by the seizure in January, 1828, was not made in the Superior Court. None of the facts stated can therefore be taken as stated in reference to that question. When they are pressed here, for the first time, must we not ask ourselves whether we can be sure that those were all the facts which appeared touching the point now made? It may have been proved that the *fieri facias* from August, 1828, was

made out by the clerk without the authority of the creditor, and that he never took it out of the office, or that having at first ordered it, he countermanded it, and never delivered it to the sheriff nor sued it out, or the execution to Halifax mentioned in the return to the *venditioni exponas* (to which a part of the money raised by the sale was applied) may have been given in evidence and been a sufficient authority to the sheriff. The questions made were not upon the authority of the sheriff to sell Tunstal's property. The whole dispute was, whether the slaves were Tunstal's at all, so as to be liable to *any* execution that could issue on the judgment in Bertie. The plaintiff cannot here, upon the facts stated to raise that question, allege that the judgment is erroneous, because those facts do not prove the judgment right upon the other point also, or indeed upon any other possible objection that might be ingeniously started. If any particular matter be not excepted to, it must be taken either that it was waived by the appellant, or that it was in the court below otherwise well and sufficiently answered (178) or avoided. Any other rule would convert this Court from one of revision to one of reversal *ex necessitate*. I am persuaded it was created for a very different purpose. Our duty is to set aside verdicts, when they have been or may have been the consequences of errors actually committed by the judge. But it is equally our duty to suppose that verdicts do right between the parties (which presumption is much fortified when they are satisfactory to the judge who tried the cause and who refused a new trial), and to give judgment in accordance with them, unless they appear to be founded in error in law—which it lies on him who impeaches them to show.

PER CURIAM. Judgment affirmed.

Cited: Norwood v. Marrow, 20 N. C., 578; *Honeycutt v. Angel, ibid.,* 452; *Hollowell v. Skinner,* 26 N. C., 173; *S. v. Gallimore,* 29 N. C., 149.

ROBERT GODLEY v. SAMUEL TAYLOR AND FREDERICK HADDOCK, EXECUTOR OF WILLIAM HADDOCK.

1. Executors having a power to sell lands of their testator are personally bound by a covenant that they, "executors, etc., do forever warrant and defend, etc."

2. Where an action was brought upon a covenant of quiet enjoyment, made by a decedent, and the eviction took place more than seven years after his death: *It was held,* RUFFIN, J., *dissentiente,* that the action was not barred by the Act of 1715 (Rev., ch. 10, sec. 7), requiring claims to be preferred within seven years after the death of decedent.

3. Per HALL, J. The statute of limitation never begins to run until a cause of action has accrued, as well as until there is a claimant in existence.

4. The case of *Jones v. Brodie*, 7 N. C., 594, and the case of *McLellan v. Hill*, 1 N. C., 595, as explained in *Jones v. Brodie*, 7 N. C., 594, approved by HALL, J.

5. An executor who has paid over the assets to the University is not subject to the claim of a creditor, not barred by the Act of 1715; but the issue of fully administered must be found for him, and the creditor must proceed against the University.

The case of *Potts v. Lazarus*, 4 N. C., 180, questioned by HALL, J.

THIS was an action for the breach of a covenant of quiet enjoyment, tried before his Honor, *Norwood, J.*, at PITT, on the last spring circuit. The question made in the cause arose upon the plea of the general issue, pleaded by both defendants, and the Act of 1715 (Rev., ch. 10, sec. 7), "concerning proving wills and granting letters of administration, and to prevent fraud in the management of intestates' estates," pleaded by the defendant Haddock, and upon these pleas a verdict was taken subject to the opinion of the court, upon the following case: James Taylor by his will appointed the defendant Taylor and the testator of the defendant Haddock executors, and authorized them to sell his land. They (179) conveyed the land to the plaintiff by deed, in which they were stated to be "executors of James Taylor," and in which they "executors to James Taylor, in consideration, etc., do give, grant, etc., the aforesaid bargained premises, together with, etc., and do by these presents forever warrant and defend the aforesaid land and premises to the said Robert Godley, his heirs, etc." The deed was dated 17 September, 1814. The plaintiff took possession under it, and was evicted by paramount title on 1 June, 1828. William Haddock died in December, 1820, and the defendant, Frederick Haddock, proved his will in September following, and this suit was commenced in February, 1829. Upon these facts his Honor, being of opinion for the plaintiff as to the plea of the defendant Haddock, but thinking that neither the defendant Taylor nor the testator of the defendant Haddock were personally bound by the covenant, set the verdict aside and entered a nonsuit, and the plaintiff appealed.

Gaston for plaintiff.
Hogg contra.

HALL, J. Where an agent wishes to be excused from obligations or covenants into which he enters, he should affix the name of his principal to the deed. *(Wilkes v. Back.*, 2 East, 142.) When he does not do so,

but only signs his own name as agent, he is personally answerable. For in such case he undertakes for his principal. *(Appleton v. Binks,* 5 East, 148.) He undertakes as agent, or as surety for his principal, that if the latter will not perform the contract he will answer for him in the manner stipulated.

The case of *Potts v. Lazarus,* 4 N. C., 180, seems to have been decided in part upon the ground that public and private agents were subjected to the same liability. Of late, however, their obligations are considered to be very different, the first standing upon the principles of policy, the latter left to meet the contract as the law of the case shall decide.

In the present case, it is true, the defendants could not have (180) signed their principal's name, but as other agents they could and did sign as agents or as executors, in which case the rule is equally strong that they shall be bound as agents to the fulfilment of any contract into which they enter. If this should not be considered to be the case, such contracts or covenants would be mere nullities. For the covenantees could have no remedy upon the covenants against the testator.

This subject is so fully and satisfactorily examined in *Sumner v. Williams* (8 Mass. Rep., 162) that the best service I can render the subject will be to refer to it.

It was also insisted for the defendant, Haddock, that he was protected from the recovery sought by the plaintiff by the lapse of seven years after the death of his testator, before suit brought against him by the plaintiff, although the fact is that the cause of action had not accrued until within seven years next before the action was brought. The Act of 1715 (Rev., ch. 10, sec. 7) the protection of which is claimed in this case, is in the following words: "That creditors of any person deceased shall make their claim within seven years after the death of such debtor, otherwise such creditor shall be forever barred." To give operation to the act, there must not only be a creditor, but there must be a claim. What is a claim? It is defined to be a challenge by a man of the property or ownership of a thing, which he has not in possession, but which is wrongfully detained from him. (Plow., 359.) It is either verbal or it is by an action brought. It relates to lands or goods and chattels. (Shep. Ab. Claim, Jacob's Law Dict. Claim.) Johnson defines a claim to be "a demand of anything due; a title to any privilege or possession in the hands of another; a demand of anything that is in the possession of another." When the Legislature say that creditors shall make their claim within seven years after the death of the testator, they must have had in contemplation such a creditor as had a *claim* to make—such a claim as might be enforced *in præsenti.* They did not mean a claim that might arise *in futuro,* which could not be enforced

until it did arise or accrue. By an equitable contruction of the
(181) act, he must make his claim within seven years after it accrues.
To require him to make it before would be to require of him an impossibility.

The statutes of limitation generally begin to run after the cause of action has accrued. *Chief Justice Abbott* says in *Murray v. The E. I. Co.* (7 Eng. C. L., 66), that "it cannot be said that a cause of action exists unless there be also a person in existence capable of suing." Would not his Lordship have been equally orthodox if he had also said, although there is a creditor in existence, yet if there is no *claim* or cause of action, the statute of limitation will not run. The *Chief Justice* further observed in that case that the several statutes of limitation, being all *in pari materia,* ought to receive a uniform construction, notwithstanding any slight variations in phraseology, the object and intention being the same.

So in the case of *Jones v. Brodie* (3 Murph., 594), it was held in regard to the statute of limitation, now under consideration, that if there was no creditor who could sue at the death of the debtor, the statute did not begin to run. So I think, although there is a creditor, but no claim that can be enforced, the statute will not run until there is such a claim. From the account which is given of *McLellan v. Hill* (Conf. Rep., 479), in *Jones v. Brodie,* I think it was rightly decided. But in the printed report of it no notice is taken of the fact that the debtor died before the creditor. Nor does the judgment of the court seem to be based upon that circumstance. And so far as the reasoning in that case is adverse to the opinion delivered in *Jones v. Brodie,* I do not subscribe to it. One reason given for the opinion of the Court in that case was, that executors and administrators after seven years were obliged to pay over whatever assets remained in their hands to the church wardens, or to the Treasurer of the State, for the benefit of creditors. My answer is, that it ought to appear that it was paid over. If it was not, it was answerable to creditors. If it was paid over, it should not have prevented creditors from obtaining judgments; but it might have been a good
reason for not fixing the executor with assets.

(182) Certainly much consideration is due to the sanctity of contracts, provided they are within the pale of the law. A man may legally contract that he and his executors will indemnify a purchaser in case of *eviction,* which may not happen until many years after his death. He may contract that a thing may be done after his death. He may give a bond payable in ten years, and die the next day.

The legislatures of the states are enjoined from passing any law impairing the obligation of contracts; and the alarm was taken in this State when the Legislature passed a law postponing the time for the

fulfillment of a contract. *Jones v. Crittenden,* 1 Law Rep., 385. How cautious, then, should courts be in giving judgment upon the construction of an act of Assembly, which will cut them off from fulfillment altogether? I see nothing in policy which should lead to such a result. For if after seven years the executors or administrators have paid over the assets to the University, which is now authorized to receive them, instead of the church wardens and Treasurer of the State, they are not to be charged with assets. But the creditor is entitled to a judgment which will be his passport to a remedy against the trustees of the University.

The statutes of limitation generally give a specified time to sue in. Creditors may avail themselves of it; if they do not, they are barred. In the present case no time is given to sue in; and the contract becomes a mere nullity. The obligation of it is totally impaired.

RUFFIN, J., *dissentiente:* I retain the opinion on the Act of 1715, which I delivered in *Rayner v. Watford,* 13 N. C., 338, and I think the action against the executor of Haddock is barred. My reasons are so fully stated there that I need not now go into the question at length. I will only observe that the only term at which the statute makes the time begin to run is *the death* of the debtor. We have no power, I think, to interpolate the words, "if the creditor's action had then accrued," or "seven years from the time the action shall have accrued, if it shall arise after such debtor's death"; which is the reading the (183) senior members of the Court and the case of *Jones v. Brodie* give, as being within its equity. Besides the objection of thus making additions to the law, I have others to this interpretation. The act has no saving in favor of infants or others. Now an infant lunatic or *feme covert* is at least as much an object of protection as an imprudent creditor, who trusts another seven years. This want of any saving shows it was intended to make the time a *conclusive* bar in *all* cases. But if the time is to run only against those claimants, who could claim, that is, bring suit, it will expose executors to ruin, by subjecting them to recoveries, after they have delivered over all the assets. For there is nothing in the act to justify the payment of legatees, or to the wardens, until creditors are satisfied; since only such money as may remain after answering those demands is to be thus paid, and there is no provision for refunding bonds. Here again it is said that an equitable interpretation is to be made in favor of the executor, reciprocal to that already made in favor of the creditor, and that the executor may, upon the plea of fully administered, show that the assets are not in his hands, but those of the legatees or trustees of the University; but that if the executor yet retains them, it is just he should pay the creditor. I answer first, that

there is nothing in the statute authorizing the inquiry into the state of the assets; secondly, that the act is a protection to the legatee, as well as the executor; thirdly, that it is also a protection to the heir, as well as the two former, and this construction repeals it as to legatees and heirs, because they can deliver over the assets to nobody, but must have them in their hands, unless exhausted by other creditors. Suppose a simple contract debt, or one in which the heir is not specially bound, to fall due eight years after the death of the testator, and that the executor is sued, and the plea of fully administered is found for him upon this ground, that he has delivered over the estate at the end of seven years to the wardens; and then a *scire facias* to issue upon the judgment for the debt against the heir. Shall he be bound before (184) the personal estate is exhausted by creditors? Yet how is the creditor to get at the personal estate? He cannot proceed at law against the legatees or wardens. The heir is liable upon such a finding, by the express words of the Act of 1784, and in no other case but in that of the insolvency of the executor, according to the Act of 1807. Yet he must pay the debt in this case, without the insolvency of the executor, or the creditor's recovery will be fruitless; because there is no method of subjecting the personal assets in the hands which now hold them, that is to say, the legatees or wardens.

For these reasons, my former opinion has been confirmed by reflection; and I have felt myself bound to express it. But in future I shall consider myself under an equal obligation to hold for law, what I understand, in conference with my elder brethren, to be their opinions. That is, that if the debt be due at the death of the debtor, claim must be made within seven years from the death, otherwise both the heir and executor are discharged; and that if the action arise after the death of the debtor, suit must be brought within seven years from the time the action accrued, or the heir and executor will in that case also be discharged; and if the suit be brought against the executor within seven years after it arose, but after the expiration of the seven years from the death of the debtor, and the executor hath, at the time of the suit brought, not paid over the assets, he shall answer the demand; but if he hath paid them over, he shall have the plea of fully administered found for him. But how it will be with the heir in this last case is yet to be determined, though I take it he is to be bound in case there be no personal estate in anybody's hands, provided he be sued by *sci. fa.* within seven years from the falling due of the demand, when that happens after the death of his ancestor; if he be sued within that time in debt on bond, in which he is named, whether there be personal assets or not.

PER CURIAM. Judgment affirmed.

Cited: *McKinder v. Littlejohn,* 23 N. C., 74; *Armistead v. Bozeman,* 36 N. C., 121; *Cooper v. Cherry,* 53 N. C., 326, 336; *McKeithan v. McGill,* 83 N. C., 519; *Rogers v. Grant,* 88 N. C., 444; *Morris v. Syme, ibid.,* 456; *Lynn v. Lowe, ibid.,* 483; *Andres v. Powell,* 97 N. C., 170; *Brawley v. Brawley,* 109 N. C., 527; *Miller v. Shoaf,* 110 N. C., 323; *Daniel v. Grizzard,* 117 N. C., 111; *Copeland v. Collins,* 122 N. C., 623; *Rhodes v. Love,* 153 N. C., 474.

(185)

CORNELIUS DOWD QUI TAM v. GIDEON SEAWELL.

1. In debt on the Act of 1778 (Rev., ch. 134) for marrying a couple without a license, if the writ demand £50, the penalty imposed by the act, and the jury find a verdict for £24.10, the sum to which the penalty is scaled, it is a variance for which the judgment will be arrested.
2. In debt, the exact sum demanded in the writ need not be found by the jury, when from the nature of the demand it is uncertain.
3. But where the contract, as stated in the declaration, fixes the amount due, the verdict must agree with the writ, or the judgment will be arrested.
4. Not because a specific sum is claimed, but because there is a variance between the declaration and the proof.
5. The same principle applies to actions of debt on penal statutes.
6. If the statute inflicts a penalty to be measured by reference to some uncertain standard, the verdict stands well with the declaration, although they do not agree.
7. But if the penalty be certain, the very sum demanded by the writ must be found by the jury.
8. Damages cannot be recovered in debt on a penal statute, but it is not error to demand them.

DEBT, upon the statute prescribing the rules to be observed in solemnizing the rites of matrimony. The writ demanded "fifty pounds, which he (the defendant) owes and unjustly detains, to his damage one hundred dollars, due for having solemnized the rites of matrimony between, etc., contrary to the act of the General Assembly in such case made and provided."

Upon *nil debet* pleaded, the jury, before his Honor, *Strange, J.,* at MOORE, on the last circuit, returned the following verdict, "that the defendant does owe the sum of fifty pounds, reduced by the scale to twenty-four pounds ten shillings." His Honor, upon the motion of the defendant's counsel, arrested the judgment, and the plaintiff appealed.

No counsel for plaintiff.
Winston for defendant.

RUFFIN, J. We think the decision of the Superior Court right, and that the judgment must be arrested.

It is an action of debt for the penalty for marrying a couple without a license. The sum demanded is *one hundred dollars,* and the verdict is for *twenty-four pounds ten shillings.* The Act of 1778 (Rev., ch. 134), gives a penalty of fifty pounds, which, when scaled, amounts to the sum found by the jury.

It was formerly thought that the action of debt, being for an entire thing, could not be maintained unless the exact sum—neither more nor less—was recovered. This is not now so considered, nor has been for a long time. And the rule is, that in actions where from the nature of the demand the true debt is uncertain, it may be alleged to be large enough to cover the real debt, and there shall be a verdict according to the truth, and judgment thereon. Hence, in debt on simple (186) contract, the declaration is good although the sums demanded in several counts do not amount to or exceed the sum demanded in the writ, or the recital of it in the beginning of the declaration. *McQuillin v. Cox,* 1 H. Bl., 249; *Lord v. Houston,* 11 East, 62. And in *Aylett v. Lowe,* 2 Bl. Rep., 1221, it was held that upon a verdict for £100 in debt for £200, on a *mutuatus,* there should be judgment for the plaintiff. And so, too, in debt on a specialty, if the deed does not of itself show the certainty of the whole demand, but the extent is matter of proof *aliunde,* the verdict may be according to the truth, and if it be within the sum demanded, there shall be judgment for the plaintiff; as in *Incledon v. Crips,* 2 Salk., 558; *S. c.,* 2 Ld. Raym., 814, which was debt on a bond, whereby the defendant obliged himself to pay the plaintiff £35 for every hundred stacks of wood, and he averred that he delivered a certain number of hundred and one-half, which came to £182.10. Upon demurrer, it was held that there could be no apportionment on this contract for the half hundred, and therefore the plaintiff could not have judgment for that; but it was further held that he might remit that, and have judgment for the rest, because the debt might be more or less by matter extrinsic of the deed, and therefore there was no variance between the deed and the verdict. And this observation shows the true rule; namely, that where the sum demanded is shown in the declaration to be on a contract or other matter, which in itself conclusively fixes the amount due thereon, then the recovery must agree with the demand. For the debt on that contract is that or nothing. This is not because in debt a sum *in numero* is claimed, but for the more substantial reason that if the recovery of more or less were allowed, there would be a variance

between the *allegata* and *probata,* and the declaration would convey to the defendant no information of the cause of action. Where the verdict, therefore, may stand with the contract set forth in the declaration, and both be true, there shall be judgment. Where the verdict cannot be made to accord with the contract, there cannot be judgment, as in debt on bond for £100, a verdict for $100 is not good, because it (187) could not be for the debt created by the specialty sued on. It is the same upon any written instrument, as upon a bond; if it be declared on as a writing, constituting in itself a substantial contract, as a promissory note. It is not the instrument described, and therefore cannot be received in evidence.

The same principles apply to actions of debt for penalties given by statutes. As in every case, the declaration must set out the matter, whether of contract or law, whereby the demand arises; so in these actions the plaintiff must show a statute giving the penalty demanded by him, and charge the acts which show the defendant to be guilty of the offense within the statute. These allegations are indispensable to enable the defendant to know for what he is sued, and to protect himself by plea in another action for the same matter. Anciently the statute was set out at full length. That was relaxed, and stating it by its title was then allowed. Afterwards, a general reference to it by alleging the particular penalties given thereby, and concluding "against the form of the statute," was held sufficient, upon the ground that the court was bound to take notice of all public laws, and that the particular statute was sufficiently identified by the statement of the penalty, and of the acts forbidden by it. But certainly there must be some description of it; and if there be no reference to it, the declaration is bad. *Scroter v. Harrington,* 1 Hawks, 192; *Myddleton v. Wynn,* Willes, 599.

If, however, the statute itself give an uncertain penalty, or a penalty to be measured by reference to some uncertain thing, then the sum demanded is not conclusive on the plaintiff; but he may recover according to the certainty made by his proof, because he can do no more towards a more definite description of the statute, or of the debt. In an action, therefore, for subtracting tithes against the statute 2 and 3 Ed., 6, which gives the treble value, the judgment shall be according to the verdict, though different from the sum demanded. *Pemberton v. Skelton,* Cro. Jac., 498. The Court says there that the variance is no objection, because the statute gives no certain sum, but only so (188) much in reference to the value, and the value cannot be positively estimated until it is done by the jury themselves. And the judges distinguish that case from an action grounded on a specialty, in which the certainty of the debt appears, and from an action grounded on a *statute which gives a sum certain,* in both which the precise sum must be

demanded. This last position is, to be sure, but a *dictum* in that case, but it is the point of the decision in *Cunningham v. Bennett,* 1 Geo., 1 C. B., stated by *Mr. Justice Buller* in his *Nisi Prius,* a book of much authority. There it was held that a penal action could not be for less than the penalty given by the statute, and though the plaintiff had a verdict, judgment was arrested. I conclude, therefore, that wherever a statute gives a certain sum *in numero,* that exact sum must be demanded, else it cannot be taken to be the penalty given *by that statute.* Here the declaration conforms neither to the Act of 1741 nor that of 1778. The former gives £50 proclamation money to the use of the parish, or by the Act of 1777, to that of the county. The latter gives £50, scaled to £24.10, one-half to the informer and the other to the county. Consequently, the judgment must be arrested for this reason.

The other objection, that damages are demanded, is not a good one. They cannot be recovered, but it is not error to demand them. The case of *Frederick v. Lookup,* 4 Burrows, 2018, shows this, for the judgment was reversed only as to the damages assessed, and affirmed for the debt, which was the penalty.

PER CURIAM. Judgment affirmed.

Cited: Skinner v. Moore, 19 N. C., 154; *Lash v. Zigler,* 27 N. C., 710; *McAlister v. McAlister,* 34 N. C., 187; *Lowe v. Schenck, ibid.,* 310.

DEN EX DEM. OF THE TRUSTEES OF THE UNIVERSITY v. JOSHUA MILLER.

1. The treaty of 1782 between the United States and the Netherlands provides that the subjects of either party may dispose of their effects by testament, and that their heirs shall receive such succession *ab intestato,* although not naturalized: *It was held* that the word effects includes real as well as personal estate.

2. An alien can hold lands against the sovereign, until his estate is divested by an inquisition ascertaining his alienage.

3. The sovereign cannot seize lands and prove the alienage *in pais* upon the trial of an ejectment. It can be proved only by an office found. So in cases of forfeiture for felony, the record of the attainder of the tenant must be produced.

4. A native-born child of an alien succeeds as heir where the estate of the ancestor has not been divested by an office found in his lifetime. An office found after his death does not affect the estate of the heir.

5. The law will not cast an estate upon one who cannot hold it; and for this reason an inquest of office is not necessary to prevent an alien from succeeding to an estate.

6. Courts cannot judicially notice what treaties with foreign countries are in force. The question must be determined by the executive.

7. If the heir be unable to take by reason of any disqualification, which is not personal, as by his alienage, the next in degree succeeds, to prevent an escheat. But where the disability is personal, as by an attainder, the next in degree cannot succeed, but the estate will escheat.

EJECTMENT, in which the lessors of the plaintiff claimed the lands in dispute as being late the property of Catharine Haslin, who had died without leaving heirs, and in order to determine the question between the parties, the following facts were submitted to the (189) court in the form of a case agreed:

Wilson Blount being seized in fee of the land in question, on 25 February, 1799, conveyed it to Edward Kean, upon trust that Kean should at any time, upon the request of John Haslin, of Demerara in South America, or of Catharine H. Haslin, wife of said John, in case she should survive her husband, convey the same in fee simple to persons qualified to take, hold and transfer lands in this State, as the said John, or as the said Catharine surviving him, should appoint. John Haslin died in March, 1804, and Edward Kean shortly thereafter, leaving two infant children, his heirs at law. Catharine H. Haslin was born in December, 1757, within the dominions and a subject of the United Netherlands, and on 21 May, 1805, being then in the United States, was naturalized as a citizen of the United States, if the following document conclusively proves such naturalization: "To all to whom these presents shall come: be it known, that it appears to the justices of the Justices Court in and for the city and county of New York, at the city hall of the said city, that on 21 May, A.D. 1805, Catharine Henrietta Haslin was naturalized in the Justices Court of the said city, as appears from the records of the said court, and that a true copy of the certificate of such naturalization was granted on the day and year aforesaid"; which certificate is the only evidence that Catharine H. Haslin ever was naturalized. Directly after 21 May, 1805, the said Catharine H. Haslin removed to France, and there resided until her death. Soon after her arrival in France, the said Catharine H. Haslin made an appointment, whereby she required the heirs of Edward Kean to convey the premises in dispute to herself in fee. The heirs of Kean not conveying according to this appointment, the said Catharine H. Haslin instituted a suit in equity against them, and in October, 1818, obtained a decree whereby the surviving heir of Kean was directed, within six months after his arrival at full age, to convey the said land according to the (190)

said appointment, unless, upon being served with a copy of the decree, he should show cause to the contrary, and by the said decree the said Catharine was put immediately in possession of the said lands.

On 4 August, 1819, the said Catharine, at Paris in France, being then possessed of valuable effects in France, made her last will in writing, with the solemnities necessary to pass land in North Carolina, and thereby devised, with the exception of some small pecuniary legacies, all her property to Ann Caroline, wife of Francis Gilbert Lefebre, whom the said Catharine had adopted as her daughter according to the laws of France, and in January, 1821, died without having altered or revoked the said will.

Ann Caroline Lefebre was born in the year 1787, within the dominion and a subject of the United Netherlands, resided in Demerara until the death of John Haslin, accompanied Catharine H. Haslin to the United States in the year 1805, and in the same year removed with her to France, where, on 5 July, 1807, she married Francis Gilbert Lefebre, a native subject and domiciled inhabitant of France. Ann Caroline Lefebre, from the year 1805 to her death, was domiciled in France.

On 21 December, 1820, Thomas Kean, the surviving son of Edward Kean, having attained his full age, and being required under the beforementioned decree, duly conveyed the premises in dispute to Catharine H. Haslin.

At the death of the said Catharine H. Haslin there was living at The Hague, in the kingdom of the Netherlands, an only sister of the said Catharine, Elizabeth Mary Van Hommel, who was born within the dominion and a subject of the United Netherlands. But the said Catharine left no relative who was a citizen of the United States. In April, 1825, Ann Caroline Lefebre died, leaving two children, her issue by her said husband, who were born in France, have ever resided and still reside there. The said Ann Caroline also left her surviving a brother, Johannis William Laurisant, who was born within the
(191) dominions of the United Netherlands, and is yet living a subject of the king of the Netherlands, but the said Ann Caroline left no relative who was a citizen of the United States. The case then stated the various changes of government which had taken place in the United Netherlands, which it is unnecessary to present, and proceeded as follows: The treaty concluded at The Hague, on 8 October, A.D. 1782, between the United States of America and the States General of the United Netherlands, is regarded by the executive authorities of both countries as being in full force between the United States and the king of the Netherlands. The convention of navigation and commerce, concluded at Washington on 24 June, 1822, is the only treaty between the

United States and the king of France, which is considered by the executive of the United States to be in force.

If upon these facts the lessors of the plaintiff had title at any time before 1 May, 1825, judgment was to be entered for the plaintiff; if otherwise, for the defendant.

His Honor, *Martin, J.*, at CRAVEN, on the spring circuit of 1828, at the request of the counsel, and to enable the cause to be brought to this Court, gave judgment *pro forma* for the plaintiff, and the defendant appealed.

The case was argued at June Term, 1831, by

Devereux for plaintiff.
Gaston for defendant.

HENDERSON, C. J. The trustees claim the land in question as an escheat upon the death of Catharine Haslin without heirs, and they insist that the certificate of naturalization which Mrs. Haslin has obtained does not prove that she has been naturalized under the law of the United States. To me that question appears immaterial. If she was an alien, and so continued until her death, she was capable of acquiring by purchase and holding real estate against all but the sovereign, and even against the sovereign until her estate was divested by an office found, establishing the fact of her alienage, or by some sovereign act declaring that fact, as by an act of the Legislature, or by seizing (192) these lands (in the same capacity), as forfeited by it, and perhaps by other means. But it is clear that the sovereign cannot seize these lands, and upon the trial of an action for them prove the alienage by parol, or other evidence *in pais*, as is attempted to be done in this case. As well might the State bring an action for the lands of a citizen, alleging that he had forfeited them for felony, and on the trial prove *by witnesses* that he had committed murder, and thereby forfeited his estate; whereas it is the well established law that a felony can be proven by a record of his attainder only, which is an office found establishing the fact. But there is another and equally strong ground to resist such an attempt. Mrs. Haslin is now dead, and the law has cast the estate upon her heirs, if she has any, and their estate cannot be divested by an office now found establishing her alienage, or proving the fact in any other manner. For, suppose she had left a child born within the United States? Can there be a doubt that it would have succeeded to these lands as her heir? In fact, the plaintiffs claim this estate because she left no heirs at her death. Without that being the case, there can be no escheat, as it is out of the question to claim the land as forfeited by reason of her alienage, both for want of an inquest of office and from

the fact that she died seized. I say they affirm that she died without heirs, as an escheat arises only on the death of the tenant without an heir, or what is the same thing, an heir qualified to take. But in this case the lessors of the plaintiff go further, and affirm that she was qualified to take and hold lands according to the laws of the State, for to such, and such only, was Kean, by the power in the deed from Blount to him, authorized to convey. And although there is nothing like an estoppel in this case, as the lessors of the plaintiff were not parties nor privies to the deed, nor parties to the suit, in which it was decreed that Kean's heirs should convey to Mrs. Haslin, yet they affirm both these facts by claiming these lands as an escheat for want of heirs to Mrs. Haslin.

(193) For, as was said before, the estate *did not pass to her,* if she was incapable of receiving it under the power in Blount's deed. And therefore it remains in Kean. It would be the same thing in a deed not made under a power. For if there is no grantee capable of receiving a thing attempted to be granted, it remains where it was. But where *the heirs* come to claim as heirs, if they are aliens, there needs no office found to ascertain that fact. They must *show* their capacity to take and hold. The *want* of it need not be shown, for the *law* will not cast an estate on him who cannot hold it against all, even against the sovereign.

This brings before us the construction and effect of the treaty with the States General of the United Netherlands, made in the year 1782. I need not state the various revolutions and changes which that government has undergone, and its present form, nor attempt to support by reasoning why treaties are, or ought to be, binding upon the people of the same countries, although both or one of the governments have undergone revolutions or changes. This does not belong to this department of the government. We can know our exterior relations only through that branch or organ of the government appointed by the form of it to represent and act for us with foreign powers. The case states that that organ or department of the government still considers the treaty as binding on us, and, of course, on the people of the other contracting party.

The next question is the effect of that treaty on the case. By the sixth article it is provided that the subjects of either party may dispose of their *effects* by testament, donation, or otherwise, and their *heirs,* subjects of one of the parties, shall receive such successions *ab intestato,* even though they have not received letters of naturalization. And if the *heirs* to whom such succession falls shall be minors, their guardian or curator may govern, direct, and alienate the *effects* fallen to such minors by *inheritance.* If this case rested on the meaning to be given to the word *effects,* even without a context, I should think, being found where

it is, in a treaty between powers having no common technical terms, in fact, not a common language, that it included things (194) immovable as well as movable. In the first place, the instrument is to receive an extended and liberal construction; not like the contract of individuals, where nothing is presumed to be granted, but what falls plainly within the words of the grant. But in this case, unless the meaning of the word be extended to things immovable, nothing at all is granted by the word *effects*. For, by our law, alienage is no objection to the acquisition of movables in any way, either by purchase or succession *ab intestato*. And so I presume it is in the States General. If not, to obtain it by pretending to grant something in lieu of it, when in fact nothing was granted, is a trick which I would not, even in argument, impute to our negotiator. But taken with the context, I think there cannot be a doubt. The words *succession ab intestato* are a well-known term of the civil law; a law on which the laws of continental Europe may be said to be based. By that law it includes succession to immovable as well as movable estates. And to use terms which by this almost universal law would give to our citizens the right to succeed to immovable estates, and deny it to them by any restricted sense, to which we might confine the terms, is not presumed to have been the intent of either party. I say to give to our citizens, because if the civil law prevails in the Netherlands, and I presume it does, it would do so. But why negotiate in the terms of the laws of the Netherlands, and not in the terms of our laws? The answer is, our laws are peculiar to us, and the English—the civil law, common to all continental Europe. But there are terms in the context which, even in our law, would give to this word *effects* an immovable character. In the civil law, he who succeeds to the estate of a dead man, either movable or immovable, is called heir. By our law, the term is confined to him who succeeds to his immovable, or rather real estate. By the civil law, inheritances embrace movable as well as immovable estates. By our law, the term is confined to immovable estates; at least, it does not embrace what we call chattels. But in the treaty, both the word *heirs* and the word *inheritances* are used. How shall they be understood, according to our laws, or theirs? (195) If by our laws, and goods only are to be included, we shall have in our legal phraseology, new, to be sure, *heirs claiming money and other personal goods descending from their ancestor as their inheritance*. It is very plain, I think, that it was intended to embrace all kinds of property by the treaty; and, therefore, the lands in question are embraced by it. Effects descending by inheritance must include land.

The case further states that after the said Catharine Haslin had appointed that the heirs of Kean should convey the lands in question to

her, she removed to France, and devised to Anne Caroline Louisa, with some trifling exceptions, *all* that she possessed or should *possess at her death*. That after the making of the will, the heirs of Kean conveyed to Mrs. Haslin the legal estate in the lands in question, and that Mrs. Haslin afterwards died. That Anne Caroline Louisa was born within the dominion of the United Netherlands. That Mrs. Haslin, in France, where they both resided, adopted her as her daughter and heir according to the laws of France. That the said Anne Caroline married, and was domiciled in France. That she died after Mrs. Haslin, leaving two children, born in France, who are still alive. That Mrs. Haslin left surviving her an only sister, residing at The Hague, born in the United Netherlands, and a citizen thereof.

An intricate question, intended to be presented, does not arise for two reasons, which I will presently give. The question is, whether a child of a Netherlander, who was born in France, is within the protection either of the French treaty or the Dutch treaty, or both combined, and if either, which? For Anne Caroline Louisa, the adopted daughter and devisee of Mrs. Haslin, was a Netherlander, married and domiciled in France, where she had two children, and died. This question is not presented, for Anne Caroline Louisa did not take these lands by devise, as at the date of the will Mrs. Haslin had no estate in them. She had only a right to call for an estate. And at the time of her death,
(196) she had obtained the legal estate from the heirs of Kean. If the estate had remained as it was at the date of the will, that is, a right in Mrs. Haslin to call for it, it would have passed; that is, a right to call for it would have passed to the devisee. The estate being changed at Mrs. Haslin's death, neither passed; not the first, for it was extinguished by the deed; not the last, because it was not in Mrs. Haslin when she made the will. If such reasons as these satisfy the makers of the law, it is not for me to complain. It would disgrace those who are emphatically called lawgivers. But the law is so written, and I cannot alter it. The other reason is, that the plaintiffs are not interested in the question, nor were they in the other. For if the French children of Anne Caroline do not take, the Dutch heirs will. For an alien child does not exclude a more remote heir. It is the *heir* who can, and not *he who cannot take,* which excludes another heir. When I say *can,* I mean who once could. He who once could have taken, but loses his capacity by a *personal* disqualification, does exclude others, as an attainted son excludes a brother, or an elder attainted son excludes a younger son. But not so with those who never could take. It is therefore unnecessary to consider this, or any other question as to who is the heir of Mrs. Haslin. For the plaintiffs have no interest in them. If

she had *any* heir, it excludes them. As it appears that Mrs. Haslin left a sister, a subject of the States General, and as by the treaty the sister is heir to her, if no other is found, Mrs. Haslin is not dead without heirs capable of succeeding to her estate in these lands. There is, therefore, no escheat, and the plaintiffs are not entitled to recover.

Although our lexicographers, and Dr. Johnson at their head, give to the word *effects* the meaning of things movable, yet one of the instances, which he adduces to show that the word is used according to his exposition, proves, I think, the contrary.

> "Shall I lose the *effects* for which I did the murder,
> My *crown,* my own ambition, and my queen."

By the word *crown* the speaker meant not the crown or cap, which encircled his brow, but the realm over which he reigned. However this may be, by the words of the treaty *the effects* are the *inheritances* which are to descend to the *heir.* This gives to the word a mean- (197) ing which cannot be misunderstood.

Lord Coke, in treating of the capacity of grantees, says that prima facie all can take and hold estates, but some can take and cannot hold, some can take and hold until the estate is divested, and some cannot either take or hold. Of those who can take and cannot hold is an attainted person. He takes, but *instanter* the estate is in the king. An alien can take and hold until office found. In both these cases, the estate passes out of the grantor, and becomes vested in some one; while a monster, not having human shape, can neither take nor hold, and is not recognized as a human being. The grant might as well be to a horse, or any of the brute creation. In such case, the estate never passes from the grantor. It remains where it was. So it is, I believe, with a person professed, who is dead in law. He may make his executor, and his estate descends on his heirs. But why argue this point? The plaintiffs themselves affirm it. For if Mrs. Haslin did not take, the estate is still in Kean's heirs. If so, they have no shadow of right. If Mrs. Haslin took the lands, they descended to her heirs, whether pointed out by the common or statute law, or by treaty. The only effect the treaty has, or was intended to have in such case, was to do away the objection of alienage, not to prescribe to us who should be the heirs. If a Dutch subject was to die now owning lands in this State, those who are his heirs under our Act of 1808 would succeed; not those who would have succeeded by the common law in 1782, when the treaty was made; nor those who are his heirs by the Dutch law. These observations are made in opposition to the claim of Anne Caroline, the adopted daughter, and

heir by the laws of France. But this question, as has been said before, is immaterial to the plaintiffs. For *any* heir will exclude them, and the adverse claims of the others are not now in litigation.

PER CURIAM. Judgment reversed.

Cited: *Rouche v. Williamson,* 25 N. C., 147; *In re Wolfe,* 185 N. C., 566.

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(198)

RICHARD GRIST, ADMINISTRATOR OF DANIEL CAMPBELL, v. WILSON B. HODGES, EXECUTOR OF HENRY CLARK.

1. One having title to land, part of which is under cultivation, and part in woods unenclosed, is taken to be in actual possession of the whole tract.
2. Although the rule of damages upon an eviction from a particular estate may differ from that upon an eviction of the fee, yet where the deed conveys a life estate, and the whole interest was lost without any enjoyment by the vendee, he is entitled to recover his purchase money and interest.
3. The mere existence of a better title, without an eviction under it, does not entitle the bargainee to recover upon a covenant of quiet enjoyment.
4. But the existence of a better title, accompanied with actual possession, is a breach of a covenant of quiet enjoyment in a deed executed after the possession commenced under that title; and the bargainee need not bring an ejectment to entitle himself to recover.
5. Where the vendee is evicted in his lifetime, an action for this breach of the covenant of quiet enjoyment is properly brought after his death, by his executor, and does not descend to the heir.
6. Where the verdict exceeds the amount of damages laid in the writ, it is fatal in arrest of judgment, unless the plaintiff remit the excess.
7. But by the Acts of 1790 and 1824 (Rev., chs. 318 and 1233), the plaintiff may in this Court amend his writ.
8. By the Act of 1824, this Court is bound to permit amendments which would be of course in the court below; but it is not authorized to direct them to be made in the court below, nor to make any but such as are necessary to support the judgment of the Superior Court.
9. None can be permitted here which would affect the judgment below, or upon which ordinarily a new plea is admitted.
10. Notwithstanding the *dictum* in *Dowell v. Vannoy, ante,* 43, verdicts which are defective in form, from the misprision of the clerk, will be corrected in this Court, if the substance is intelligible.
11. Defects which require an actual amendment, and which are not cured by the statutes of *jeofail* can be amended only upon the payment of all

costs. And where the amount of damages laid in the writ was increased, the amendment was permitted upon these terms, HENDERSON, C. J., *dissentiente.*

(The case of *Coble v. Wellborn*, 13 N. C., 388, approved.)

THIS was an action for the breach of a covenant of quiet enjoyment in a deed from the testator of the defendant to the intestate of the plaintiff, conveying to the latter an estate for life in two hundred acres of land. The breach assigned was the eviction of the bargainee from ninety acres of the land by one Wingfield, under a better title than that of the bargainor. Upon *non est factum* and *performance* pleaded by the defendant, the case was, that at the execution of the deed Wingfield was in the actual possession of a part of the land, having it under fence, and that he had title not only to that part which was in his actual possession, under cultivation, but also to some adjoining it in woods, amounting altogether to ninety acres; that the intestate of the plaintiff, in his lifetime, commenced an action of ejectment against Wingfield, in which he failed, in consequence of the better title of Wingfield.

It was contended for the defendant:

1. That the evidence offered did not prove an eviction, as the bargainee never had been in possession.

2. That as to so much of the ninety acres to which Wingfield had title which was not enclosed, the plaintiff could not recover.

3. That if Wingfield was in actual adverse possession of any part of the land at the execution of the deed, the plaintiff could not recover for an eviction of his intestate thereupon by the person having a better title thereto, although the intestate had a good title under (199) the same deed to other parts of the land therein described.

4. That the conveyance being for a less estate than a fee, the rule of damages was not the original purchase money and interest.

5. That the action ought to have been brought by the heir of the intestate, and not by his personal representative.

His Honor, *Donnell, J.*, charged the jury that if they were satisfied that Wingfield was in possession of the ninety acres, under a valid title at the execution of the deed, and cultivating a part of it, which was enclosed, and that he had succeeded in the ejectment brought by the plaintiff's intestate, by setting up his valid title, this was in law such a disturbance of the possession of the intestate as would entitle him to recover in an action upon the covenant of quiet enjoyment, contained in his deed; and further, that the present action was properly brought by the personal representative; and that the rule of damages for the breach of a covenant of quiet enjoyment in a deed conveying a life estate was the same as that in a deed conveying the fee.

The jury returned a verdict for the plaintiff, and assessed his damages at $2,334, and the defendant appealed.

(200) *Gaston for plaintiff.*
J. H. Bryan for defendant.

RUFFIN, J. All the cases cited for the defendant upon the point of eviction, except one, are those where the bargainee was in possession, and fall within the hard rule which this Court was constrained to adopt in *Coble v. Wellborn,* 13 N. C., 388. The existence of an encumbrance, or the mere recovery in a possessory action, under which the bargainee has not actually been disturbed, are held, for technical reasons, not to be breaches of a covenant for quiet possession, or, in other words, of our warranties. But that is a very different case from this, in which the bargainee never in fact was in possession, but was kept out by the possession of another, under better title, existing at the time of the sale and deed, and ever since. The case of *Kortz v. Carpenter* is of the same character. But it is distinguishable from the present, for there had been no attempt in that case to get possession. Here there was, by ejectment. I do not, however, think that was necessary, but the existence of a better title, with an actual possession under it in another, is of itself a breach of the covenant. It is manifestly just that it should be so considered, for otherwise, the covenantee would have no redress but by making himself a trespasser by an actual entry, which the law requires of nobody, or by bringing an unnecessary suit, for the event of that suit proves nothing in the action on the covenant. But upon purely legal grounds it is so. For, as between the bargainor and bargainee, the latter is in by force of the statute of uses. It is upon that idea that the legal title is acquired by a deed of bargain and sale. It passes the use, and the statute carries the possession. It is so in the conveyance by lease and release. There must be a possession for the latter to operate on. But it is not an actual possession; at least, the actual entry need not be proved. The statute transfers the possession, and the lessor cannot say it was not actual for the purpose of defeating his subse-
(201) quent release. As between the parties, then, the bargainee is, on strict principles, in; but if there be in reality an adverse possession, he can only be held to be in for an instant, for there will be no implication against the truth further than is necessary to make the deed effectual for its purposes. If such adverse possession be upon title paramount, then there is an eviction of the bargainee *eo instanti* that the possession conferred by the statute takes place, for the eviction need not be by process. Upon general reasoning, therefore, I conclude the case

is for the plaintiff on this point. But there is a case in the Supreme Court of the United States directly in point. *Duvall v. Craig,* 2 Wheat., 45. This was also one of the questions decided in the famous case of *Ricketts v. Dickens* in this State (1 Murph., 343).

There can be no doubt but Wingfield's possession is coextensive with his title, he being in the actual possession of part. He could have maintained trespass for an entry on the wood land. Whatever may be the rule for damages upon an eviction from a particular estate, after the expiration of a part, this case cannot form an exception to the general rule, because the whole interest was lost, and there was no enjoyment.

The last exception stated in the record is, that the action ought not to have been brought by the executor, but belongs to the heir. This is contrary to well settled law. The case of *Lucy v. Livingston,* 2 Lev., 26, and 1 Ventris, 175, established that for a breach in the testator's time the executor and not the heir is to sue, because as no estate in the land descends to the heir, there is nothing in him to which the covenant can attach itself, and the demand had become a personal thing in the testator, and so goes to the executor, who represents the person. The case of *Kingdom v. Nottle, ubi supra,* has been cited to the contrary. It is to be observed that it is directly opposed to the cases of *Hamilton v. Wilson,* 4 Johns. Rep., 72, and *Bennet v. Irwin, 3 id., 363.* But if it were not, it is distinguishable from the case at bar. This is an action on a covenant for quiet possession, where there has been an eviction (202) and the possession lost in the lifetime of the bargainee. Everything, then, was gone before either the heir or the executor could claim, except the right in one of them to recover damages, which right, for the reasons given in *Lucy v. Livingston,* comes to the personal representative. *Kingdom v. Nottle* was on covenants of seizin and of a right to convey. It is true this is broken as soon as made, if the covenantor had no title, and for that reason it would seem that the executor ought to sue. And so I should think he certainly ought, if that be the only covenant in the deed, and there be a total defect of title, so that nothing passed under the deed. But if there be other covenants, as, for example, for quiet possession, and some estate or interest did pass, it may make a difference. For the bargainee may choose to keep the estate, such as it is, and rely upon his title becoming good by matter subsequent, rather than treat his own title as defective, while he is enjoying under it. And where the ancestor has not himself elected to treat his title as bad, but on the contrary to depend on the other covenants, and to let it descend, or devise it as good, it would seem reasonable that the executor should not be permitted to interfere with the claims of the heir or devisee, without showing a special damage to the personal estate. This is what

I suppose *Lord Ellenborough* might have meant by saying, the declaration by the executor ought to show some special damage to the testator in his lifetime. It then becomes a personal demand to the extent of that damage. But if the testator treats it as an estate in possession, and will not consider the breach of covenant as destructive of his estate, nor give the latter up for the damages which he might claim on the former, I do not see that the executor can exercise that power against the heir or devisee, or (for it would go thus far) even against an alienee. The executor ought not to make that personalty for his own benefit, which the testator disposed of as realty, unless there be no method by which those who claim it in the latter character could obtain redress for the final loss of the estate. But here, in a case of covenant for quiet possession, broken in the testator's time, the whole loss is then
(203) incurred, and there can be nothing but damages had, and they, of course, attach to the person.

Another objection is taken here upon the matter appearing in the record. The damages are laid at $1,500, and found in the verdict to be $2,334. This is fatal in arrest of judgment, unless the plaintiff be allowed to remit the excess, or unless an amendment can be made enlarging the sum in the declaration. The plaintiff does not offer to remit, but moves for leave to make the amendment. This motion is founded on the Acts of 1824 (Rev., ch. 1233) and 1790 (Rev., ch. 318). Certainly there is no other foundation for it, for under the English statutes of amendment it has always been held that there must be something to amend by. But it is plain from the words of the Act of 1790 that *any thing* may be amended *at any time,* introduced in the latter part of the section, after the enumeration of many particular instances in which amendments should be allowed, that the Legislature intended amendments to be made in the most liberal manner possible. The expressions seem to have been used, in a spirit of impatience at the reluctance of the courts to allow amendments, and as was expressed by *Chief Justice Taylor,* in *Grandy v. Sawyer,* were designed to overcome the remaining scruples of the courts. In the interpretation of the act there has been a latitude correspondent to its terms. Writs have been amended by striking out defendants (*McClure v. Burton,* 1 Law Repos., 472), and by striking out some plaintiffs and inserting another. *Grandy v. Sawyer,* 2 Hawks, 61. Declarations have been amended after a special demurrer (*Davis v. Evans,* 1 L. Repos., 499), besides other cases equally striking. In fine, the plaintiff has been permitted, not to *amend,* but to *change* his process, and make a new action. But this act is confined to amendments made in the court in which the action is originally brought, and does not therefore enable a revising court to either disregard the defect

or make the amendment. To remedy this, the Act of 1824 was passed. And the enactment of this last law, after the adjudications on the former, is a legislative declaration of the enlarged construction (204) both ought to receive. By it the Superior Court, upon appeal or writ of error, is authorized to make any amendments the county court could, and the Supreme Court is likewise directed to make them in the same manner as they could have been made in either of those courts, and this *"from time to time,"* and *"at any time, in any thing."* There is, therefore, no restraint upon this Court but its own discretion, and such as grows necessarily out of the nature of its jurisdiction. The words are as broad as they can be, but they must be construed in reference to the subject-matter. The Court is bound to make every amendment which would be, of course, in the inferior court, and which does not involve the merits. But plainly the act does not contemplate any amendment to be ordered by this Court to be made elsewhere, nor any to be made in this Court but such as may be necessary to support the judgment below, on a verdict on the merits. We cannot make an amendment, then, after judgment, which would leave it at large whether the verdict was upon the merits of the case as amended, nor one which necessarily, or by the equity of the Court, would let in a new plea or replication. For that would not be an amendment in support of what had been done, but one on which the judgment rendered must be reversed, and the parties sent to a new trial. The object of the act, in reference to *this* Court, is to avoid that. Upon an appeal in the Superior Court it is different, because the cause is there to be tried *de novo,* and the verdict in the county court is annulled by the appeal. The whole merits are there open, and the Superior Court, from the nature of its functions, may amend anything upon terms. The amendment now moved for does not require repleading, nor admit of it. It is not of a kind which changes the merits as tried, but is made necessary by those merits as found. It hurts nobody but the plaintiff, who discharges the bail and loses his costs thereby. There is no possibility of its doing an injury to the defendant by making him pay more money than he owes, or sooner than he ought, namely, before it is due. Why, then, send the parties to renew their litigation? The acts, in permitting us to avoid that (205) necessity, forbids us from imposing it on the parties. And here I must qualify the expression which dropt from me in *Dowell v. Vannoy, ante,* 43, on this subject, when I was not aware of the very strong terms used by the Legislature. Probably in that case, I mean a verdict defective only in form by the misprision of the clerk, and where the substance is intelligible, an amendment would be allowed here, as it would be, of course, in the Superior Court. I think, for these reasons, we are bound to amend here, as prayed for.

The terms, I think, must be upon the payment of all the costs. The general rule is, that where the defect is not one that is cured by the statutes of *jeofail,* but which requires an actual amendment, the party who asks it must pay all the costs to that time, unless it be the fault of the officer and not of the party. This is emphatically applicable to cases where the action is *changed,* in which the plaintiff by his own admission could make no recovery, and would be compelled to pay all the costs if prosecuted to a final decision. It is equally applicable to a case where there can be no judgment for debt or costs, unless the amendment be made, as here. The plaintiff gets more than he asked, and he must pay the expense upon which the gain is founded. The rule is based on two grounds. The one, of duty to the particular party who is defendant, who has a right to ask that the plaintiff shall not enlarge or change his demand, without paying him his costs incurred in defending the former one; the other, of a duty to the profession and the country, which enjoins it on the Court not to encourage ignorance or negligence, by giving them all the advantages of knowledge and diligence. The amendment is allowed, therefore, upon the payment of all the costs, including those of this Court, and upon the record, as amended, the judgment is affirmed, except as to the costs.

HENDERSON, C. J., *dissentiente:* I most fully concur with the Court that the amendment should be made, for it presents no new state-
(206) ments of *issuable facts.* Nor have I the least doubt that this, a *substantial* amendment, falls under the meaning of the Act of 1790. But I think that the amendment should be made without giving the defendant costs. For I cannot consent to give that which the defendant cannot, with a safe conscience, receive.

PER CURIAM. Judgment affirmed.

Cited: S. v. Muse, 20 N. C., 466; *Lee v. Gauze,* 24 N. C., 445; *Williamson v. Cannady,* 25 N. C., 353; *Clayton v. Liverman,* 29 N. C., 96; *Justices v. Simmons,* 48 N. C., 189; *Brannock v. Bushwell,* 49 N. C., 34; *Wilder v. Iredell,* 53 N. C., 87; *Ashe v. DeRosset, ibid.,* 246; *West v. West,* 76 N. C., 48; *Noville v. Dew,* 94 N. C., 96; *Hodges v. Latham,* 98 N. C., 243; *Hodges v. Wilkinson,* 111 N. C., 60; *Shankle v. Ingram,* 133 N. C., 258; *Fishel v. Browning,* 145 N. C., 76; *Cower v. McAden,* 183 N. C., 646; *Newbern v. Hinton,* 190 N. C., 112.

MARY EURE, ADMINISTRATOR OF JOHN TILLERY, v. ELISHA H. EURE.

When an executor sells the assets of his testator and takes a bond payable to himself, *as executor*, and dies leaving the bond uncollected: *It was held*, RUFFIN, J., *dissentiente*, in the absence of any evidence that the executor had appropriated the bond to his own use, that both at common law and under the Act of 1794 (Rev., ch. 415), "to explain and supply the deficiencies of certain acts of Assembly respecting sales by executors and administrators," the bond was of the assets of the testator, and an action on it might be brought by the administrator *de bonis non*.

THIS was an action of debt, originally commenced by warrant upon a bond executed to Stephen Eure, as administrator of John Tillery, upon the sale of the personal property of the intestate. After the execution of the bond, Stephen Eure died intestate, and administration *de bonis non* upon the estate of Tillery was then committed to the plaintiff. Upon the trial before *Mangum, J.*, at HALIFAX, on the spring circuit of 1829, it was objected for the defendant that the bond was not evidence of a debt due by the defendant to the plaintiff, as administratrix of Tillery, but was only evidence of a debt due Stephen Eure in his lifetime, and that the action ought to have been brought by his administrator.

Upon this objection, his Honor being of opinion with the defendant, nonsuited the plaintiff, who appealed.

Devereux for plaintiff. (207)
No counsel for defendant.

HENDERSON, C. J. If we resort to authority, we shall find that as soon as it was determined that an executor or an administrator could receive a bill or note as executor or administrator, and could sue thereon in his representative character, that those decisions were immediately followed by others, declaring that if the bill or note was not collected by the executor or administrator, but was left uncollected at his death, the right to collect and sue on it devolved upon the representative of the first testator, or intestate, as unadministered by the first representative. And were it not for a difference in the opinion of the Court, I should think that there could not be a doubt upon the question. Because the reason why the executor or administrator could sue in his representative character was that the bill or note was of the estate of his testator or intestate, yet to be administered. On no other principle could the action by him in that character be sustained. If unadministered by the first representative, the administration of it devolved on the administrator

de bonis non, or the executor of the executor, as the case might be, who thereby became the executor of the first testator. In the case of the administrator *de bonis non,* his commission or letters of administration direct and authorize him to *administer all the estate of the testator or intestate unadministered by A. B., the former executor or administrator.* And the law makes the same injunction to the executor of the executor, as to the unadministered estate of the first testator. When it was held for law, as it once was, that an executor or administrator could not receive a bill or note in his representative character, and of course could not sue on it in that character, it is not to be wondered at that it was also held that if he died, holding a note or bill, although professed to be received in that capacity, and for a debt due to his testator or intestate, upon his death, his executor or administrator only could sue upon it, and the representative of the first testator or intestate could not.

(208) Indeed, it would have been wonderful if it had been held that the representative of the first testator could have sued. For it would have presented a case where the administrator *de bonis non* could sue as such, where the first administrator or executor could sue only in his private and not in his representative character. It would be saying that the bill or note, in the hands of the first administrator or executor, was not of the estate of the testator or the intestate, but on the death of the executor or administrator it became so. The doctrine can only be attacked in the bud, in the right of the executor or administrator to receive a bill or note, as executor or administrator. For if that is admitted, I think the other follows of course. In deciding this case, I have no interest to support or deny the modern doctrine of the English courts that he can. Indeed, it seems now to be universally admitted there ever since the case of *King v. Thom,* 1 T. R., 487, that executors or administrators may receive bills or notes in their official character. The doctrine has been gradually extending itself to other official acts. And in the case of *Catherwood v. Chabaud,* 8 Eng. C. L., 45, where the assignment was to the administrator *generally,* not as *administrator,* yet being for a *debt due to the intestate,* the bill being uncollected by the administratrix in her lifetime, it was held that it devolved on the administrator *de bonis non,* as assets of the estate of the first intestate, to be administered by him as unadministered by the first administratrix.

I said I felt no interest in supporting the English decisions that an executor or administrator, as such, might receive a bill or note, in order to support the opinion I have formed. For be that as it may in England, they can certainly in this State take bills, bonds, and notes in their representative character. The acts of our Legislature direct executors and administrators to sell the estate of their testator or intestate *on a*

credit, to take bonds with surety; that the money, *when collected, shall be assets,* and prescribe how judgments shall be entered against them before collection. Argument is useless, I think, to prove that they hold the evidences of these debts in their official and not in their individual character. The money due on the sales is not assets until (209) collected. They may, therefore, sue on these bonds, as executors or administrators, for they are of the estate of their testator or intestate unadministered. If they can, and should die before they do, the administrator *de bonis non* certainly can and must. They devolve on him as unadministered assets of the first testator or intestate. It is said that inconveniences will result from giving this right to the administrator *de bonis non* to sue, as that the first executor or administrator will lose his right to retain for his own debt, and his opportunity of reimbursing himself for advances. Not so. He has nothing to do, but by some overt act, to make an appropriation, and the debt is his. It is administered. This, however, is not a contest between the two representatives, but the debtor sets up this defense against the administrator *de bonis non.* Besides, we find this bond in the hands of the administrator *de bonis non,* and we must presume it came rightfully there. But if the law is settled, inconveniences cannot alter it. They can only be thrown in, in doubtful cases, to show how the law is, and, I think, from our acts of Assembly, were it not for the difference of opinion that this is not one of those doubtful cases where inconveniences should have any weight. But I think the inconveniences are the other way. If this be as contended for, that is, the first administrator's own debt (and they who hold that the administrator *be donis non* cannot sue affirm it), if the defendant, the purchaser at the sale, have a debt against the first administrator, he may set it off, and thus make the administrator, who may be an insolvent, act unjustly against his will. For nothing can prevent such debt being a set-off, if the note be the first administrator's. They are due, then, in the same right; that is, both individually. They are therefore *mutual.* Thus, the whole property may be swept away by the creditors of the administrator purchasing up the property at the executor's or administrator's sale, and setting off their debts against the executor or administrator. A further inconvenience will follow. The administrator *de bonis non* must stand by and wait the pleasure of the representative of the first administrator or executor in the collection of the (210) debts, and his further pleasure in paying them over to him, after he has collected them, when it might be done at once by authorizing the administrator *de bonis non* to collect them.

As to the objection that it does not appear that Tillery was the first administrator, the bond shows it, as to this defendant. But if it did not, the letters *de bonis non,* of which the court had a *profert,* do. They are

to administer all the goods not administered by Tillery, the former administrator. I have taken it for granted that this is a bond taken at a sale of the assets.

HALL, J. It was held in *Jenkins v. Plombe,* 6 Mod., 181, that where an executor sued *as such,* but might have sued in his own name, he was liable for costs. Sayer's Law of Costs; *Atkey v. Heard,* Cro. Car., 219. And that was the reason given why counts in such an action could not be joined with counts in an action where an executor could sue only as executor, because it was said he was liable for costs in the first case, but not in the latter (*Rogers v. Cooke,* 1 Salk., 10; *S. c.,* 1 Show., 366), and because the costs were entire and could not be severed. *Betts v. Michell,* 10 Mod., 316. The objection, therefore, would not lie against either suit, when brought singly, although in the name of the executor.

In other cases, however, the validity of this objection seems to be impaired, for in *Bull v. Palmer,* 2 Lev., 165, the plaintiff charged that the defendant covenanted with him as executor, and was nonsuited. It was held that as the action was brought in right of his executorship, and the money, if recovered, would be assets, he should not pay costs. *Portman v. Came,* Str., 682; *Peacock v. Steere,* Cro. Car., 29; *Mason v. Jackson,* 3 Lev., 60.

In another and a later case the question was, not concerning costs, but whether executors to whom a bill of exchange had been endorsed could sue upon it as executors. It was held that they could, because, amongst the reasons, it was said that the money, when recovered, would be considered as assets. *King v. Thom,* 1 Term, 487.

(211) In a still later case, in an action of trover by an executrix for a conversion in the testator's lifetime, and also for a trover and conversion after his death, on a nonsuit it was held that the plaintiff was not liable for costs. And Buller stated that whether the conversion was before or after, if the goods, when recovered, would be assets in the hands of the executrix, she must sue for them in her representative character. *King v. St. Mary,* 4 Term, 477.

It was said in *Cowell v. Watts,* 6 East, 405, that the correct and rational rule is that counts may be joined in which the money, if recovered, will be assets. *Petrie v. Hannay,* 3 Term, 659.

In the late case of *Catherwood v. Chabaud,* 8 Eng. C. L., 45, it was held that where a bill of exchange was endorsed generally, but delivered to S. C. as administratrix for a debt due to the intestate, and S. C. died intestate after the bill became due, and before it was paid, the administrator *de bonis non* could sue upon the bill. The money, in case it had been received by S. C. upon the bill of exchange, would have been assets

of the estate of the intestate. As it was not received, the plaintiffs, the administrators *de bonis non,* had a right to sue for it.

This last case seems to be decisive of the one before the Court. The note in question was given to Stephen Eure, as administrator of John Tillery. When Stephen Eure died, and letters of administration were granted to the plaintiff, she had a right to institute the present action, according to the principles laid down in the foregoing authorities. Whether the debt was recovered by Stephen Eure, the former administrator, or by the present plaintiff, the administratrix *de bonis non,* it is assets of the estate of John Tillery. I therefore think the nonsuit should be set aside and a new trial granted.

RUFFIN, J., *dissentiente:* It seems to me that a reversal of this judgment is *quieta movere.* Nothing, I thought, was better settled in the law of this State than that a bond, taken by an administrator, for property of his intestate sold by the administrator, belonged to the administrator. The opinion now entertained by the other members of (212) the Court has led me seriously to reconsider my own. It has not resulted in any change.

The old law was certainly in conformity to the opinion of the court below. An executor could declare in his representative capacity only for matters arising in the testator's time. The executor's own acts were all personal to himself, and were declared on in his own right. Upon his death there was no privity between him and the administrator *de bonis non.* I admit that changes to a certain extent have gradually taken place in England which, after producing no little confusion in the law of administration, have resulted in the modern case of *Catherwood v. Chabaud,* the reasoning in which is nearly in point with the case before us. I not only entertain profound respect for those adjudications, as the opinions of eminent and learned men, but I acknowledge them to be authoritative as determining what the common law is. Nevertheless I cannot allow so much authority to a single judgment of a single court, as to suffer it to overrule a multitude of the decisions of their predecessors, and the uniform course of our own. Innumerable cases have occurred in which this question has arisen. Yet I have not heard of a solitary instance in which the law has not been expounded as by the judge below. I have myself had it ruled on me, and ruled it so repeatedly, on the circuit. I am well satisfied that those decisions were right.

It is of the utmost importance that the course of administration should be certain; that no rule should be countenanced which will disturb the order of paying debts or embarrass the right of set-off, or im-

pair the right of retainer in the first administrator or his claim to indemnity for advances for the estate. I think all these consequences will follow the change now made.

It is said that the principle of the modern cases is that an executor may declare on a promise to him, *as such,* if the debt, when recovered, will be assets. I will not deny that. But if a new bond be taken by the executor for an old debt, due to the testator himself, it is a change (213) of the debt, which makes it assets immediately. Why? Because upon his death the new bond will not survive to the administrator *cum testamento annexo.* This is the very reason given in the old books. Such a bond is declared on in the *debet* and *detinet,* and goes to the executor's own administrator. But here the bond was taken for property sold. *That* was assets as soon as it came to hand; and if the executor sell it, it does not cease to be assets. Whether the price be recovered or not, the value of the property is assets. Suppose a conversion or detention of it? Certainly the executor sues upon his own possession and declares in his own right. He does not make a *profert* of his letters, but gives them in evidence as a link in his title. The reason is, that before recovery the property is assets, and since the executor is chargeable the property is *his.* I am not speaking of a mere constructive possession by the executor, as where the trover was in the testator's time and the conversion in the executor's. In such a case he may declare as executor because the whole matter did not arise in his own time. But where he has had actual possession, it is clear that he declares in *proprio jure.* Then the property is changed and becomes his. Is it not strange that the property is assets and the price should not be? And upon a bond taken for it, debt in the *detinet* will not lie. *(Hosier v. Ld. Arendel,* 3 Bos. & Pul., 7.) For it cannot be alleged that the obligor *owed* to the *testator,* and detains from the executor.

The English cases allowing counts upon promises to the testator and to the executor, *as such,* to be joined, had their origin in a necessity under which the courts felt themselves to permit that mode of declaring for the sake of avoiding the statute of limitations. They first held that if the promise was laid to be made to the testator and the statute was pleaded, evidence of a promise to the executor was not admissible to take it out, because that was a different contract. Why a different contract if it relate to the same subject, and the debt due upon each promises to be assets only when recovered? Yet the courts of Westminster did not say until a late day, if it be yet definitely said, (214) whether the recovery is to be on the old promise as being revived by the new one, or upon the latter. *Lord Mansfield* indeed tells us that the statute goes to the action only, and not the cause of action. The

reports of Burrow, Cowper and Douglas are full of such expressions, as that the *remedy* and not the right is barred. In our own day the question has been more minutely discussed, and an attempt made to follow the rule, that an executor might so declare, by another, that this new promise is the ground of the action and the old debt but the consideration. On this I must remark, that this Court has said nothing yet. Though pressed to it in *The Bank of New Bern v. Sneed* (3 Hawks, 500), it was declined, and what was dropped leaned the other way. But let the rule prevail to the extent of the necessity which caused it. I cannot carry it further so as to overturn other well settled principles and the rights of third persons.

The statutes of set-off are amongst the most valuable we have. They save expense, and in the true spirit of equity hold the balance due on dealings between the parties to be the real debt. The debts to be set off must be mutual and due in the same right. If an action be brought on a debt due the testator, a debt due from the testator may be set off. But if the debt arise in the executor's time, the debt of the testator cannot be set off. Why? Because it would disturb the order of administration. Specialty creditors, for example, are to be paid before those by simple contract. Yet if a sale of property by the executor create a debt from the purchaser to him *as executor,* a simple contract creditor by buying at the sale will defeat specialties by setting off the debt from the testator. If it be said that the executor can avoid this by suing in the *debet* and *detinet,* I answer that fails when the bond comes, upon the death of the executor, to the administrator of the testator, for he is obliged to declare in the *detinet* only, and *as* administrator. It cannot be said that the set-off is to be allowed or not, as it shall appear that there are creditors of higher dignity, for that would involve an account of estate upon every issue of set-off. I do not suppose that it is meant that the right of set-off shall be at the mercy of the (215) executor. Yet I cannot tell how it is to be exercised hereafter. If the executor discovers that the debtor has a demand upon the testator, then he will sue in his own right, and by the form of declaring, preclude the set-off. If the debt be one of the executor's own, then he declares as executor, and the issue is alike unfavorable to the defendant. If the executor is himself to be compelled, without reference to his mode of declaring to admit as a set-off, against a debt contracted with himself, his own debt, why is that right of his creditor to be defeated by his death, as it will be when the bond passes to the administrator *cum testamento annexo?* The rights of the debtor ought not to be altered on one and the same contract, when sued by one or another person. It ought to be certain what debt is the legal set-off, and not varied by the will of

the plaintiff. I have not cited authorities to these points, because I have chosen as illustrations positions the most elementary and familiar. But the general doctrine of set-off is explicitly laid down in the cases of *Shipman v. Thompson* (Willes, 103), and *Tegetmeyer v. Lumley (id.,* 261n). These considerations do not seem to have been adverted to by the judges who decided *Catherwood v. Chabaud.* They seem to me to be important, and I suspect a case of set-off will be found very perplexing to that court, when it shall arise. One difficulty seems to have pressed itself on the notice of *Mr. Justice Best,* who gave his opinion last. The thought occurred to him, how he would have treated the action had it been brought by the administrator of the administratrix. He does not dispose of it otherwise than by remarking that "it was unnecessary to decide whether he could sue, for that it was sufficient to say that the administrator *de bonis non* might." He is pleased to add that "this observation will reconcile the cases." With great deference, I do not see any harmony in that argument. It seems rather to increase the discord. For I am at a loss for a principle upon which two different persons, in distinct rights, can have the power to sue on the same
(216) contract, for the same sum at one and the same time. The right existing in one must *ex necessitate* exclude the other. I can hardly suppose that if the administrator of the administratrix had been plaintiff then he would have been turned out of court. If not, the other ought. *Chief Justice Abbot,* struck with the new view of *Justice Best,* takes up the case again and remarks that there is much weight in the distinction. But he immediately admits that "there may be cases where the administrator of the administrator might and *ought* to sue, viz., if the first administrator had made himself *debtor* to the intestate's estate for the amount of a bill received in payment of a debt due to that estate." Does not this give up the argument? There is no principle on which the administrator can make himself debtor to the estate by taking a bill, but that by changing the original debt, he makes it present assets—a *debt* not being assets until collected or altered or the lapse of a reasonable time for collection. When thus extinguished, it is assets chargeable to the executor, and therefore whatever he receives in satisfaction of it, whether a bill, the purchaser's bond or a specific thing, is the administrator's own. But specific chattels, once in the executor's hands, are assets *eo instanti,* whether sold or retained by him—that is to say, at the common law.

This brings me to another branch of the subject not less important. The *Chief Justice* puts an instance of an administrator becoming debtor to the estate in which he admits the security ought to belong to the administrator. The reason is much stronger when we consider him a

creditor of his intestate or of the estate by advances for it. Is he to lose his right of *retainer?* This must be if the right to the bond survive to the administrator *de bonis non.* I had thought before that the right to retain changed the property of the assets as soon as they came to hand. *(Muse v. Sawyer,* N. C. T. R., 204; *Merchant v. Driver,* 1 Saund., 307.) It is said, however, that suffering the administrator *de bonis non* to sue is most convenient and accords more with justice, because it brings the intestate's estate more directly and speedily to be answerable to demands of creditors and next of kin. It is plain that the circuity (217) will be greater on the one side or the other, as the first administrator *happens* to be a debtor or a creditor of the estate. I admit that the executor of the first administrator holds the proceeds of the bond in trust for the estate of the first intestate. But when he accounts as trustee, the estate of the first administrator is fully protected not only by a retainer, but by all fair allowances for advances. This is manifestly just, and I cannot assent to any rule which inverts the natural order of things, and that to the detriment of plain right. This view is also taken in a modern English case—that of *Hosier v. Arendel,* before mentioned. And that is grounded on *Betts v. Mitchell* (10 Mod., 315). In the former it was expressly held (in 1802, and though reference was made to the new fashion of declaring), that an executor could not join a count on a bond to his testator, with one on a bond to himself as executor. In *Catherwood v. Chabaud* this case is not noticed, although *Lord Alvanley* expressly declares that if a bond be given to an administrator, and he happen to die before the debt be recovered, *"it cannot be contended* that the administrator *de bonis non can put it in suit."* He says it could not be allowed, as it might affect the right to retain. And *Chambre, J.,* says the debt created by a bond to an administrator is a debt *to him,* and will devolve on *his* representative. This case is precisely in point. *Catherwood v. Chabaud* may indeed be distinguished from it, in what likewise will distinguish it from the case before us. It was an action of *assumpsit* on a bill of exchange, passed to the administrator *as such,* for a previous debt to the intestate. Now there is a latitude of declaring in that action not allowable in debt. And since the case of *Bickerdike v. Bollman* (1 T. R., 405), it has been the common understanding that a bill received for a previous debt does not extinguish it. If the bill be not good, an action will lie on the original debt, and the bill is only collateral security. The *debt* therefore might survive to the administrator *de bonis non,* and draw after it the bill. But here there was no debt to the intestate. It was contracted with the administrator (218) himself, and *he* could not declare in the *detinet,* but only in the *debet* and *detinet.* For no action but debt will lie on a *bond,* and there

is a prescribed form for that which ties the Court down. The truth is, there is no *privity* between a first and second administrator; and the law does not transfer contracts made with the one to the other. Let us consider the case of a judgment obtained by the administrator, even for a debt due to the intestate. Upon his death it is well known that, at common law the administrator *de bonis non* could not enforce it, but was remitted to the original cause of action. Much less could he interfere with a judgment rendered on a bond given to the administrator himself. As to the first, we have now a remedy in the Act of 1824. But why was a statute necessary if the mere volition of judges was adequate to change the law? The act is confined to judgments in favor of the administrator in his representative character. How can we extend it to contracts *in pais,* entered into by the administrator himself? If the bond had ripened into judgment before the Act of 1824, it is plain that the administrator of the administrator alone could have sued on it. I cannot perceive any power in us to say that anybody else can sue on the bond itself.

I apprehend the Act of 1794 (Rev., ch. 415) has no bearing on the question. That does not mean to change the executor's rights or those of creditors, or the law of set-off. It only means to say when execution shall issue against the executor. If, however, it embraced the whole case, it would not affect the present question, because the bond fell due in January, 1827, and Stephen Eure himself received part payment in February, 1828. He lived long enough to make the bond his own, for if he does not use all lawful means to recover the money, he is chargeable with it by the letter of the act.

I know not how far the reasons upon which the judgment is reversed will carry us in other cases, but if this plaintiff can recover upon the ground that the bond, payable to S. Eure, the administrator of J. T. is,
in effect, a bond *to the estate,* I cannot see why a bond given to a
(219) guardian may not be sued on by the succeeding guardian, or by
the ward in his own name, or why upon the removal of a guardian, or death of an administrator, these bonds may not be recovered in *trover* by the ward or by an administrator *de bonis non.* I do not deny that the guardian or administrator is chargeable for the amount of the bonds payable to him as part of the estate. But that is in another court and upon the ground of a trust. That very proceeding admits the legal title to be in him to whom the bond is payable. But here the question is whether a *bond,* payable to one man, can be sued on by another, who is not the assignee nor administrator of the obligee. If it can, I do not see why every bond payable to one, with a trust expressed on its face for another, is not a bond in law to the *cestui que trust.* I have examined this subject thus minutely because I consider it one of

much practical consequence. I hope I am mistaken in my views of the law and in my apprehension of evil results, but under my present impressions I must say that I think the judgment ought to be affirmed.

PER CURIAM. Judgment reversed.

Cited: Alston v. Jackson, 26 N. C., 51; *Setzer v. Lewis,* 69 N. C., 134; *Thompson v. Badham,* 70 N. C., 143; *Rogers v. Gooch,* 87 N. C., 444; *Ballinger v. Cureton,* 104 N. C., 477.

SUSAN A. McCULLEN ET AL. v. BRITTAIN HOOD.

A receipt, acknowledging the payment of a particular sum, without stating it to be in full, is not in itself sufficient evidence to support the plea of accord and satisfaction.

TRESPASS QUARE CLAUSUM FREGIT, tried on the last circuit, at WAYNE, before his Honor, *Donnell, J.*

Plea—*accord* and *satisfaction,* upon which the case was, that the plaintiffs were the heirs, and the defendant the administrator of Asher McCullen; that the defendant entered upon the lands which descended to the plaintiffs, and rented them out for two years; that afterwards the defendant handed to the guardian of the plaintiffs several notes, and took from him the following acknowledgment: "Received of Brittain Hood, as next friend to the heirs of Asher McCullen, de- (220) ceased, the following notes of hand, for rent of lands, etc., viz., etc." No other evidence was offered.

It was contended for the plaintiffs that a guardian could not make an accord and receive satisfaction for a claim of his ward; and, if he could, that the receipt was not evidence of an accord and satisfaction of the whole demand, so as to defeat the action, if in truth they were entitled to a greater amount of damages than that stated in the receipt.

His Honor instructed the jury that a guardian might, acting *bona fide,* make an accord and receive satisfaction for an injury to the estate of his ward so as to defeat his action, and left it with the jury to determine whether the notes were received as an accord and satisfaction or as a discharge *pro tanto* of the damages.

The jury returned a verdict for the plaintiff, allowing the amount of the notes as a part satisfaction, and assessed damages for the residue, and the defendant appealed.

W. C. Stanly for defendant.
Gaston, J. H. Bryan and Mordecai contra.

HENDERSON, C. J. The plaintiff does not, and the defendant *cannot* bring into review the law, as laid down by the presiding judge, as to the power of the guardian to make an accord and receive satisfaction for the entry, and occupation by renting out the lands of his wards. Nor does the case require that we should examine the question. For we are of opinion that the evidence offered by the defendant is not even prima facie evidence of that fact. The only evidence offered in support of that plea was the receipt. And that shows only that certain bonds were received by the guardian of the defendant as next friend to the infants for rent. If it had been expressed in full of the rents received by him, or that they were all the bonds received by him for rent, or all that he had rented the lands for, an inference might be drawn that the guardian received them in *full satisfaction.* But no such expression is found in the receipt. Nor was any evidence offered of all or any of these (221) facts. There might be more bonds or money, and yet the receipt speak the truth. We, therefore, think the defendant has no reason to complain of the charge of the judge. He neither showed that they were all the bonds he received, or that they were for the full value, on which to found a presumption that the guardian received them in full satisfaction. Nor does the guardian say so in the receipt.

PER CURIAM. Judgment reversed.

Cited: Grant v. Hughes, 96 N. C., 191.

KINCHEN NORFLEET v. JOSEPH RIDDICK, EXECUTOR OF THOMAS RIDDICK.

1. An administrator who holds property of the intestate under a conveyance fraudulent and void against creditors is liable to them as an executor *de son tort.*
2. One who intermeddles with the goods of a decedent may be subjected as executor *de son tort,* although letters of administration afterwards issue. If the administration is committed to him it entitles him to retain.
3. But an intermeddling after a grant of administration does not make an executor *de son tort,* because he is answerable to the administrator.
4. If the intermeddler claims under a grant valid as to the administrator, but void as to creditors, the latter may, from necessity, subject him as an executor *de son tort.*

NORFLEET *v.* RIDDICK.

THIS was an action of assumpsit, tried before *Martin, J.*, at GATES, on the last circuit. The question arose upon the plea of *ne unques executor*. The facts were that Thomas Riddick died intestate, and letters of administration on his estate issued to the defendant before the commencement of this action; that the defendant claimed title to two slaves under a pretended sale, fraudulent against the plaintiff, and that he had been in possession of them before and since the death of Thomas, claiming them as his own.

His Honor, thinking the action could not be sustained upon these facts, nonsuited the plaintiff, who appealed.

Iredell for plaintiff.
Kinney contra.

HENDERSON, C. J. Were this a case where the defendant had made himself liable to actions as executor of his own wrong, by intermeddling with the goods of the dead man, for which he would have been subject to the rightful administrator when appointed, he does not by afterwards obtaining administration purge the wrong he committed before its grant, so as to prevent his being sued as executor. The ad- (222) ministration purges the wrong so as to confer on him the rights of a lawful administrator and to enable him to retain, but he is still liable to creditors if they elect to consider him an executor, and whether he or another administers the assets the principle is the same. If this was not the rule in cases where the wrongdoer is liable to the rightful administrator, yet in the present case it must be so *from necessity*. The wrongful act complained of is the taking by the defendant and holding in his possession, under a fraudulent conveyance from a dead man, two negro slaves. For this act he is not responsible, either to an executor or an administrator. The conveyance bound the dead man, and it binds them also. But it does not bind the dead man's creditors. It is void as to them. The law has therefore wisely provided that he who takes or has in his possession, under a fraudulent conveyance from the dead man, any of his goods, becomes thereby an executor of his own wrong. This is the case whether there be an executor or not, and whether the taking be before or after administration granted, contrary to the rule in cases of mere intermeddling. For the general rule is that where there is an executor, or after administration granted, an intermeddling with the goods of the deceased will not make one an executor of his own wrong, because the trespasser shall answer to the executor or administrator, and not to creditors; and it is because he is answerable to the executor or administrator for those acts that he is not answerable to creditors. The reason and policy of the rule are obvious. But even where there is an

executor or administrator, and the acts are of that nature, that they cannot obtain satisfaction for them, as in the present case the fraudulent grantee, being a privileged intermeddler, shall be liable to creditors as executor *de son tort*. The law would be inconsistent with itself if, after giving the right to creditors, it afforded no remedy to them. Upon either principle, therefore, this action can be sustained.

PER CURIAM. Judgment reversed.

Cited: Burton v. Farinholt, 86 N. C., 267.

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WILLOUGHBY D. BARNARD v. ARTHUR GREGORY, EXECUTOR OF JONATHAN ROBERTS.

One who sets up a claim to goods of an intestate, under a fraudulent conveyance, and thereby injures the sale of them, does not render himself an executor *de son tort*.

DEBT upon a single bond; and on the trial before his Honor, *Martin, J.*, at CAMDEN, on the last circuit, the only question was upon the plea of *ne unques executor*. To make the defendant an executor of his own wrong, the plaintiff proved that the sheriff having an execution, the *teste* of which overreached the death of Roberts, levied it upon a negro in his possession at his death; that the defendant at the sale produced an unregistered bill of sale for the same negro and claimed title; that the slave, in consequence of this claim, went at a small price, and that the defendant paid the purchaser an advance upon his bid, and took a bill of sale from the sheriff to himself. The plaintiff then offered evidence tending to prove that the defendant's bill of sale from Roberts was fraudulent, and contended in that case that the defendant by forbidding the sale, and causing the negro to sell for less than its value, had made himself an executor of his own wrong. But his Honor, being of a different opinion, directed the jury to find for the defendant, and the plaintiff appealed.

Kinney for plaintiff.
Iredell for defendant.

HALL, J. An executor of his own wrong is defined to be a person who, without any authority intermeddles with the estate of the deceased, and does such acts as properly belong to the office of an executor

or administrator. (Went. Off. of Ex., 171.) And by statute 43 Elizabeth, ch. 8, he is declared to be an executor of his own wrong, who holds any goods of, or who owes any debt to the intestate, for which he holds a fraudulent release or discharge, and without such valuable consideration as shall amount to the value of the same goods or debts or thereabouts.

But I am not aware that it has ever been adjudged that a (224) person was an executor of his own wrong who has not intermeddled with the estate of the deceased, or who does not hold any of his estate in his hands, but who only sets up a claim against the estate, although that claim may not be a valid, but in truth a fraudulent one. This may have been the defendant's case; but it has not been proved. It is not stated, although probably the fact was so, that Roberts' estate was insolvent. Nor has it been made to appear that the defendant's unregistered bill of sale was fraudulent. To be sure it appears that he had not all confidence in it when he purchased the title of the person who bid off the negro. Be that as it may, I think the judge did not err when he decided that, although the bill of sale was fraudulent, and although the defendant forbid the sale, claiming under it, and thereby caused the property to sell for a less price, yet that did not constitute him an executor of his own wrong.

PER CURIAM. Judgment affirmed.

URIAS COLLINS v. MARTIN NALL.

1. Where an opportunity of appealing has been lost by the neglect of an officer of the law, the contrivance of the opposite party, or improper conduct in the inferior court, a *certiorari* will be granted without reference to the merits.

2. If an appeal be lost by the neglect of the applicant or of his agent, a *certiorari* will not be granted.

3. It is otherwise where it is lost by the accidental inability of the applicant to give security for the appeal.

4. But in such case it is not granted, when applied for merely to delay the other party, or to avoid a decision on the merits.

5. And the applicant will also be laid under terms not to avail himself of a technical advantage arising from a mere informality.

(The cases of *Chambers v. Smith*, 2 N. C., 366; *McMillan v. Smith*, 4 N. C., 173; *Davis v. Marshall*, 9 N. C., 59; *S. v. Williams*, 9 N. C., 100; and *Estes v. Hairston*, 12 N. C., 354, approved by RUFFIN, J.)

Seawell for plaintiff, had obtained a *certiorari* upon an affidavit in which the plaintiff swore that a petition was filed by him in the county of WAKE against the defendant, under the Act of 1809 (Rev., ch. 773), "directing how persons injured by the erection of public mills shall in future proceed to recover damages"; that upon the trial a verdict was taken, subject to the opinion of the court upon a question touching the title of the land in the petition mentioned; that
(225) thinking the point abandoned by the defendant he went home, but towards the end of the term, accidentally hearing that the point had been determined against him, he came to Raleigh, and found a judgment had been entered for the defendant from which he prayed an appeal, but that he was not then able, after great exertions, to give surety; and on account of the late period at which this happened, there was not sufficient time to return home and procure his neighbors to join him in a bond before the expiration of the term.

The plaintiff filed with his petition a copy of the record of the cause in the court below, which contained a statement of the facts upon which the verdict was set aside, and judgment entered for the defendant.

W. H. Haywood moved to dismiss the writ upon the affidavit of the defendant, stating that the cause was tried on Wednesday of the term; that final judgment was pronounced on Friday morning; that on Saturday morning the plaintiff came into court and prayed an appeal and time to get his sureties; that the judge informed him the court should be kept open until midnight to enable him to give his bond and surety; that the judge then handed to the defendant's counsel a statement of the facts on which the verdict was set aside, and directed it to be filed in case the appeal was taken.

RUFFIN, J. I think the motion to dismiss the *certiorari* must be overruled. It is true that writ is an extraordinary remedy, and is grantable, in my opinion, in the discretion of the court. It is not a matter of right as an appeal or writ of error is, but in allowing it as a substitute for an appeal the courts have always exercised their discretion very liberally. And in cases where the party has lost his appeal by the neglect of an officer of the law, the contrivance of the opposite party, or the improper conduct of the inferior court, the cause will be examined upon *certiorari* without reference to the merits. This is upon the ground that the party has been deprived of a right to appeal without his fault. *Chambers v. Smith,* 1 Hay., 366. Where indeed he
(226) loses his appeal by his own neglect or that of his agent, as if he does not pray an appeal when he could, and had reasonable time, nor bring up his appeal after obtaining it, he is not helped, because he had an obvious and regular relief which it was his own folly to abandon.

McMillan v. Smith, 2 Law Rep., 75; *Davis v. Marshall,* 2 Hawks, 59; *S. v. Williams,* 2 Hawks, 100. The present is not like either of the foregoing cases, for there were no omissions nor surprise by the party or the court.

But there is another class of cases within which it does fall—that of accidental inability to give security for the appeal, which is the party's misfortune and not his fault. It is admitted that he intended to appeal, and prayed for it, for the point reserved was drawn out by the court and the plaintiff's exception to the opinion given on it. The defendant states that this was on Friday morning, and that the court was kept open for the purpose of allowing the appeal until the term expired on Saturday night. This was all the court could do. But the plaintiff swears that he came to court on Saturday morning, and then first heard of the decision; that he prayed an appeal, the judge stated the case, and that he made every effort to procure sureties, but could not. This the defendant does not profess to deny in his affidavit. In such a case it has always been the course to grant a *certiorari,* where it was not apparently merely for delay or for the vexatious purpose of avoiding a decision made on the merits. If the case is a fair one for discussion, a rehearing ought not to be precluded by an inability to give security at the moment. I do not suppose indeed that it would be granted if it appeared that it would or might be used unfairly, without laying the party under terms not so to use it or to take advantage of a mere slip or informality without regard to the merits. This would be an abuse of a discretionary writ by one who has been deprived by another of no right, but who gets it by asking it as a favor. The case before us furnishes an example illustrative of my meaning. The record, which the plaintiff exhibited with his petition, contains a verdict in favor of the plaintiff, subject to the opinion of the court on a point reserved, (227) but did not state the point nor the facts on which it arose, and on this a judgment for the defendant. Now this was a plain error for which there would necessarily be a reversal. In such a case I should think it proper to lay the party under a rule to amend the verdict by inserting the case then stated or now to be stated by the judge. In this case the parties have rendered this unnecessary by inserting the matter reserved by consent in the record returned with the *certiorari* by the clerk of the Superior Court. Upon the inspection of the record it appears that the cause was brought here not to stifle the merits, not to delay a final decision vexatiously, not entirely without merits, but upon an exception to the opinion of the court upon the validity of the plaintiff's title to the land alleged to be damaged. The point is one which enters into the *gist* of the dispute, and the exception is a fair one to an

opinion of very general consequence and, to say the least of it, the correctness of which is very doubtful.

Writs of *certiorari* have often been granted upon the circuit, on the ground of real inability to obtain an appeal. *Estes v. Hairston,* 12 N. C., 354, is an instance in this Court. I take it for granted when the party swears to his inability, and that it is not contested in the opposing affidavits, it is true. For there is in general no inducement to refrain from appealing, after excepting and praying it, but inability, because security must be given before he can have a *certiorari,* and because it is not so advantageous as an appeal upon which he can be laid under no terms.

I think, therefore, the cause must be put on the docket to be decided on the matter of the exception.

PER CURIAM. Motion overruled.

Cited: Elliott v. Holliday, post, 377; *Britt v. Patterson,* 31 N. C., 201; *McConnell v. Caldwell,* 51 N. C., 470; *Barton ex parte,* 70 N. C., 136; *Walton v. Pearson,* 83 N. C., 311; *Smith v. Abrams,* 90 N. C., 24; *S. v. Warren,* 100 N. C., 493.

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(228)

CHARLES HATCHER v. JOHN MCMORINE.

1. Where A. and B. were endorsers of a bill drawn for the accommodation of C., and A. being the first endorser paid it, and afterwards received the note of C., endorsed by B., for one-half the amount; *it was held* that this note was not given for the accommodation of A., and that he might recover on B's endorsement.
2. The case of *Daniel v. McRae,* 9 N. C., 590, approved by HENDERSON, C. J.

THIS was an action of debt, brought upon the defendant's indorsement of a single bond made by Asa and Isaiah Rogerson for $500, payable to the defendant, and on *nil debet* pleaded, the cause was tried before *Martin, J.,* at PASQUOTANK, on the last circuit, when the case was that Asa Rogerson had drawn a bill upon Garrison and Ford, of Norfolk, for $1,000, payable to the plaintiff, who indorsed it to the defendant, by whom it was indorsed to the office of the Bank of the United States at Norfolk. At its maturity this bill was protested, and the drawer and acceptor having become insolvent, the plaintiff took it up. One witness stated that the bond which the defendant had indorsed, and on which the suit was brought, was executed for the benefit and accom-

modation of the plaintiff, to enable him to receive its amount from the bank, and when received it was to be applied to the payment of one-half of the bill of exchange, and a letter of the plaintiff was produced by the defendant in which he said, "I have paid an indorsement of yours for $1,000. I have agreed to waive it for half, $500, at sixty days for Asa Rogerson's note, with your indorsement."

His Honor charged the jury that the plaintiff as the first indorser of the bill was liable for the whole amount of it, and if the bond in question was made and indorsed for his accommodation in order to raise funds for its payment, he could not recover on the indorsement.

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

Hogg for plaintiff.
Kinney contra.

HENDERSON, C. J. This case may be determined without the (229) aid of the principle established in the case of *Daniel v. McRae,* 2 Hawks, 590, to wit, that in bills or notes for the accommodation of the drawer or maker, prior and posterior indorsers stand in equal degree as cosureties, without any express contract to that effect, if at the time of their respective indorsements they knew that it was accommodation paper for the benefit of the drawer or maker, and that nothing was paid for or upon the indorsement. For this case states that Rogerson, the maker of the note, had before that time drawn a bill on Garrison and Ford for $1,000 in favor of Hatcher, which they had accepted, and which Hatcher had indorsed to McMorine, and McMorine to another, and finally it was discounted at bank; that the drawer and exceptors became insolvent, and that Hatcher, the first indorser, *paid the bill.* If this was a real transaction, Hatcher had a right to call on Rogerson for the $1,000. And if the note now in suit was drawn by Rogerson, although it might have been indorsed by McMorine solely for Rogerson's benefit, McMorine is bound to Hatcher, because Rogerson, whom he authorized to receive value for it, has in fact received it, as he paid it to Hatcher in part discharge of the money which the latter had paid on the bill. Rogerson's receipt of value for the note is McMorine's receipt of value, because Rogerson received it by his authority. This is our daily experience with the banks upon accommodation paper. Therefore, in the absence of all proof on the subject, except that Hatcher paid the $1,000 on the bill, the plaintiff has a clear right on this note and indorsement. Does Hatcher's letter to McMorine, which McMorine produces, and therefore makes evidence, vary the case? I think it makes it stronger for the plaintiff. That letter proves, I think, that Hatcher and McMorine were Rogerson's accommodation indorsers on the bill.

It requires McMorine to pay him one-half, and offers to take Rogerson's note (who was bound for the whole) with McMorine's indorsement for $500. For what? For McMorine's part of the $1,000, which he (Hatcher) had paid on the bill, and of which it seems, from the letter, he held McMorine bound for one-half, and McMorine's accession (230) to the proposition, and his offering the letter in evidence are very strong evidence that the fact is so. This superadds an obligation prior to and independent of the indorsement on which he is sued. There is nothing, then, but the testimony of the witness, who swears that the note in question was given for Hatcher's accommodation, upon which to rest the defense. But how for Hatcher's *accommodation?* The witness himself tells us, "that Hatcher might get it discounted at the bank, and thereby raise or get money to pay the bill." He must mean to reimburse Hatcher for the money paid on the bill, as the case states that Hatcher had before that time paid the bill. Then, according to the witness' own account, it was not for Hatcher's accommodation. The parties may have called it so, but in reality, from the witness' account, it was to pay Hatcher part of what was due to him from Rogerson, and according to the letter, and I think the acquiescence in the proposition contained in it, due to Hatcher by McMorine also as cosurety on the bill. If the bill of exchange had been for Hatcher's accommodation, it cuts up the plaintiff's case. For then this note and indorsement have no value—no consideration to rest on. I thought I might have misunderstood the case, and examined it again to see *what* the witness said was for Hatcher's accommodation. But I find the case is explicit. It is the bond on which this suit is brought.

The judge, therefore, as I conceive, mistook the point of the case as to prior and posterior indorsers. It depended not on that solely, but on the question whether the bill for $1,000 was for Hatcher's benefit and accommodation. If it was the plaintiff is entitled to recover.

I should have been glad to review the decision in *Daniel v. McRae,* as I am aware that it has not given very general satisfaction, and the Supreme Court of the United States has decided a case in direct opposition to it which I have seen and examined. But the reasoning is very far from satisfying me that they are right, or that *Daniel v. McRae* is wrong.

PER CURIAM. Judgment reversed.

Cited: Richard v. Simms, 18 N. C., 50; *Dawson v. Petway,* 20 N. C., 535.

(231)

RUFUS HAYWOOD, ADMINISTRATOR OF J. G. BLOUNT, v. EDMUND D. MCNAIR.

1. A bond payable on demand, which is assigned eight years after its execution is dishonored, and liable in the hands of the assignee to all the defenses which the obligor had against the obligee.
2. But these defenses, in order to be available at law, must be legal defenses.

THIS was an action of debt upon a bond executed by the defendant to David Barnes, and by him assigned to Sherwood Haywood, the first administrator of J. G. Blount. Upon the death of Sherwood Haywood, administration *de bonis non* upon the estate of Blount issued to the plaintiff.

The cause was defended upon the ground that the bond was overdue when assigned, and that the defendant had a set-off against Barnes to a greater amount.

On the trial at EDGECOMBE, before *Swain, J.*, on the last circuit, the case was that the bond on which the action was brought was for $428, payable on demand, with interest from 1 November, 1820, and dated 9 January, 1821. The plaintiff proved that on 25 November, 1828, Sherwood Haywood sold the perishable property of his intestate upon a credit of six months, the purchasers to give bond with surety; that Barnes purchased a quantity of corn, amounting in value to $408, and not having complied with the terms of the sale, the administrator directed his agent to call for a bond with surety; that on the 27th of the same month Barnes deposited with the agent the bond on which the suit was brought, to remain in pledge until he had complied with the terms of the sale, and at the time of doing this requested the agent to say nothing about it to the defendant; that the agent did not mention the circumstance to McNair until the month of April following, when McNair, upon the bond being presented to him, refused to pay it; that in May following Sherwood Haywood had a conversation with McNair, when the latter observed that "Mr. Jackson had a demand upon the estate of Blount to nearly the amount of the bond, and *as* he had it to pay, or *if* he had it to pay, he would prefer making pay- (232) ment to Jackson," and requested that the matter might be arranged accordingly, which was agreed to. In the same conversation the defendant requested that Barnes might be induced to take up the bond and give another security, saying if he could get it back into his hands he had a set-off against it. In the hope of effecting one of these proposed arrangements, the bond was retained by the agent until after 1 July following, when Mr. McNair refusing to pay it, an assignment of

it was taken from Barnes to Sherwood Haywood as administrator. The defendant produced a note for $1,839, dated 28 November, 1828, payable 1 March, 1829, to Sherwood Haywood, signed by him as surety for Barnes, on which there was an indorsement of payment in full on 1 July, 1829.

His Honor left it to the jury to inquire into the character of the transaction between Barnes and the agent of Sherwood Haywood, and instructed them that if they should be satisfied that the request of Barnes not to mention the deposit of the bond to the defendant, and the compliance of the agent with that request was the result of a combination between them to withhold the information from the defendant, that he might be the more easily induced to become the surety of Barnes in the note for $1,839 to Sherwood Haywood, or with the view of defrauding the defendant in any way, the plaintiff would be affected by the fraudulent conduct of the agent, and they ought to find a verdict for the defendant; that if the bond was delivered on 27 November, 1828, in good faith for the purpose of securing the purchases of Barnes, the deposit gave the administrator of Blount an equitable interest in it, and that having subsequently procured an assignment of it, he had thereby acquired a legal title, and had a right to institute this suit; that the fact that the defendant became Barnes' surety on the day following the deposit of the note by the latter constituted no defense to the action, and that even if he had paid the money on that day the assignee, having received the bond on the day previous, had the prior equity.

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

Attorney-General and Gaston for defendant.
Hogg and Badger contra.

HENDERSON, C. J. This note, although payable on demand, from the great length of time since its date is overdue and therefore dishonored, by which is meant that if assigned it is subject to all defenses and exceptions to its payment in the hands of the assignee, to which it was open in the hands of the assignor. But if the defenses are of a legal nature they are to be made in a court of law; if of an equitable nature they must be made in a court of equity. The equities of the parties are not examinable in a court of law any more than the equities between other parties. Therefore, whether Haywood had a right to call for an assignment before the payment of the money by McNair as Barnes' surety, because the note was in his hands as collateral security for a debt due from Barnes to him, and whether he had not forfeited that right as to McNair by agreeing to keep the deposit secret, and not dis-

closing it to McNair, when he accepted him as Barnes' surety for the debt of $1,839, are all questions with which a court of law has nothing to do. And the principal question, and in fact the only one in this case is, what were the legal rights of the parties when the plea of McNair was put in? This depends on the rights of Barnes at the time of the assignment. If it was subject to the defense offered against Haywood, when in the hands of Barnes, it is subject to the same (234) defense in the hands of Haywood, for Haywood took the assignment subject to all exceptions, in his hands, to which it was subject when in those of Barnes at and before the assignment. With this explanation a mere statement of the facts will, I think, decide the question. At the time of the assignment NcNair had paid for Barnes, as his surety, money to a greater amount than was due on the note. Barnes was then McNair's debtor to that amount. And if McNair had then been sued by Barnes on this note he could have pleaded this debt in bar to the action as a set-off. Therefore, when sued by Haywood as Barnes' assignee, the same defense being open to him, not to be sure by way of the plea of set-off against Haywood, but in bar of Haywood's action by reason of the set-off which he had against Barnes, the defense must be sustained. For it has been often said before, if the set-off against Barnes was a bar to Barnes' action, it is a bar to Haywood's also. The conversation which passed in April did not amount to such a fraud on the part of McNair as to preclude him from using this defense. Nor is it an abandonment of it. What he then gave up (if he gave up anything) was not purchased by Haywood. He neither paid anything nor did he forego any right in consequence of it; nothing grew out of it beneficial to McNair coming from Haywood. Nor was any loss suffered by Haywood in consequence of any promise made by McNair. But it is evident that no new obligation was intended to be incurred by the one or acquired by the other. I forbear to enter into an examination of the authorities, for they are not in opposition to what has been said. The case in Johnson only establishes this position; that where there is anything flowing from the maker which holds out that a note, although overdue, is still unpaid in whole or in part, as by making payments, he shall not be permitted to say that nothing is due on it. It would be more consistent with principle if it had precluded the maker from showing that nothing had ever been due, as a total mistake in giving it. For the partial payments are in opposition to such an aver- (235) ment. For I cannot see how a partial payment precludes a partial mistake in the amount due being shown. It does not appear to me that such a circumstance renders a dishonored note negotiable again in the proper sense of the term. When a note is given it is an acknowledg-

ment that the amount is due. The making of a partial payment amounts only to the same thing, that a balance is due, which balance may become dishonored if not paid in a reasonable time on a note due on demand, to which such payment may possibly convert all notes where the time of payment is past. But let this be as it may, McNair held out no false lights as to the facts to Haywood. Haywood was as well acquainted with McNair's ground of defense as McNair himself, and much better with his equitable grounds, from the time he took Barnes' note with McNair as surety until McNair knew that Haywood held the note in question as collateral security for another debt.

There is nothing in the argument that as the demand is not against Haywood, but against Barnes, it cannot be used as a set-off, because that relates to mutual debts between plaintiff and defendant. The point is, if McNair had a set-off, a counterclaim against Barnes, it forms a plea in bar against his assignee. The conclusion of the plea is not as in the plea of set-off, and therefore he sets off said debt against a demand on the part of the plaintiff, and which of course he acknowledges to be due the plaintiff, but he pleads the demand against Barnes as a bar to Haywood's action, to whom he denies anything to be due.

HALL, J. From the statement of the case furnished by the record, it is necessary to ascertain what are the legal rights of the parties.

It appears that the note on which the suit is brought was executed 9 January, 1821, payable on demand; that it was deposited with Sherwood Haywood's agent, 27 November, 1828, and that it was assigned to Sherwood after 1 July, 1829. At that time Sherwood Haywood first acquired the legal title to it, and as the note was payable many
(236) years before that time, he could only acquire by the assignment such legal rights against McNair as Barnes himself could enforce against him. This leads to the inquiry, what were the rights of McNair against Barnes, or in other words what defense could McNair set up to a suit brought on the note by Barnes?

It appears that before the assignment was made to Haywood McNair had paid Barnes, upon a judgment obtained against Barnes and himself as surety for Barnes, the sum of $1,839, besides interest. There was certainly nothing to prevent him from pleading that as a set-off to a suit brought on the note against him by Barnes, consequently as Haywood succeeded only to Barnes' rights he may make the same defense to an action brought on the note by him as assignee of Barnes.

But it has been relied upon in argument for the plaintiff that circumstances have occurred which throw this case out of its ordinary legal channel. It appears that Sherwood Haywood and the defendant had a

conversation in the month of May in which the defendant remarked that "Mr. Jackson had a demand upon the estate of plaintiff's intestate of about the amount of the bond, and *as he had it to pay,* or *if he had it to pay,* he would prefer making a settlement with Jackson," and asked that an arrangement of this kind might be made, which was agreed to. The defendant further requested, if it could be done, that Barnes should be induced to take up the bond by substituting one on some other person, saying that if he could get it back into his hands he would have a set-off as against him. Now I think it makes no difference whether in this conversation the defendant said, *as* he had it to pay, or *if* he had it to pay. Be it either, he only showed an ignorance of the law of his case. It certainly did not amount to a promise or a new contract. In the conversation the defendant manifested a disposition to avail himself of his set-off against Barnes. His mistake was that he did not know he could do so against the plaintiff.

Another circumstance may be here noticed, which (if it has any effect) certainly militates against the plaintiff's claim. When the note was deposited with the plaintiff's agent, Barnes requested him to keep it concealed from the defendant. He did so until the (237) following April, when application was made for payment, and the defendant refused to pay it. The day after the note was pledged the defendant became Barnes' surety for the money, which the case states he has since paid off. Now had the defendant known that Barnes had parted with his note he might less readily have entered into that suretyship.

I see no grounds on which the plaintiff is entitled to recover, and I think the rule for a new trial should be made absolute.

PER CURIAM. Judgment reversed.

Cited: S. c., 19 N. C., 284; *Turner v. Beggarly,* 33 N. C., 334; *Wharton v. Hopkins, ibid.,* 506; *Capel v. Long,* 84 N. C., 19.

GEORGE W. WOODMAN v. JOHN MOORING.

After a bond has been discharged by the principal debtor, it cannot be set up again, to the prejudice of a surety, by a subsequent agreement between the principal and the obligor.

DEBT, upon a single bond, executed by one Pinkit, with the defendant as surety.

Plea—*payment,* on which it was tried before *Swain, J.,* at MARTIN, on the last circuit.

The defendant proved that the plaintiff came to the house of Pinkit and purchased from him a negro for $550, from which was to be deducted the amount of the bond, and the residue to be applied to other debts due the plaintiff; that the boy was not then delivered, and that the sale was to be completed by the delivery of the slave at the residence of the plaintiff the ensuing week, after which the boy was seen in his possession. To rebut this testimony the plaintiff offered to prove by his clerk that a year after the time when the sale was alleged by the defendant to have been made, he and Pinkit made another contract, by which a debt due him by Pinkit, incurred after that time, was to be paid from the purchase money and the residue applied to the bond in suit.

His Honor refused to receive this testimony, thinking it to (238) be irrelevant, and the defendant had a verdict, whereupon the plaintiff appealed.

Attorney-General and Gaston for plaintiff.
Hogg contra.

HALL, J. The question presented in this case is, whether the judge erred in rejecting the testimony of the plaintiff's witness, who lived with him as a clerk. I think that evidence was properly rejected, because admitting the facts to be as the plaintiff proposed proving them by that witness, he was not entitled to recover against the present defendant. I do not speak of the effect or relevancy of the evidence in case Pinkit was sued. When the plaintiff purchased the negro boy, or when he was delivered perhaps, according to the testimony the bond was paid in pursuance of the express contract between Pinkit and the plaintiff, and the defendant was discharged from his suretyship, and no contract which the plaintiff and Pinkit could afterwards enter into could revive it and make the bond again obligatory upon the defendant. It not only appears that the bond was discharged by the sale of the negro to the plaintiff, but a balance of the purchase money remained and was to be applied to Pinkit's credit in some other way. If the rejected evidence amounts to anything, it shows an unfair combination between the plaintiff and Pinkit against the defendant. It certainly discloses no merits on the plaintiff's side to entitle him to recover.

PER CURIAM. Judgment affirmed.

JOHN W. PULLEN v. JOHN SHAW, ADMINISTRATOR OF W. S. ROBERTS.

An alteration in a deed, which is prejudicial to the obligee, as where the date was altered so as to deprive him of one year's interest, is presumed to have been made before the execution.

DEBT upon the following bond of the defendant's intestate: "One day after date I promise to pay to J. W. P. the just sum of nine hundred and eighty-seven dollars fifty-seven cents, for value received. (239) Witness my hand and seal this 11 November, 1821."

Plea—non est factum, upon which the cause was tried before *Swain, J.,* at WAKE, on the last circuit.

The defendant contended:

1. That the note was a forgery.

2. That the obligor and obligee had dealings in the bank, and that the plaintiff's intestate had signed the paper in blank with the view of being used, upon applying for a discount, and that the plaintiff had fraudulently filled up the blank signature.

3. That the bond had been altered, having been originally 11 November, 1820, instead of 1821.

Upon these points many witnesses were examined, and the examinations certified with the record. It was manifest upon inspection that the date had been altered. The body of the note and the erasure was in the plaintiff's handwriting, and the defendant attempted to prove that the alteration benefited the plaintiff, by rendering an admission of his concerning the accounts between him and the intestate consistent with the date to which it was altered.

The counsel for the defendant moved the court to instruct the jury that, as the bond on its face appeared to be altered, it was incumbent on the plaintiff to show its fairness. But his Honor, leaving the two first grounds of defense to the jury upon the facts, charged them that if the plaintiff had, after the execution of the bond altered the date, without the knowledge and consent of the obligor, he could not recover. A verdict was returned for the plaintiff, and the defendant appealed.

Seawell and Gaston for defendant.
Badger and W. H. Haywood contra.

HENDERSON, C. J. Erasure avoids a deed when made by the (240) party claiming a benefit under it, *even if it be an immaterial part,* if made by a stranger in a material part, it also avoids the deed; if *by accident,* it does not. Formerly the court judged of an erasure by inspection, latterly the jury do. In judging by inspection the court

governed itself as juries do now, by probabilities in the absence of positive proof. If the alteration on the erased part was in the handwriting of the obligee or a stranger, and beneficial to the obligee, the court adjudged it an erasure; that is, an alteration made after the execution, and avoided the deed. If prejudicial to the obligee, the court adjudged it no erasure; that is, made before execution, and did not avoid the deed. If in the handwriting of the obligor either way, they adjudged it no erasure; that the alteration was made before execution and did not avoid the deed. Juries are now governed by the same rules. In the case before us, the date of the bond is altered, and it is made payable in 1821, instead of 1820, as it is said, is evident from the erasure not being complete, as appears from an inspection of the deed, and the alteration is in the handwriting of the obligee, and prejudicial to the obligee, for he loses one year's interest. It is payable from the date, or from a fixed period from the date. One of the rules before mentioned, to wit, that if the alteration is prejudicial to the obligee, though in his handwriting, it is no erasure, determines this case, as it is presumed that the alteration was made before execution. If the question was to be decided by the court, as formerly, we should pronounce it to be no erasure. In the absence of all evidence *dehors* the deed, the jury were properly instructed to *pronounce* it so. The plaintiff has failed in his evidence to prove, if that was his object in putting it on the record, that the alteration was beneficial to the obligee by showing that he thereby avoided the effect of his admissions as to the state of the account against the defendant by changing the date from 1820 to 1821.

PER CURIAM. Judgment affirmed.

Cited: Smith v. Eason, 49 N. C., 38; *Wicker v. Jones,* 159 N. C., 109.

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(241)

DEN EX DEM. CALEB WHITE v. WILLIAM ALBERTSON.

1. A *cestui que trust,* who obtained possession in that character, is not permitted at law to deny the title of the trustee. And where he has admitted it by a parol declaration, a purchaser under the trustee is not bound to prove the title of the latter.
2. A judgment cannot be collaterally impeached for error; if rendered according to the course of the court, however erroneous, it is valid until reversed.
3. Although satisfaction of a decree against an executor who has fully administered, can now be had out of the lands of the testator only upon a bill against the heir, yet a sale under an order made upon a *sci. fa.* is valid.

4. A judgment by *nil dicit* against an infant heir is not void, but only erroneous.

5. Where judgment was rendered against an infant upon process issuing against his guardian, who appeared for the infant, this appearance, although irregular, is taken to have been sanctioned by the court.

6. A judgment is void when rendered contrary to the course of the court, but if improperly rendered against a party when it should have been in his favor it is only erroneous.

EJECTMENT for a lot of ground in Elizabeth, tried on the last circuit, at PASQUOTANK, before his Honor, *Martin, J.*

The plaintiff proved that the defendant had admitted that William T. Muse and John Mullen had bought the lot for him, and that he was to have it when he paid the purchase money; that he had complied with this engagement and claimed the lot as his property.

The plaintiff then introduced the record of a suit in equity against John B. Blount, the executor of William T. Muse, in which the plaintiff had obtained a decree for $1,935, and on which, as the plaintiff admitted the executor to have fully administered, a *scire facias* was ordered to issue "to the heirs and devisees of Muse, by their guardian, John B. Blount." In pursuance of this order a *scire facias* issued reciting the decree and the descent of lands, and directing the sheriff "to make known to the said John B. Blount, guardian to the heirs of the said William T. Muse, that he appear," etc., which was endorsed "Service accepted. J. B. Blount, guardian of J. B. and W. T. Muse, per Thomas M. Blount." Afterwards an entry was made "that execution issue to "sell the land for the amount of the decree." An execution issued according to this order, and the lessor of the plaintiff purchased at sheriff's sale and took a deed to himself. The plaintiff also proved that John B. Blount was the executor of Muse and guardian to his children, and contended that as the defendant claimed under him, he was estopped to deny his title, and could not set up an equitable defense in this Court. But his Honor being of a different opinion, a nonsuit was entered and the plaintiff appealed.

Kinney for plaintiff.
Iredell contra.

HENDERSON, C. J. We cannot look into the mere errors in (242) rendering judgment, but only into its regularity according to the course of the court. For if the judgment be regular, however erroneous we may think it is, it has, until reversed, all the power and effect of a judgment.

The process of *sci. fa.* against heirs to enforce a decree in equity against the executor or administrator of the ancestor upon a deficiency of assets, until declared to be improper by this Court, in the case of *Jeffreys v. Yarborough* (1 Dev. Eq. Cases, 506), a decision in which I did not concur, was the common and ordinary mode of proceeding. We cannot impeach the judgment for that irregularity. It would unsettle too much property. Nor can we impeach it, because a default or judgment by *nil dicit* was taken against the infant heirs; for this is only error, but does not render the judgment null. The only objection which has the appearance of solidity is, that the defendants, the heirs, were not made parties; and if the fact be so, the judgment is void, for there can be no judgment but against one in court. It is not according to the course of the court to render judgment against one not brought into court. The *sci. fa.* in this case is not against the proper person. It should have been against the heirs themselves. But when the service was admitted by John B. Blount, the guardian of J. B. and
(243) W. T. Muse, we must then consider J. B. and W. T. Muse as in court. For that court was the proper judge. It is so decided, and it cannot be contradicted in this collateral way, whether they were properly in court, whether John B. Blount was their guardian, or whether it was competent for Thomas H. Blount to admit service for John B. Blount, for it is evident that these points were either expressly or impliedly so adjudicated by the court. The court may have erred, and certainly acted very unadvisedly in permitting the executor to defend as guardian, for on his full administration it depended, whether execution was to issue against him or the heirs. The judgment therefore is not void, neither is it taken contrary to the course of the court.

The lot was sold as the property of the heirs of William T. Muse, and it was proved that the defendant declared that Muse and one Mullen purchased it for him, and that when he paid the purchase money it was to be his, and that he had paid the money. The plaintiff showed no conveyance but the sheriff's deed. The defendant showed no title. As to setting up an equitable title, it has been long since exploded for reasons much better than I can give. I can see no reason why, after the declaration that the defendant held under Muse, or that Muse had the legal title, and that he had only an equitable one, when sued by Muse, his acknowledged trustee, or a purchaser under him, that he should put the plaintiff to the proof of that which he had admitted. The adoption of such a rule would destroy all confidence between man and man. It is true that the admission does not give Muse a title, for that would be to give him one by mere parol, but it requires that the defendant should not retain that possession against Muse, which he acquired from Muse in confidence, and as his *quasi* tenant. After hav-

ing surrendered that possession he may controvert Muse's title, but he shall not weaken it by setting up a possession thus confidentially acquired. In this case, however, the plaintiff upon this evidence is entitled to recover possession of one-half only, for the defendant obtained it under Muse and Mullen, and the plaintiff represents (244) the former only.

When I say that the *scire facias* should have issued against the heirs of Muse, and not against their guardian, I do not mean that it must be against the heirs *by name,* for I think that a *scire facias* directing the sheriff to make known to the heirs generally, without naming them, would be good.

A judgment is void and confers no rights against *any one* (wherever and however it may be introduced, either directly or collaterally) when it is taken *contrary to the course of the court.* It is erroneous when the court mistakes the law and renders judgment for one party, when upon the record it should have been rendered for the other, or rather when a judgment different from the one given should have been rendered, but in that case it is as binding until reversed, as if it were not erroneous.

PER CURIAM. Judgment reversed.

Cited: Skinner v. Moore, 19 N. C., 150; *Burke v. Elliott,* 26 N. C., 359; *Newsom v. Newsom, ibid.,* 389; *Keaton v. Banks,* 32 N. C., 384; *Turner v. Douglas,* 72 N. C., 132; *McAden v. Hooker,* 74 N. C., 29; *Moore v. Gidney,* 75 N. C., 41; *Larkins v. Bullard,* 88 N. C., 36; *England v. Garner,* 90 N. C., 211; *Fry v. Currie,* 91 N. C., 437; *Spillman v. Williams, ibid.,* 487; *Hare v. Holloman,* 94 N. C., 21, 22; *Sumner v. Sessoms, ibid.,* 376; *Tate v. Mott,* 96 N. C., 25; *Morris v. House,* 125 N. C., 563; *Ditmore v. Goins,* 128 N. C., 327; *Rackley v. Roberts,* 147 N. C., 208; *Phillips v. Denton,* 158 N. C., 303; *Harris v. Bennett,* 160 N. C., 343; *Finger v. Smith,* 191 N. C., 820.

JAMES MOORE, EXECUTOR, v. SOLOMON TICKLE.

No power can be inferred from a relation of master and servant, whereby the servant can bind his master. Hence a groom has not the right to vary from his employer's terms, unless a special authority be proved.

THIS was an action commenced by a warrant, wherein the plaintiff sought to recover five dollars for the season of a mare belonging to the defendant, to the horse of his testator.

The cause was tried before *Norwood, J.*, at ORANGE, on the last circuit, when the plaintiff having proved that the horse was advertised for the season at five dollars, and that the defendant's mare was put to him for that period, the defendant proved a special agreement with the groom whereby he was to pay but three dollars and fifty cents, and offered some evidence of a custom among the keepers of horses whereby the grooms were permitted to alter the advertised prices.

(245) His Honor informed the jury that if it was the custom for grooms to make special contracts with the owners of mares, they might from the evidence in the cause presume the agency of the groom, and in that event the plaintiff would be bound by the agreement between his groom and the defendant.

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

No counsel for plaintiff.
Nash for defendant.

HALL, J. The terms which the plaintiff held out to the public were notorious. There is no complaint that the defendant was ignorant of them. The employment of the agent did not lead him into contact with those terms; it had no relation to them. He had no right to alter them in whole or in part. If the defendant and the agent made a contract in contravention of them, it must have been understood, or ought to have been understood, that it was not obligatory without the assent of the employer.

But a custom sanctioning this agreement with the agent has been relied upon. I imagine it would be very difficult to prove such a custom. Instances of such secondary contracts may have happened and been connived at, but such instances fall far short of establishing a custom which is to be considered generally obligatory. There is no necessity in this case to presume that an implied power was given by the employer to the agent to alter the terms held out to the public. If the employer had thought proper to confer such a power he could easily have expressed it. This is not like the case of a salesman behind the counter. He is identified with his employer. He acts in the room and place of his employer in selling goods. He is placed there for that purpose, and his employer is bound by his acts. But a principal is not bound by a regulation entered into by his agent, unless it come within the scope of a delegated authority.

RUFFIN, J. The terms expressed in the advertisement may certainly be varied by a special contract, and that contract may be made with the owner of the horse or his agent. But if made by the latter, his

character must be proved. This is not done by the evidence in (246) this case. There is no proof of an express agency to this purpose. Nor can an authority to make special bargains be inferred from the relation between the parties. A groom is the mere servant, menial as it were—not the general agent of the owner of the horse. And as to what the case calls "some proof of a custom," I must say that the understanding or misunderstanding of the law in a particular neighborhood, or by a portion of the people in the neighborhood, cannot enlarge the powers of a lackey into those of an agent capable of controlling the contracts of the master.

Customs are of two sorts—general and local. The former needs no proof, but are judicially known and form part of the law. The latter, if proved, cannot alter the law or form a ground of the construction of a contract, except in a very few cases, which are mostly of a mercantile character.

If indeed there had been proof that this groom had made other contracts on terms variant from those advertised, and the master recognized them, by receiving payment according to them, or otherwise treated them as valid, it would have been different. That would have been evidence; that in this particular case there was in fact an agency as understood by all the parties. But there was no evidence of that sort. And such an agency cannot be inferred from the circumstance that some other grooms have been, or have been understood to be, their master's agents. A groom is not known, as a trader's shopman or a merchant's clerk, and therefore there must be evidence of an actual authority in the former to make contracts different from those offered by the owner.

PER CURIAM. Judgment reversed.

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(247)

JOHN FINLEY v. WILLIAM D. SMITH.

1. The proper county to which a *ca. sa.* should issue, in order to charge the bail, is the county where the original writ was executed.

2. The case of *Benton v. Duffy*, Conf. Rep., 98, approved in part.

3. If the defendant has no fixed residence in the State, then the *ca. sa.* ought to issue to the county where the bail bond was taken, that the bail may have notice.

4. But if the defendant has acquired a domicil in another county and the plaintiff has notice of it, the *ca. sa.* ought to issue to that county.

5. A temporary residence by a single man without property is not such a change of domicil as justifies the plaintiff, in order to charge the bail, in issuing the *ca. sa.* to any other county than that in which the original writ was executed.

THIS was a *scire facias* against the defendant as the bail of one Newton. The *sci. fa.* recited that the original writ against Newton had issued to the defendant as sheriff of Buncombe, who executed it, but took no bail bond.

Plea—that the *ca. sa.* upon the judgment obtained by the plaintiff against Newton had not issued to the county of Buncombe, with an averment that Buncombe was the proper county to which the writ should have been directed.* Replication that the *ca. sa.* had issued to the county of Lincoln, where Newton was domiciled, and which was the proper county to which the writ should have been directed. Issue was taken upon the facts pleaded in the replication, which was tried on the last circuit before his Honor, *Daniel, J.*, at WILKES.

On the trial it appeared that Newton was a single man without a house or land; that he was a plasterer by trade, and went about the country procuring work where he could find it; that after his arrest he left Buncombe County and went to Lincoln, where he undertook to plaster a house, and remained for three weeks, when he left the State.

(248) His Honor charged the jury that the proper county to which the *ca. sa.* should have been issued was that where Newton had a domicil, or had last resided; that if it was unknown to the plaintiff where his domicil was the law presumed it to be in the county where the original writ was executed, but that presumption might be rebutted; that if they were satisfied that Newton had abandoned Buncombe County and had gone to Lincoln to work at his trade, then it would not be proper to direct the *ca. sa.* to that county, but it should have issued to

*The 19th section of the Act of 1777 is as follows: "That all bail taken according to the directions of this act shall be deemed held and taken to be special bail, and as such liable to the recovery of the plaintiff; but the plaintiff, after final judgment, shall not take out execution against such bail until an execution be first returned that the defendant is not to be found in his proper county, and until a *scire facias* hath been made known to the bail, which *scire facias* shall not issue till such execution shall have been so returned; and after return of such execution against the principal, and *scire facias* against the bail, execution may issue against the principal and securities, or any of them, or any of their estates, unless the bail shall surrender the principal before the return of the first *scire facias*, or shall appear and plead upon the return thereof, any law, custom or practice to the contrary thereof in any wise notwithstanding."

Lincoln; that if they thought Newton had entirely abandoned Buncombe when he left it for Lincoln, then a residence in the latter county of three weeks, together with the fact that the plaintiff was ignorant of his having left the State, would enable them, if they thought proper, to infer that Lincoln was the proper county.

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

No counsel for either party.

RUFFIN, J. The question is, what is the *proper county* within the Act of 1777 (Rev., ch. 115, sec. 19) to which the *ca. sa.* shall issue before charging the bail?

In England it is the county in which the *venue* was laid. *(Dudlow v. Watchorn,* 16 East, 39.) And as that in transitory actions is at the election of the plaintiff, and need not be that in which the defendant lives, or was arrested, it seems, as *Mr. Tidd* remarks, that the *ca. sa.* is not intended there actually to cause an arrest of the principal, but rather to intimate to the bail to what species of execution the creditor means to resort. The purpose is not so much to take the body on the writ as to let the bail know that he must render the body. Hence it is only necessary to take effectual means of giving that notice, which is held to be by depositing the writ in some certain sheriff's office to which the bail can have recourse for inquiry, and that in which the action was laid has been the one selected in all cases.

We think, however, that our Legislature meant that and something more in our statute, and that the *ca. sa.* is required as well for the benefit of the bail as the plaintiff. The *ca. sa.* ought to be issued to the county where it may be executed by the actual arrest of (249) the defendant, if that can be done, and if that cannot be done, then to the county in which it will most probably give notice to the bail. For the words are not "in *the* proper county," but "if the defendant cannot be found in *his* proper county." This is prima facie the county in which the defendant was originally arrested, because his residence must be taken to have then been there, because it is presumed the bail reside there, and will get notice by the writ, because the plaintiff is not to be charged, at his peril, with the duty of taking notice of the defendant's change of residence; and because, in case the defendant leaves the State, or has no fixed residence in another county in the State, there is no other certain place to which the defendant can send his execution, and the law surely intended to give some certain one. This we take to be the principal point decided in *Benton v. Duffy* (Conf. Rep., 98), which is believed to have been followed ever since. But as I have before said, the

execution required in our act was intended to be an effectual one. If sent into the county where the *capias ad respondendum* was served, it would not have that character in case the defendant had in fact removed from it. In that event it ought to go to the county where he then resides, provided the plaintiff has knowledge of it. There is no reason for obliging the plaintiff to know where the defendant lives. He has a right to presume, as against the bail, that his original county is yet his proper county until it be shown that he knows the contrary, or had reason to know it. Upon this point, therefore, the court now differs from *Benton v. Duffy* if in that case the demurrer to the rejoinder was sustained. The report is obscure, and it does not appear what judgment was directed to be given, nor do I understand what is meant in the latter part of the opinion, where it is said that the county of the arrest ought not to be departed from unless a return of the sheriff evinces that such county no longer continues to be his proper county. It is clear, however, in the admission that the original county is to be de-

(250) parted from where it satisfactorily appears that it no longer continues to be the defendant's proper county. And I do not know how that could be more conclusively established than by a plea that at the time of issuing the *ca. sa.* to one county, the principal resided in another county and the plaintiff knew it, and an admission thereof by a general demurrer. We think in that case that the county of the defendant's present residence is *"his* proper county," and in that respect concur with the judge of the Superior Court.

But we think that court erred in saying that Lincoln was, or could be found by the jury upon the evidence to be, the proper county of Newton. The plea is, that there was no *ca. sa.* to Buncombe, in which Newton was first arrested. The replication is, that there was a *ca. sa.* to Lincoln, which was the domicil of Newton; and on this last point, to wit, the domicil and residence, the rejoinder takes issue. The evidence does not establish anything like a domicil. On the contrary it proves that Lincoln was not Newton's place of residence—home. He had, in truth, no place of residence in North Carolina, certainly not in Lincoln. Without house, land, family, he wandered about the country seeking employment *de die in diem,* and only stayed three weeks in Lincoln for the temporary purpose of plastering a house. What rights as a citizen was he entitled to, or to what duties was he subject in that county? He could not vote; he was not liable to military duty, nor bound to repair the highways. He sojourned there, but did not reside there. It was not *his* county, and his stopping in that county was no more to the purposes of residence than boarding for a week, or putting up at a tavern for a night. He did not *dwell* there, nor did he

purpose so to do. The judge of the Superior Court seems to have thought that the abandonment of Buncombe by Newton, and going into another county for any purpose, makes the former cease to be the proper county. Clearly not. It is not alone that he leaves Buncombe; for if he went out of the State, then there would be no proper county; nor that he goes into another, which makes the latter his proper county. For he must go there to inhabit and dwell, either for an indefinite period and for the general purposes of livelihood, or if for a (251) definite time, through the seasons of the year as an overseer or the like. But a mere casual employment in a job of a few weeks will not give him a domicil there, although he may not have one elsewhere. He is a citizen of the world—a mere bird of passage—not an inhabitant.

This is not like the case of one having no fixed residence, dying at a particular place, as to the purposes of administration and distribution. There the place of death must be taken, because there is no other. Here the converse is true. The accidental and occasional place of being is not taken because there is another certain place, namely, the county where the writ was served, which continues to be "his proper county" until some other is adopted as a fixed residence.

Cited: Howzer v. Dellinger, 23 N. C., 478; *Ferrall v. Brickell,* 27 N. C., 69; *Jackson v. Hampton,* 32 N. C., 598.

JACOB CONRAD v. DAVID DALTON.

1. A *sci. fa.* suggesting a *devastavit* by an administrator does not survive against his executor.
2. In no case is the executor of an administrator liable at law to the creditors of the intestate.
3. But, upon a proper case, he may be made responsible in equity, on the ground that he is in the possession of the fund liable to the payment of debts.
4. Is there any remedy against the executor of an administrator for a *devastavit* by the destruction of assets? *Quære.*
5. But if the administrator has converted the assets to his own use, *it seems* the administrator *de bonis non* may recover against his executor for money had and received.

CONRAD *v.* DALTON.

THIS was a *scire facias,* reciting that the plaintiff obtained a judgment against Isaac Dalton, administrator of Jonathan Dalton, upon which a *fi. fa.* had issued, which was returned *nulla bona;* and it was suggested that assets of the said Jonathan had come to the hands of the said Isaac, and had been by him wasted. After the return of this writ the death of Isaac was suggested, and process issued to revive the suit against the defendant, his executor. The defendant appeared to this process, and filed a general demurrer, which was sustained by his Honor, *Mangum, J.,* and thereupon the plaintiff appealed.

Devereux for plaintiff.
(252) *Nash for defendant.*

HENDERSON, C. J., after stating the substance of the pleadings, as above set forth, proceeded: This is an attempt by the creditor to reach the assets of the debtor (Johnathan Dalton) in the hands of the executor of the administrator, which certainly cannot be done at law. For neither the administrator of the executor nor the executor of the administrator represents the first testator or intestate. The unadministered assets belong to the administrator *de bonis non* of the first dead man, and may be recovered by him, and when so recovered are assets in his hands. And if he neglects to recover them, it is a *devastavit,* and he is responsible for their value, viz.: for what he might have recovered. Where the goods have actually been wasted by the first executor or administrator, I am at a loss to say what is to be done. For a *devastavit* is in *tort,* which dies with the person. Perhaps our acts of Assembly, reviving all causes of action where property is the subject of controversy, that is, all which are not merely vindictive, will enable the administrator *de bonis non* to sustain an action, even where there has been an actual *devastavit.* Where the goods remain in kind, and are unadministered, there can be no doubt that the administrator *de bonis non* may recover them. But in no case which I can conceive is the administrator of the executor, or the executor of the administrator, liable at law to the actions of creditors of the first testator or intestate. Where the executor or administrator becomes fixed with assets, it is then his own debt, and his executor or administrator is liable. Property or debts, in compensation for a *devastavit,* may in equity afford ground of relief to creditors, legatees and distributees upon a *proper* case. But the executor of the executor, where there is only one executor of the first testator, or of the surviving executor where there are more, is liable at law. For, in fact, he is the executor of the first testator.

When I say that, independently of our acts of Assembly keeping alive actions for *torts,* where property is the subject-matter of them, I am at a loss to say how in the case of a waste of property by the executor or first administrator, the administrator *de bonis non* could (253) obtain satisfaction; I mean where the property has been *destroyed.* If the executor or administrator has converted the goods into money, and failed to apply it to the uses of the estate, it is so much money in his hands, for which the administrator *de bonis non* may support an action, I suppose, for such money received to his use. But this is rather straining the action for money had and received. For it cannot, otherwise than by a fiction, be said to have been received to the use of the administrator *de bonis non.* To sustain the action, we must personify the estate, and as the administrator *de bonis non* represents the estate, give the action to him. There is no difficulty when the property remains in kind. And, I believe, by a justifiable extension of our acts before mentioned, they may embrace cases of actual waste.

PER CURIAM. Judgment affirmed.

Cited: Lansdell v. Winstead, 76 N. C., 369; *Walton v. Pearson,* 85 N. C., 51; *Morris v. Syme,* 88 N. C., 455.

JOHN HODGES v. FARQUHARD ARMSTRONG, ADMINISTRATOR OF THOMAS ARMSTRONG.

1. A judgment against a surety will not entitle him to maintain an action for money paid to the use of the defendant, until it has been satisfied.
2. To enable a surety to recover for money paid to the use of his principal, he must prove an actual payment in satisfaction of the debt.
3. In order to get the benefit of the security, upon payment of the debt, he must have it assigned to a trustee; or if bound collaterally, he may take the assignment directly to himself.
4. If an assignment of the security is taken, the surety may have his redress upon it immediately in the name of the creditor.
5. But while it is not in force, the surety cannot maintain an action for the money paid for the assignment.
6. An executor cannot retain his commissions against a creditor or a legatee, until they have been allowed by the county court, or in a suit for the settlement of his accounts.
7. They cannot be allowed by a jury upon the plea of fully administered.

HODGES *v.* ARMSTRONG.

ASSUMPSIT for money paid to the use of the defendant, tried before his Honor, *Daniel, J.,* at CUMBERLAND, on the last spring circuit. On the trial, upon *non assumpsit* pleaded, the case was as follows:

The plaintiff was the surety of the defendant's intestate and of one William Hodges, upon a bond payable to one McArthur; before the bond became due, the principal debtors died, and the plaintiff administered upon the estate of William Hodges, and the defendant upon that of Armstrong; suit was brought by McArthur against the plaintiff and defendant in their representative characters, and against the plaintiff upon his personal obligation. On the trial the plaintiff, as administrator, established the plea of fully administered, and judgment was
(254) taken against the present defendant, *de bonis intestati,* and against the plaintiff as administrator, *quando,* and in his own right absolutely. To protect himself, the plaintiff, through the intervention of a third person, paid the amount of the judgment to McArthur's attorney, and procured an assignment of it to be made to a trustee for his benefit, and issued a *scire facias* to obtain execution against the present defendant, *de bonis propriis;* but the payment by the plaintiff having been held to be a satisfaction of the judgment, he failed in that action, and then commenced the present. Upon these facts it was objected that the plaintiff could not recover because he had not paid the money to the use of the defendant, but had purchased a judgment against the defendant, and that his proper redress was either by *sci. fa.* or debt upon that judgment. But the presiding judge ruled that the payment was one which would support the action.

The defendant then contended that the plaintiff, as administrator of William Hodges, had received assets since the rendering of the judgment which were subject to the payment of the debt to McArthur, and that as far as those assets extended, they were to be applied to the payment of that debt. On this ground the defendant was permitted to investigate the account of the plaintiff as administrator of William Hodges. In making this examination, the plaintiff claimed commissions on the estate, but the claim was resisted by the defendant, because no order of the county court was produced whereby they were allowed upon a final settlement of the administration account. His Honor overruled the objection, and a verdict was returned for the plaintiff The defendant appealed, and it was agreed, in case the opinion of the court was against the plaintiff on the first point, that a judgment of nonsuit should be entered.

Gaston for plaintiff.
W. H. Haywood for defendant.

RUFFIN, J. As a surety cannot maintain an action against his principal merely upon the rendering of a judgment against the former, it was material and necessary that the plaintiff in this case should show a satisfaction of the judgment by a payment made by him- (255) self. To make that fact appear, he proved that he deposited the money with a friend, to be delivered to the original creditor, with express directions not to pay it in discharge and satisfaction of the judgment, but to take an assignment thereof for the purpose of keeping it in force against the defendant. The agent complied with the instructions, and took from McArthur an assignment to himself, in trust for the plaintiff. This transaction was held in the Superior Court to be a payment. This Court entertains a different opinion. There was no satisfaction of the judgment acknowledged of record; no release of it; nor any receipt of money as and for a payment of it. No payment was intended. Both the testimony of the witness and the deed of assignment prove that the contrary was intended. The question, then, is whether, against the intention of the parties, the payment shall be deemed to be in satisfaction, because the money belonged to one of the defendants in that suit. We think not. It is a common mode whereby a surety indemnifies himself. He may relinquish it by making payment in satisfaction. But he may make the payment, not in satisfaction, and take an assignment. If the surety is not a party to that suit, he may take the assignment to himself. This is generally done by an endorser who is not sued jointly with the maker. It is greatly for the benefit of sureties that it should be so; for many of the rights of the surety are secured only through this principle of subrogating him to the securities of the creditors, and entitling him to an assignment of them. Hence, if the creditor does any act which puts it out of his power to make an assignment to the surety, the latter is discharged. By taking an assignment, the judgment is preserved, and satisfaction may be obtained from the principal by immediate process, which is of great consequence in a case of insolvency or the death of the principal. If the judgment be joint against the surety and the principal, the former does not thereby lose his right to an assignment. If he did, all claim to the benevo- lence of the creditor would fall with it. He cannot indeed take (256) the assignment, in that case, to himself, for that would be an extinction of the judgment. But he may take it to another person. In law the plaintiff alone is the owner of the debt. The assignee can act in his name alone. And a court of law can take no notice of the trust upon which the assignee or the plaintiff keeps up the judgment. But if we could, we would not make the legal right unite with that of the *cestui que trust*. It is like the owner of an inheritance taking a conveyance to

a trustee of an outstanding satisfied term. The interposition of the trustee keeps the legal and equitable estates apart, even in equity—much more at law.

There is no doubt that McArthur may yet acknowledge satisfaction of record, or the assignee may do it in his name, provided the terms of the assignment authorize it. But until that be done, or the judgment be otherwise discharged, in such wise as to bar a suit on it at law, it remains in force. While it does, the surety cannot maintain an action of which the *gist* is the satisfaction of that judgment.

This opinion renders it unnecessary to decide the other questions. But there is one of them of very general consequence, which may frequently occur, on which all the judges entertain a clear opinion, different from that given in the Superior Court, which we think it proper to express. It relates to the commissions of the executor. We think the Acts of 1715, 1723, and 1799, taken together, clearly contemplate that commissions, to be retained against a creditor or legatee (which were not chargeable at all at common law), must be allowed *by the court* before which the executor is to return an account of his administration, or in which is pending a suit directly for the settlement of those accounts. A just allowance can be made only upon an examination of the accounts. It is impossible that a jury can, in this collateral way, have the information necessary to a proper estimate. Besides, there is another reason of policy which forbids it. The account current is to be returned on the oath of the executor. It is frequently important evidence for the
(257) creditor upon the issue of fully administered. The administration is often within the knowledge of the executor alone. In England he may at any time be summoned by the creditor before the ordinary to render his account, which the creditor uses as evidence in the suit at law. Here the only method we have of obtaining such an account is to withhold the allowance of commissions until it be returned. The refusal of them, until expressly allowed by the court, will make it the interest of the executor to do his duty, and make fair disclosures. The rule can never be of any importance, except in the case of estates alleged to be insolvent. Whenever that is alleged by the executor, he must of necessity be prepared to exhibit his accounts; for when the estate is exhausted, he has nothing further to administer, and must be ready to return the account current. We think, therefore, that an executor in default in not making his return is not entitled to retain for commissions at the discretion of a jury. They only form a charge against the estate when specifically allowed by the court, upon the settlement of the estate.

Wherefore, the judgment must be reversed, and judgment (according to the agreement of the parties in the record) of nonsuit entered.

PER CURIAM. Judgment reversed.

Cited: *Sherwood v. Collier, post,* 382; *Foster v. Frost,* 15 N. C., 429; *Walton v. Avery,* 22 N. C., 410; *Lynch v. Johnson,* 33 N. C., 225; *Brown v. Long,* 36 N. C., 192; *Harrison v. Simmons,* 44 N. C., 81; *Barringer v. Boyden,* 52 N. C., 189; *Hanner v. Douglas,* 57 N. C., 266; *Tiddy v. Harris,* 101 N. C., 593; *Liles v. Rogers,* 113 N. C., 200; *Peebles v. Gay,* 115 N. C., 41; *Davison v. Gregory,* 132 N. C., 395; *Bank v. Hotel Co.,* 147 N. C., 598.

ABNER WILLIAMS v. WILLIAM WOODHOUSE ET AL.

1. The plaintiff cannot recover in case for malicious prosecution without producing the record of his acquittal.
2. Judgments cannot be impeached collaterally; and while they are unreversed, they are conclusive as to their legal effects.
3. And where the defendant in an indictment was convicted of the charge, he cannot in any form of action recover against the prosecutor, although he shows that the conviction was the result of conspiracy and perjury.

The plaintiff declared as follows:

"And the said Abner complains, etc., that heretofore, etc., they, the said Woodhouse and Salyear, together with other persons, etc., did conspire, combine, confederate, and agree to accuse and charge the said Abner, together with J. P. and W. G., of a conspiracy to cheat and defraud the said William Woodhouse of one-half of a vessel, called, etc., and to give and procure evidence against said Abner, (258) J. P., and W. G. sufficient to convict them of the said charge, and to cause them to be indicted for the same charge so unjustly and falsely to be made by them, the said Woodhouse and Salyear, against them, the said Abner, J. P., and W. G., in the Superior Court, etc., and cause them in such court to be convicted on their trial. And the said Abner saith that the said Woodhouse and Salyear did at, etc., in pursuance of the said corrupt agreement and conspiracy, cause the said Abner, together with the said J. P. and W. G., to be indicted, and him, the said Abner, to be convicted for a conspiracy, etc., and did appear and give evidence, and procure evidence to be given against the said Abner, whereof he was convicted, and suffered much by long imprisonment and loss of money; although at the same time it was well known to the said Woodhouse and Salyear that the said charge so made was false and unfounded, and the said William Woodhouse was not at that time and never was the sole owner of said vessel, etc."

Upon *not guilty* pleaded, the jury, before *Donnell, J.,* at PASQUOTANK, on the last spring circuit, found a verdict for the plaintiff. Upon the

motion of the defendant's counsel, his Honor set the verdict aside, and directed a nonsuit to be entered, because it was admitted by the plaintiff that he had been convicted of the offense for which he averred he had been maliciously prosecuted.

From this judgment the plaintiff appealed.

Iredell for plaintiff.
Kinney contra.

HALL, J. From the finding of the jury in this case, it may be that the judgment we feel ourselves bound to give will not accord with the justice of the case. Admitting that, however, to be the case, it is better that the injury be submitted to than that a wholesome and well-established rule of law should be shaken.

Judgments are the solemn determinations of judges upon subjects submitted to them, and the proceedings are recorded for the purpose
(259) of perpetuating them. They are the foundations of legal repose.

It is stated by *Lord Mansfield* in *Moses v. McFerlan,* 2 Bur., 1005, that the merits of a judgment can never be impeached by an original suit either at law or in equity; that the judgment is conclusive as to the subject-matter of it whilst it is in force, and until it is reversed or set aside. So it is stated in 1 Stark. on Ev., 224, that the record of a judgment in a criminal case is conclusive evidence of the fact of conviction and judgment, and all the legal consequences resulting from it. It is in the nature of a judgment *in rem.*

When an action is brought for a malicious prosecution, it is indispensable that the plaintiff should not only show forth the record of the prosecution, but also by the same record his acquittal of the charge made against him. 2 Stark. on Ev., 906. If he cannot do this, he must fail in his action. So, likewise, must he fail if he shows forth a record which shows a verdict and judgment of conviction. That judgment is evidence of his guilt whilst it is in force.

But the plaintiff denies that this is an action for a malicious prosecution in the limited, technical meaning of that action; but an action on the case in its extensive meaning, complaining that the plaintiff sustained damages in being convicted of the crime of conspiracy, through the agency of the defendants, and by their conspiracy. He admits the lawfulness of the conviction, but says it was procured by the perjury and conspiracy of the defendants.

The plaintiff certainly confines himself to very narrow limits. He suffered under that judgment, but he admits its legality. He only complains of the conspiracy and perjury of the defendants. If their conspiracy and perjury, admitting them to be guilty of them, are considered as unconnected with the judgment and the effects of the judgment,

they are offenses of a public nature. They may be punished for them by indictment. But keeping the judgment out of view, they have not injured the plaintiff either in person or in purse. Let the case be disguised as it may, it is an action brought for an injury sustained by that public prosecution, and as long as the plaintiff's guilt is established by the judgment in that prosecution, so long must he (260) be without a remedy.

PER CURIAM. Judgment affirmed.

Cited: Spillman v. Williams, 91 N. C., 487; *Sledge v. Elliott,* 116 N. C., 716.

BENJAMIN BULLOCK v. EDWARD BULLOCK, EXECUTOR OF MICAJAH BULLOCK.

1. Where *non assumpsit* and the *statute of limitations* are pleaded, and the jury find the general issue for the defendant, this Court will not examine the charge of the judge on the plea of the statute.
2. The case of *Morisey v. Bunting,* 12 N. C., 3, approved.

THIS was an action of *assumpsit,* tried at GRANVILLE, on the last circuit, before *Norwood, J.*

Pleas—*general issue* and the *statute of limitations.* The plaintiff excepted to the charge of the judge upon the plea of the statute of limitations. The jury returned the following verdict: "That the defendant's testator did not assume." Upon this verdict judgment was rendered for the defendant, from which the plaintiff appealed.

Devereux for plaintiff.
No counsel for defendant.

RUFFIN, J. The Court is precluded from considering the judge's charge by the verdict on the general issue. It is found by the jury that the defendant's testator did not assume, which puts the other issue, on the statute of limitations, and the instructions of the Superior Court on it, out of the question. As the existence of the debt is negatived, the judgment must of course be affirmed. To this, *Morisey v. Bunting,* 12 N. C., 3, besides other cases, is a direct authority.

PER CURIAM. Judgment affirmed.

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

(261)

DEN EX DEM. OF GEORGE BLAIR v. ELISHA P. MILLER.

A note given for the payment of rent, and proved by the subscribing witness to have been executed thirty years *ante litem motam*, is competent evidence to prove the date of the lessee's possession. But it is otherwise as to a recent admission of the lessee.

AFTER the new trial granted in this cause (13 N. C., 407), it came on to be tried again before his Honor, *Daniel, J.*, at BURKE, on the last circuit, when the only question was, as before, whether Greenlee, under whom the defendant claimed, had a seven years possession, so as to perfect a paper title originally defective. To establish the commencement of Greenlee's possession, the defendant offered a note given for the rent of the land, signed by one Elrod and dated in the year 1800, and proved its execution by the deposition of the subscribing witness. No objection was made to the note going to the jury—and a verdict was returned for the defendant, when the plaintiff moved for a new trial because the note was improperly read. His Honor discharged the rule, and gave judgment for the defendant, and the plaintiff appealed.

Seawell and Gaston for plaintiff.
Badger contra.

HALL, J. Slight mistakes in offering evidence to a jury, and in the examination of witnesses, particularly when not objected to at the time, are not generally sufficient reasons for setting aside verdicts, upon objections taken for the first time after the verdicts are recorded.

In the present case, however, it does not appear that any mistake has happened. The note was read for no other purpose than to fix the time, from its date, when Elrod took possession of the land for which this suit is brought, in order to make out a seven years possession. The note was given by Elrod in the year 1800, and its execution proved by the subscribing witness. It cannot be believed that it was *then* given by Elrod to furnish evidence *at this day* that Elrod was tenant of the land at that time. The strong presumption is otherwise. I
(262) admit that an acknowledgment of the note by Elrod of recent date would not be sufficient.

I think there is not the smallest pretense for granting a new trial.

PER CURIAM. Judgment affirmed.

DEN EX DEM. OF EDMUND McLINDON v. GIDEON B. WINFREE.

Where a deed was proved, and before its registration, the boundaries of another tract were inserted in it; *it was held* that evidence of that fact did not impeach the deed, but that as to the tract, the boundaries of which were inserted after probate, the deed was unregistered.

EJECTMENT, tried before *Strange, J.*, at ANSON, on the last circuit.

The plaintiff claimed title under a judgment, execution, and sheriff's deed, and having made out his case, the defendant offered to prove by the sheriff that the land in dispute had been sold with several other tracts; that by mistake it was not inserted in the deed until after its probate, and the order for its registration, and that then, the mistake having been discovered, the sheriff, at the request of the purchaser, inserted the land in question in the deed, when it was registered without another probate. The plaintiff objected to this testimony, but his Honor received it, and the sheriff, upon his examination, fully supporting the defense, the plaintiff was nonsuited, and appealed.

No counsel for either party.

HALL, J. I think the testimony of the sheriff in this case was properly received. It was not the reception of parol evidence to destroy or alter a deed, but to support it, and to preserve it from contamination, by preventing matters *dehors* the deed from creeping into it. The deed shown forth in evidence by the plaintiff has been acknowledged in court and registered, and includes the land sued for, and to all appearance conveys title to it, when, in fact, there never was any ac- (263) knowledgment or order of registration, as far as relates to that land, and it is to rescue the deed from the burden of that falsehood that the testimony is received. When that is done, the deed is placed in its original shape, and like other deeds, is unassailable by parol evidence. To say the least of it, though probably there was no injury intended to be done to any one, the conduct of the sheriff was very reprehensible in making the insertion after he had acknowledged the deed in court.

It may be said that the plaintiff has a deed for the land, but that deed has been neither proved or acknowledged in court, nor registered.

PER CURIAM. Judgment affirmed.

ARTHUR MORROW ET AL. v. WILLIAM WILLIAMS.

1. A remainder in chattels, after a life estate, cannot be created by deed.

2. A gift of slaves, made by an instrument not under seal, and unaccompanied by delivery, is void.

(The cases of *Gilbert v. Murdock*, 3 N. C., 182; *Nichols v. Cartwright*, 6 N. C., 127; *Graham v. Graham*, 9 N. C., 322; *Foscue v. Foscue*, 10 N. C., 538, and *Sutton v. Hollowell*, 13 N. C., 185, approved.)

DETINUE for a slave, tried on the last circuit, before his Honor, *Norwood, J.* A verdict was taken for the plaintiff, subject to the opinion of the court upon the following case:

Jemima Bradshaw, on 30 December, 1820, signed an instrument of which the following is a copy:

"To all people to whom these presents shall come: I, Jemima Bradshaw, for and in consideration of the natural love and affection which I have and bear to my beloved son-in-law, Arthur Morrow, and my daughter, Jemima Morrow, and for divers other good considerations me hereunto moving, have given and granted, and by these presents do give and grant unto the said Arthur and Jemima Morrow, my negro boy, Abraham," etc. (mentioning several articles of personal property), "to their use, and to use singularly to them, and the children of Jemima Morrow, that she may have by her said husband, to enjoy full power and possession of after my death, to have and to hold and enjoy all and singularly the said negro boy, Abraham, etc., unto the said Arthur and (264) Jemima and their children. In witness whereof, etc.

"JEMIMA BRADSHAW.

"Signed in presence of, etc."

The plaintiffs were the wife of Morrow, and the children born at the date of the paper above set forth.

The plaintiffs moved to amend the writ, but his Honor being of opinion that they could not recover upon the merits, did not notice the motion. The verdict being set aside and a nonsuit entered, the plaintiffs appealed.

Winston and W. A. Graham for plaintiffs.
No counsel for defendant.

HALL, J. Several valid objections occur to the claim of the plaintiffs. The first is, that the gift is not established by a deed, or in its absence, by evidence of a delivery; the writing introduced and relied upon, not

being under seal, is nothing more than the declaration of Jemima Bradshaw that she gave the negro to her daughter and son-in-law; but there having been no delivery, no title vested in them, and there being no valuable consideration, no right of property passed from her.

Another objection is, that supposing this writing conveyed the title of the negro, only a remainder is given by the donor, after the expiration of her own life. She gives the negro in appropriate words enough, but adds these words, *"to enjoy full power and possession of after my death."* Now it has been held in repeated decision that such a remainder in personal chattels cannot be created by deed. *Gilbert v. Murdock,* 2 Hay., 182; *Nichols v. Cartwright,* 2 Murph., 137; *Graham v. Graham,* 2 Hawks, 322; *Sutton v. Hollowell,* 13 N. C., 185; *Foscue v. Foscue,* 3 Hawks, 538. The doctrine may therefore be considered as settled.

But laying these objections out of the case, another might be taken. If the title to the negro passed by the writing, it vested in Jemima and Arthur Morrow, and not in their children. A use only was declared to them, and they ought not to be plaintiffs. The record shows that a motion was made to amend the writ by striking out, probably to (265) remedy that mistake. But it does not appear what became of it.

These objections arise upon the record, and appear to me to be fatal. I therefore think judgment should be given for the defendant.

PER CURIAM. Judgment affirmed.

Cited: Dail v. Jones, 85 N. C., 225; *Outlaw v. Taylor,* 168 N. C., 512.

HILL & NALL v. SAMUEL CHILD.

Where the sheriff has two writs of *fi. fa.* in favor of the same plaintiff, one against a principal debtor alone, and another against the same debtor and a surety, and raises money by a sale under both writs, it is to be applied *pro rata* to both; and neither the sheriff nor the plaintiff can, by a subsequent application, affect the right of the surety to have the judgment against him discharged *pro tanto.*

At August Term, 1829, of ORANGE County Court, the plaintiffs obtained a judgment against Thomas Clancy and James Child for $979, and also against the same persons, together with the defendant as their surety, for the sum of $3,283. Writs of *fi. fa.* issued on each of these judgments, returnable to February Term, 1830, which were levied upon the property of the principal debtors. Writs of *venditioni,* with clauses of *fi. fa.* issued, returnable to May Term following, upon which the

sheriff returned that he had made the sum of $3,212; and the plaintiff's attorney gave him a receipt for $2,600, stating it to be in part satisfaction of two executions in favor of the plaintiffs. *Alias* writs of *venditioni exponas,* with clauses of *fi. fa.* then issued, upon which was made the further sum of $606. After the return of these writs, the sheriff being about to pay the residue of the $3,212 made under the writs returnable to May Term, and also this sum of $606, to the plaintiff's attorney, was informed by him that he should apply the payment first to the satisfaction of the small execution, and the residue as far as it would go to the large one, to which the defendant, as surety, was a party.
(266) This application was objected to by the defendant, who insisted that it should be applied *pro rata* to both executions. The sheriff stated that he was desirous the money should be applied in a manner to release him from responsibility to either of the parties; and, subsequently, the attorney of the plaintiff received the money from the sheriff, and gave him a receipt therefor, stating it to be in full satisfaction of the small execution, and in part satisfaction of the large one. Another *fi. fa.* issued on the large judgment, and the property of Thomas Clancy and James Child being exhausted, it was levied upon the goods of the defendant, who paid $715, alleging that the application by the plaintiff's attorney was improper, and that the sum then paid by him was in full of the balance due upon that judgment. If the application made by the attorney was proper, then $200 was still due upon the judgment.

The foregoing facts were stated upon a motion to the county court, made by the plaintiffs, to issue another execution. But the motion was overruled, and the plaintiffs appealed.

His Honor, *Swain, J.,* on the last circuit, affirmed the judgment of the county court, and the plaintiffs appealed to this Court.

W. H. Haywood for plaintiffs.
Badger and Winston for defendant.

RUFFIN, J. If the money raised upon the two executions is to be applied to each in proportion to the debt, that in which Samuel Child is a defendant is satisfied thereby, and by the payment of the sum of $715 afterwards made by him. The creditor contends that his execution against the two shall be first satisfied, so as to throw the whole unpaid balance upon the other.

No authority has been adduced in support of the position, nor do I perceive any principle on which to place it.

It is not the question, what the creditor might have done, or the sheriff. But the controversy is, What is the effect of what has been done by each of them? No doubt the creditor could have enforced the

entire satisfaction of the small debt by withholding his larger (267) execution until that was done. And there is no doubt, also, that after both were delivered to the sheriff, that officer might have proceeded to satisfy the whole execution against the three out of the property of Samuel Child, and thereby left the estate of the other two open to the other writ. This, indeed, places a discretionary power in the sheriff's hands, according to the exercise of which the one debt will be wholly or partially satisfied. This is necessarily so, where the one writ is against one person, and the other against that person and another, for each defendant is liable for the whole. And it is a power which the party cannot control by directions. The officer is governed by the mandate and force of the writ. But the sheriff may first seize and sell, under both writs, the estate of him who is defendant in both. If he does, the estate of him who is defendant in but one is liable only for the balance due upon that execution, after the legal application of the money before raised. The question, then, is, What is a due application of that money?

If the two executions were at the suit of different plaintiffs (on which, by the way, the sheriff has the same discretionary power as that above mentioned), there is no doubt that each would be entitled to its share of the money. I can discover no difference, where there is the same plaintiff in both. The writs create certain well-known liens, and entitle the plaintiff, where there is conflicting process, to certain portions of the money raised upon the two jointly. If the sheriff seize only the estate of him who is defendant in both, and each has an equal lien, and is entitled to a proportion of the fund, and sell that estate, the seizure and sale satisfy both writs *pro tanto*. If the sheriff thus apply the money, what complaint has the plaintiff? If they are different persons, manifestly none; for he whose execution is only against one gets his share of *his debtor's* estate. If there be the same plaintiff, he has as little, for the estate of him who is the debtor in both has been applied to each as the law directs, and the balance upon the execution against that defendant and another is satisfied out of the estate of the latter. (268) There could be no action against the sheriff for thus dividing the money raised on both, out of the effects of him against whom both run. But if directions from the party could control, there were none here; and the sheriff appropriated the money by his return. The subsequent act of the plaintiff, even with the sheriff's assent, could not alter it, because the writ was already satisfied *pro tanto*. It is true of debts generally that the creditor may apply the money, if the debtor does not direct a special application, to which of the two debts he chooses. But the very act of raising money on an execution is an application of it to that debt, according to the legal effect of the execution. I say raised on it because, as I have already remarked, the sheriff *may*, where an

execution is against two, satisfy it out of the estate of either. But the creditor who has two debts can keep the control of both in his own hands only by holding up one of the executions. If he deliver both, he places it in the power of the sheriff to act upon both, against the property of him who is defendant in both, and the money levied on both is equally applicable to both; indeed, is applied in the very act of raising it.

PER CURIAM. Judgment affirmed.

Cited: *Eason v. Petway,* 18 N. C., 46.

PHILIP CANSLER v. JOHN HOKE ET AL.

The return of a processioner must set out the courses and distances in words at full length. And where the courses were expressed by abbreviations, and the distances in figures, the return was set aside. HENDERSON, C. J., *dissentiente.*

THE plaintiff sued out in the county court an order for the processioning of five acres of land lying in LINCOLN, adjoining the lands of the defendants, to which the processioner returned that he had run several lines, and had been forbidden by the defendants from proceeding further with the survey. Upon this return, the county court, under the Act of 1799 (Rev., ch. 541), appointed five freeholders to complete the
(269) processioning, who made their return setting forth the courses in abbreviations, thus—n. for north, etc.—and the distances in figures instead of words. The defendants objected to the return, but it was confirmed by the county court, from which the defendants appealed.

His Honor, *Daniel, J.,* on the last circuit, affirmed the judgment, and the defendants again appealed.

Attorney-General and Hogg for plaintiff.
Gaston for defendants.

HALL, J. When I observed that the first act on processioning, which is to be found in the Revisal, ch. 14, declared that any person whose lands were twice processioned according to that act shall be deemed and adjudged the sole owner of such land, and that it was supposed that clause gave a title to lands which might be twice processioned under the Act of 1792 (Rev., ch. 365), I could not but consider it as a proceeding fraught with danger to the rights of land proprietors, and felt myself altogether justified in throwing every legal impediment in the way of a

title thus to be consummated. I was prepared to say that the processioner's return in this case was not made out according to the sixth section of the Act of 1792 (Rev., ch. 365), which declares that "the processioner shall make out a certificate in words at full length, for each tract by him processioned"; an objection which I should be at a loss how to get clear of in cases of minor importance. The act is imperative, and the processioner's certificate is not made out in words at full length. And for that reason the report must be set aside, with leave to the plaintiff to proceed further in the cause, as the law directs.

It is to be observed that the Act of 1823 (ch. 14) directs that lands shall be processioned, and the marks renewed once in every three years. And that he whose lands are twice processioned shall be adjudged the sole owner of such lands. The Act of 1792 leaves every person at liberty to have their lands processioned or not. If they elect to have them processioned, no particular time is stated in which it is to be done. They may have them processioned today, and again tomorrow. (270) And the doubt may be very honestly entertained whether that is such a *twice processioning* as will give a good title. The present case does not require an opinion to be given on this point.

RUFFIN, J., concurred.

HENDERSON, C. J., *dissentiente:* I cannot but believe that the words *at full length,* to be found in our processioning acts, are fully satisfied by abbreviations, not only of common, but I believe I might say of universal use; as N. for North, E. for East, W. for West, *po.* for poles, *chs.* for chains, when it is shown by the context that these abbreviations are used as descriptive of the courses and distances. There can be in such case no possibility of a mistake. In our acts, describing the mode in which surveyors shall make out and return plats of vacant lands, made upon entries, the words are *"words at length."* And surely there can be no substantial difference between words *at length* and words *at full length.* Yet this interpretation would render nearly all of our surveys void. And thereby, also, our grants would be annulled. The Legislature meant that, as the thing was to be done in words, and frequently for the use of plain and unlearned men, the proceedings should be so described that all could understand them. I must therefore declare my dissent from the opinion of the Court, for I think that the proceedings should not be quashed.

PER CURIAM. Judgment reversed.

Cited: Vandyke v. Farris, 126 N. C., 746.

SIMON GENTRY v. CHRISTOPHER WAGSTAFF ET AL.

1. The husband acquires by marriage no estate in the land of his wife, of which he is not actually seized. And where the wife has a vested remainder in lands, a sale, in the lifetime of the particular tenant, of the husband's interest passes nothing to the purchaser.
2. A sheriff can sell only such estates as the defendant in the execution can convey by deed passing an estate. Where the deed of the defendant would operate only by way of estoppel, a sheriff's deed conveys nothing.

THIS was a petition for partition. The demandant averred that John Baird, being seized of the land of which partition was sought,
(271) devised them to John Kerr and his wife Margaret for their joint lives, with remainder to the issue of the wife; that the wife died, leaving several children, and among them Margaret, the wife of the defendant Wagstaff; and that the demandant had purchased the interest of Wagstaff at an execution sale.

The defendants pleaded that at the sale of the interest of Wagstaff in the land, John Kerr, the tenant for life, was alive, and the demandant demurred.

His Honor, *Norwood, J.*, at PERSON, on the last circuit, overruled the demurrer, and dismissed the petition, whereupon the demandant appealed.

P. H. Mangum for demandant.
(276) *W. A. Graham for defendants.*

HENDERSON, C. J. When this case was opened, my impression was that, as the interest of the wife was a vested remainder in fee, after an estate for life in her parents, and was therefore incapable of a seizin either in deed or in law, the law cast an estate on the husband during the marriage, which he could himself alien, and which could consequently be sold for his debts. I was led to this conclusion from cases which I then thought analogous, to wit, where the estate was incapable of an actual seizin, as in cases of advowsons, rents and other incorporeal hereditaments; that the law gave them to the husband during the marriage, and upon the death of the wife, having had issue born alive, he became tenant by the curtesy thereof; and that upon the death of the wife, her heir succeeded to her estate or interest therein without an actual seizin by her. But upon reflection, I am satisfied that all these analogies fail. That as regards the freehold interest of the wife, the husband by the marriage alone can acquire no estate or interest, and that there must

be an actual seizin of the husband during the marriage of such estates as admit of it; as in lands and other corporeal heredita- (277) ments; and in both corporeal and incorporeal estates a *present interest*. I confine myself to freehold interests. This rule is founded, I think, on feudal reasons, and although the doctrine of feuds has in a great measure been abolished, still many of the rules growing out of it remain, and govern our real estate, and this among others. The reason why, in freehold interests, there must be a present estate in the wife to give the husband an interest arises from the principle of the feudal law, that it is the freeholder only who is bound to perform the feudal duties, and that as the functions of the government could not otherwise be carried on (as the feudatory was concerned in the making and administration of the laws, as well as the defense of the kingdom), there must in every feud be a freeholder. For if one feud could be withdrawn from the obligations by law imposed on it, all might; and thereby the functions of the government would entirely cease. Hence the rule that the freehold could not be in abeyance, or in no one; and hence grew the rule that a contingent freehold remainder must be preceded by a particular freehold estate. But no such rule prevailed with the residue of the inheritance. It might be in abeyance, in uncertainty, or as is expressed by some, *in nubibus*. All that was required was that there should always be a freeholder to occupy the land, and answer for its duties. Where there was one, the ulterior limitations might be to uncertain persons, provided the uncertainty was removed before or at the time the person was wanted to fill the freehold. Hence the rule that the contingent event, on which the remainder is to vest, must happen, or the contingent remainderman must be *in esse* during the particular estate, or *eo instanti* that it determines, that there may be no chasm. A child in *ventre sa mere* would not at common law fill the freehold, and make the contingent remainder good. Hence the law is entirely regardless of looking out the remainderman until he is wanted to fill the freehold, and will not before that time decide on the person to take. As where there is an estate to A. for life, remainder to B. and his heirs; B. dies leaving A.; the heir of B. is not looked for until the death of A. (278) For until that time he is not wanted to fill the freehold, although B. had a vested interest, and he who is the heir of B. at A.'s death, and not he who is heir at B.'s death, succeeds to the estate. We had a remarkable application of this rule some years ago, in the late Supreme Court, in the case of *Exum v. Davie,* 1 Murph., 375. An estate was limited to Harwood Jones for life, remainder to John Jones and his heirs. John Jones died before 1795 (when the act passed calling the females equally with the males to the inheritance), leaving a son and a

daughter. The son was then his heir, to wit, at his death. After 1795, Harwood Jones, the tenant for life, died, at which time both the son and daughter were the heirs of John Jones, and they both succeeded equally to the estate. It was said to be quite immaterial who were the heirs of John Jones as to these lands when John Jones died. For there was a freeholder in the person of the particular tenant; and the law looked for the heirs only when they were wanted to succeed to the freehold interest, which was on the death of the tenant for life. In the case before the Court, the law does not look for the children of the tenants for life until the estate of the tenants for life determines. For they were granted for no purpose, and as the husband had no duties to perform in regard to the lands, the law gave him no interest or estate therein. I have confined myself entirely to freehold interests. As to chattel interests in lands, as terms for years, the doctrine of feuds does not apply, as they were unknown to the feudal law.

As to the argument that the husband could have sold these lands by estoppel, so he might sell any other lands in the same way; but the sheriff can only sell what the defendant himself can sell, where his conveyance operates by way of passing or transferring an estate; not where it operates by way of estoppel. If it included sales operating by the latter mode, the sheriff might sell any tract of land, or all the lands in his county.

I have entered more at large into this case from what fell from me when it was opened. The authorities cited and relied on by the
(279) defendant prove that there must be a present interest and a seizin of corporeal hereditaments. *Taylor v. Hoode,* 1 Bur., 107; Tho. Co., 672, 582; 2 Bl. Com., 127; 2 Bac. Ab. Curtesy, chs. 2, 3; Preston on Estates, 215. It may therefore be said as universally true that by the marriage the husband acquires no interest in the corporeal real estates of the wife until actual seizin, and therefore can have no interest in her real estates in reversion or remainder, dependent on or after a preceding freehold estate therein in another, until the determination of that estate, and a seizin in him.

PER CURIAM. Judgment affirmed.

Cited: Caldwell v. Black, 27 N. C., 471; *Arrington v. Screws,* 31 N. C., 43; *Badham v. Cox,* 33 N. C., 459; *Williams v. Lanier,* 44 N. C., 35; *In re Dixon,* 156 N. C., 28; *Tyndall v. Tyndall,* 186 N. C., 277.

DEN EX DEM. OF JAMES SEAWELL v. BANK OF CAPE FEAR.

1. Sealing is necessary to the validity of all writs, except those issuing to the county of the court where they are returnable; and a sheriff by acting under an unsealed writ, does not thereby render it valid.
2. A *fi. fa.* vests a property in goods seized under it in the sheriff, but as to land it confers upon him only a power to sell.
3. Goods may therefore be sold by the sheriff under a previous levy, without a *venditioni;* but a sale of land without such authority is inoperative.
4. If a sheriff has several writs against the same defendant and does not sell under one of them, that writ cannot aid the title of a purchaser under the others, although the money arising from the sale is applied to its satisfaction.
5. Where a sheriff levies a *fi. fa.* on land and goes out of office, a *venditioni* must be directed to his successor.
6. Per HENDERSON, C. J. Where the sheriff has acted under an unsealed writ, the court from which it issued may, after its return, render it valid by affixing the seal.

(The cases of *The Governor v. McRae*, 10 N. C., 226, and *Barden v. McKinnie*, 11 N. C., 279, approved.)

EJECTMENT, tried on the spring circuit of 1830, before his Honor, *Norwood, J.,* at CUMBERLAND.

The plaintiff claimed title under a sheriff's deed for the premises in dispute, dated 2 June, 1823, and reciting "an execution" which issued from the county court of New Hanover, against Peter Perry and Dominic Cazaux for $662.90, and produced the record of a judgment against Perry and Cazaux entered up in New Hanover County Court at August Term, 1819, and a *fi. fa.* thereon, tested the second Monday of August, 1820, and returnable the second Monday of November following, which was returned levied upon the land in question, on 11 November, 1820, as the property of Perry, subject to sundry prior levies, made under executions issuing from Cumberland County and Superior Courts, at the instance of the defendants. The plaintiffs also produced a *venditioni exponas,* tested the second Monday of November, 1820, and returnable the second Monday of February, 1821, which recited the former levy, and upon which the sheriff returned that he had, on 9 February, 1821, sold the land levied on under the *fi. fa.* to the lessor (280) of the plaintiff.

The defendants objected that these writs did not confer upon the sheriff a power of sale, and to support the objection, produced the original *venditioni exponas,* and proved that it had never been sealed with the seal of New Hanover County Court, and urged first, that for this reason the writ was a nullity, and second, that as the sale took place

after the return of the *fi. fa.*, it was made without any authority in the sheriff, and consequently was inoperative. But his Honor overruled the objection, thinking that although the writ was not legally authenticated, yet if the sheriff thought proper to act under and recognize it, it warranted his subsequent sale.

The plaintiff also offered in evidence several judgments and executions in favor of the defendants against Perry, and proved that they were in the sheriff's hands at the time of the sale, and that the proceeds of the sale had been applied to their satisfaction; but it appeared that the agent of the defendants had directed the sheriff not to sell under these writs, although he had not withdrawn them, nor paid or tendered the sheriff his fees.

The defendants claimed title from Perry under an assignment of a mortgage, prior in time to the lien of the execution under which the lessor of the plaintiff purchased. This was impeached as fraudulent between the mortgagor and Perry, and a verdict being returned for the plaintiff, the defendant appealed.

(281) *Gaston and Badger for plaintiff.*
Hogg for defendant.

HENDERSON, C. J. A writ issued to another county must be under the seal of the court from which it issues. Without a seal it confers no power on the sheriff, and his acting under it cannot give it validity. This has heretofore been ruled in this Court, in the case of *The Governor v. McRae.* The Act of 1797 (Rev., ch. 474, sec. 5), dispensing with the sealing of process in the cases mentioned in it, operates only in those cases. And it is a sufficient answer to say that this is not one of them, and therefore must be governed by the general rule. But if that act has any effect in this case, it is to show that a seal is here necessary. For if by the general rule it was not, why make the exception?

It is next contended that the levy under the *fieri facias* issued from New Hanover County Court, and returned to the succeeding ses-
(282) sion of that court, levied on the lot in dispute, gave the power to sell, and that although this case may be embraced by the reasoning of the Court in delivering the opinion in the case of *Barden v. McKinnie,* yet the facts are very different. There the endorsement of the levy was not made until long after the return of the *fi. fa.*, the sale was not made until more than two years after its return day, and in the meantime the defendant in the execution had died. Here the levy was endorsed at the proper time, the sale made shortly after, and in the lifetime of all the parties. It is admitted that the case referred to is a much stronger one than this. But the principle is the same, to wit, that a sale of lands

under a *fi. fa.* is in virtue of a *power,* and not of a *property* in the thing sold. The latter is the case, as regards goods. By the seizure, the sheriff acquires a qualified property in them, and may maintain an action founded on that right of property, qualified to be sure, but still it is a right of property. He stands charged to the plaintiff in the *fi. fa.* for their value, and the debtor is discharged to the same amount. It is in virtue of this property that he makes the sale, and he needs not a *venditioni exponas* to confer it. He had it before. A *venditioni exponas* only puts him in contempt for not selling. But in regard to a levy on lands, it is far otherwise. The sheriff makes no *seizure;* is not *liable* for the value; the debtor is not *discharged* to that or any amount; the sheriff acquires no possession. He only sells the defendant's estate in the lands. He does not deliver possession to the purchaser as he does in the sale of goods, but only clothes him with the defendant's estate and leaves him to acquire possession as he can. This shows very clearly that the sheriff sells by virtue of a power, and not by virtue of a property of any kind. When, therefore, that which gives the power is withdrawn, the power ceases. As a *venditioni exponas* can give no power to sell, it is argued that *ex necessitate* the power given by the *fi. fa.* must remain. The argument would prove much were it true. For although it is admitted that a *venditioni exponas* confers no power to sell in the case of a chattel levied on under a *fi. fa.,* because the power existed before, and therefore could not be conferred again, yet (283) where the power did not exist before, that reason fails; and if not conferred by the *venditioni exponas,* it does not exist. The reason *ex necessitate* is therefore turned against the defendant. In these cases we have considered, and must consider, that a *venditioni exponas,* or order of sale, by whatever name it be called, changes its character from that which it bears where there has been a levy on goods. There it confers no power to sell, because the power existed before. But in the case of a levy on lands, it confers the power of sale, for the very contrary reason. Where goods are levied on under an attachment, and they are afterwards ordered to be sold, or where lands are levied on by a constable, and returned to court and ordered to be sold, the order of sale, whether it be called simply by that name, or *dignified* with the name of *venditioni exponas,* is the writ which gives the sheriff power to sell. The very same reasoning is applicable to an order to the sheriff to proceed to sell land levied on by a *fi. fa.* which has been returned, and the power of acting under it thereby withdrawn or expired. So, also, where an heir is sued on his ancestor's bond, and he confesses and sets out assets, and the plaintiff accepts them, a *venditioni exponas,* or order to sell them, issues. And certainly in this case no power existed before and independently of the writ.

As to the sheriff's having in his hands writs of *fi. fa.* against the same defendant, at the instance of the Cape Fear Bank, that gave the sheriff no power to sell. For he was directed by the agent of the Cape Fear Bank not to sell under them. And this order given by parol without withdrawing the writ was good; at any rate, the sheriff obeyed the order and did not act under the writs. And this is not like a case where a person has various powers to do an act, and does it, a misrecital of the power afterwards, under which power he could not rightfully do it, will not vitiate the act. He *did* it under *all*, and if *either* was good, the act is effectual, and his misrecital shall not prejudice. He did not act, nor profess to act, under the bank executions. The directions of the
(284) agent were good without paying the fees, and especially if acquiesced in by the sheriff.

We cannot examine into the grounds of the decisions in our sister states for want of their laws in regard to these writs of *fi. fa.* There must be something in them to warrant the decisions, or we misunderstand the common law.

It is asked, If the sheriff made a levy on lands, and went out of office, is he to sell? I imagine not. Indeed, I say not. And yet if the plaintiff's argument is sound, he must. And if so, all sales made by succeeding sheriffs, where their predecessors had made a levy on lands, would be set aside. For they have uniformly been made by the successors, under writs of *venditioni exponas.* Nor will the application of the surplus in the sheriff's hands (after applying what he chose to the *venditioni exponas*) to the bank executions alter the case; that is, make it a sale under the bank executions. This is only matter of evidence, and is entirely contradicted by the full proof to the contrary. As this case is to go back for a new trial, I imagine that it is within the power of New Hanover County Court to affix their seal to the *venditioni exponas* now, if it was omitted by mistake; that is, if it was intended the *venditioni exponas* should be a genuine writ. I make this suggestion, that the parties may meet on equal terms at the next trial.

PER CURIAM. Judgment reversed.

Cited: Tarkington v. Alexander, 19 N. C., 92; *Purcell v. McFarland,* 23 N. C., 35; *Love v. Gates,* 24 N. C., 16; *Smith v. Spencer,* 25 N. C., 264; *Samuel v. Zachary,* 26 N. C., 379; *Freeman v. Lewis,* 27 N. C., 96; *Bailey v. Morgan,* 44 N. C., 355; *Mardre v. Felton,* 61 N. C., 282; *Isler v. Colgrove,* 75 N. C., 343; *Taylor v. Taylor,* 83 N. C., 118; *Perry v. Adams, ibid.,* 268; *Gifford v. Alexander,* 84 N. C., 332; *Henderson v. Graham, ibid.,* 498; *Redmond v. Mullenax,* 113 N. C., 511; *McArter v. Rhea,* 122 N. C., 617; *Calmes v. Lambert,* 153 N. C., 252; *S. v. Lewis,* 177 N. C., 557.

THE JUSTICES OF CUMBERLAND v. JOHN ARMSTRONG ET AL.

1. The acts of Assembly which direct the justices of the county courts to take bonds in certain cases, confer on them, as to such bonds, a corporate character; and they may take a bond from one of their number to themselves.
2. A bond payable to the justices of a county, which is not taken according to the directions of act authorizing it, may be supported as a valid bond at common law.
3. But an action must be brought on it in the name of the surviving obligees, and not in that of the successors.
4. And if one of the obligees be a justice at its execution, it is void as to all.
5. The case of *Pearson v. Nesbit*, 12 N. C., 315, approved by RUFFIN, J.

THIS was an action of debt, upon the bond for £2,000, given by the defendant Armstrong for the faithful discharge of his duties as clerk of Cumberland County Court.*

W. H. Haywood for plaintiff. (285)
Badger for defendant.

RUFFIN, J. It is to be hoped that the perplexing questions on official bonds, which have frequently arisen of late, will not have a much longer continuance, since the new act directs them to be given to the Governor. Perhaps all difficulty would be most effectually cut up by the roots by making them payable to the State at once.

After all our endeavors, we are unable to sustain this action. It is a suit on a clerk's bond for £2,000, payable to the justices of the peace for Cumberland County. The writ is brought by A., B., C., etc., *nominatim,* as the successors of those who were justices at the time the bond was given. And McMill, one of the obligors, was also then a justice.

We have no doubt that when a statute directs an official bond to be payable to a class of official persons, it may and ought to be taken to them, by their name of office, and in that name they may sue on it. The statute confers upon them a corporate character *pro hac vice,* and the capacity to take implies that of bringing suit. And in such case the bond is not invalidated by reason that one of the obligors is one of the justices,

*This cause was decided several terms ago, but the record certified to this Court was mislaid and is supposed to have been lost in the fire, which destroyed the State House. The report was delayed in the hope of being able to supply the loss, but the reporter is informed that the original was also destroyed in the fire at Fayetteville. These circumstances are mentioned to excuse the omission of a statement of the pleadings and facts, of which the reporter knows nothing, except as they can be gathered from the opinion of the Court.

for a corporator may give his bond to the corporation, which has a contracting capacity, distinct from that of the individuals who compose it. If this bond had in other respects conformed to the statute a suit might have been sustained in the name of the "Justices of the County Court of Cumberland."

(286) We also think the bond might be good at common law, as one payable to the individuals who were justices. There is no contradiction in this. The same bond, it is true, cannot be held to be payable to the justices as a corporation and as individuals. As a corporation they are unlike those expressly created by charter. They have a general contracting capacity, limited only by the restrictions of the charter. But when the corporation arises by inference, in order to support a contract which, as a class, they are directed by statute to enter into, they constitute a corporation solely for that single purpose, and if the contract is not within the statute they do not contract as a corporation. Such is the case here, because the penalty of the bond is too large. The bond is therefore at common law. As such we would support it, for the justices of a particular county cannot be said to be an indefinite multitude since it is so readily made certain who they are. And a deed may be made to persons as well by description as *nominatim,* for after all names are but a more precise description.

But there are two other objections, each of which is fatal to the plaintiffs. The one is, that this suit is brought by the successors, *nominatim,* of the justices to whom it was given. The obligation belonged to them individually, and comes to the surviving obligees or obligee, when we consider it a common law contract. These plaintiffs therefore cannot sue. The other is, that McMill, one of the obligors, is also an obligee. If an individual give his bond to another individual and himself, it is void. It is certainly so if the obligees be mentioned by their proper names. So it is, if it be by description, which includes him. Thus a note to a *firm,* of which he is a member, is void. *(Pearson v. Nesbit,* 12 N. C., 315; *Mainwaring v. Newman,* 2 Bos. & Pul., 120.) So I think it is, if payable to a class of persons, of which the obligor is one. If I give my bond to "my father's children," upon what ground shall I be excluded? Is there any intention that I shall not have a share? It is said there is, or at least it must be inferred, in order to sustain the contract. The same reason extends to the bond to the *firm.* And

(287) the intention seems to be that "the children," *as a class,* should have the benefit of the thing to be done in which I am to participate. That it is which makes the bond void, because it cannot be enforced without naming me both as plaintiff and defendant. The same principle extends to the case before us. It may be said, and very truly, that here no benefit could be intended to McMill as an obligee, because

none of the obligees are beneficially interested, for the bond is taken in trust on its face. That intention will make no difference, for if it went on that the bond would not be good at common law at all, since the intention was to give a bond under the statute, and such a bond only. We hold it to be good at common law, contrary to the actual intention, because as a common law bond it may enure to some purpose, since in fact there are obligors, obligees and a thing to be done. But if upon its face it cannot be sustained at common law, it must share the same fate then as under the statute. We cannot say that the parties did not intend to make McMill an obligee, when he is in fact made one, as much as any other of them is. The point in question was directly ruled in *Justices v. Shannonhouse.* It was of such consequence, and the rule is likely to produce such mischief, that we have been willing to reëxamine it and overrule it if possible. But that case stands upon ground that cannot be shaken. It is the gross injustice that is done by the rule which makes one hesitate, not the doubt of the law.

PER CURIAM. Judgment affirmed.

Cited: Justices v. Dozier, post, 288; *Justices v. Bonner, post,* 290; *Williams v. Ehringhaus, post,* 298; *Dickey v. Alley,* 15 N. C., 44; *Davis v. Somerville, ibid.,* 383; *Bank v. Griffin,* 107 N. C., 174.

THE JUSTICES OF CURRITUCK v. DENNIS DOZIER ET AL.

A bond made by a guardian and his sureties to A. B. and the rest of the justices, is not in pursuance of the Act of 1762 (Rev., ch. 69, sec. 7), and can be supported only at common law. If one of the obligors be a justice at its execution it is void as to all.

THIS was an action of debt upon a guardian bond. The bond was made payable to "Willis Etheridge, Joseph Ferebee and the other justices of Currituck County." Upon *oyer* had, and *non est factum* pleaded, it was proved that Dozier, one of the obligors, was at (288) the execution of the bond a justice of the peace. The action was brought in the name of those justices who were in office at its commencement.*

Kinney and Devereux for plaintiffs.
Hogg contra.

*The record in this case also was lost, and the reporter is therefore unable to give a more particular statement of the facts.

RUFFIN, J. The principal question in this case has been already decided in *Justices of Cumberland v. Armstrong et al., ante,* 284. The Act of 1762 (Rev., ch. 69, sec. 7) directs a guardian bond to be made payable to the "justices present in court, the survivor or survivors of them, their executors or administrators." Under the statute therefore, the bond is nothing more than a common law bond, payable to individuals and their personal representatives in trust for another. This being the case, this bond must be taken to have been given to the individuals who were justices, by the description of their office. Dozier, then, was both obligor and obligee, and the bond is void. There has been an attempt to distinguish this case from that of the *Justices v. Armstrong,* by the circumstance that it is payable to *"Willis Etheridge, Joseph Ferebee, and the other justices of Currituck County."* This is said to exclude, by necessary implication, that justice who was obligor, as if it had been expressed, "the rest *except Dozier.*" That depends upon what the word "rest" refers to. It is introduced in that part of the bond in which the obligees are set forth, and was designed to describe them, and it plainly refers to the obligees, Etheridge and Ferebee, who are expressly named, and was designed to include, and does include as obligees all that class of persons of which those two form parts. This is the plain and obvious grammatical construction of the words, and we cannot imply an intention of the parties or insert an exception against those words.

PER CURIAM. Judgment affirmed.†

Cited: Justices v. Bonner, post, 290; *Davis v. Somerville,* 15 N. C., 383.

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THE JUSTICES OF CHOWAN, UPON THE RELATION OF JOHN SPENCER ET UX., v. JOHN BONNER.

1. A bond payable to the justices of a county, executed by several persons, one of whom is a justice of that county, is void as to all the obligors.

2. A personal incapacity of one obligor does not affect the validity of the bond as to the others; but it is otherwise where one of them is both obligor and obligee.

3. The case of *Pearson v. Nesbit,* 12 N. C., 315, approved by RUFFIN, J.

†The case of *The Justices of Martin v. Stewart* was in every respect similar to the above, and the same opinion was filed in both.

JUSTICES *v.* BONNER.

THIS was an action of debt, tried on the last circuit, before *Martin, J.* Upon *oyer* the bond was set forth *in hæc verba:*

"Know all men that we, Henry Holmes, John Bonner and Baker Hoskins are held and firmly bound unto Exum Simpson, Esquire, and the rest of the justices assigned to keep the peace of the county of Chowan, in the full sum of, etc., to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed," etc.

The condition was that the obligor Holmes should improve the estate of the wife of the relator as her guardian, and should pay it over at her full age.

Several pleas were entered for the defendant, but the cause being decided upon that of *non est factum,* it is not necessary to state them or the breaches assigned by the plaintiffs. The original plaintiffs were those justices of Chowan who were the survivors of the obligees at the date of the writ, and among them was Baker Hoskins, one of the obligors. On the trial it was proved that Holmes and Hoskins, two of the obligors, were justices at the execution of the bond, upon which his Honor nonsuited the plaintiffs, who appealed.

Iredell for plaintiff.
No counsel for defendant.

RUFFIN, J. This case comes directly within the decision in the four cases of *The Justices v. Shannonhouse,* 13 N. C., 6, *The Justices v. Armstrong, ante,* 284; *The Justices v. Dozier, ante,* 287; and *The Justices v. Stewart,* and must therefore abide the rule there laid (290) down. It has been argued that there is a difference, because Bonner alone is sued here, and it is said that the objection must be pleaded in abatement and cannot be taken on the general issue. But those cases did not turn on the fact that some of the obligors who were justices were jointly sued, but that the same person was a coöbligor with others, and also one of the obligees, which rendered the bond void. It is not like the cases cited of bonds by a *feme covert* or a man professed and another. There the incapacity is personal, and does not affect the obligor who is able to contract. But here the question is, whether a joint and several bond by A. and B. to A. is good as the bond of either. There can be no delivery to an obligee by himself, nor by one obligor to another obligor. It is like the case of the same person being plaintiff and defendant. No judgment can be rendered in such a case. If it be it is a nullity. *Pearson v. Nesbit,* 12 N. C., 315. That indeed was a writ of error, but it was one *coram nobis* for error in fact not of law, and was necessary only to identify the person of the same name, who was both plaintiff and de-

fendant, to be the same person. If that had appeared on the record, the judgment would have been vacated or set aside on motion as being null. There seems to be no difference between the validity of a judgment and a bond, as affected by this objection. For if the bond would be good as to one, so would the judgment. The true reason governing both and making both void is, that there must, in the nature of things, be parties to both contracts and judicial proceedings.

If this be correct, *non est factum* is the proper plea. There cannot be a plea in abatement that the other obligor is not sued, for that would not be giving the plaintiff a better writ, since the obligor not sued is one of the obligees, and he cannot sue himself. The objection is that the instrument is *void in toto,* and therefore not the deed of any of the parties. It is like the case of a joint and several obligation of two, canceled as to one by tearing off his seal. It avoids it as to both, (291) though it would be different if they were severally bound. *Pigot's case,* 11 Co., 28. The reason is, the parties intended to have contribution. So here it never could have been intended that one of the persons who sealed the instrument should alone *pay to the other* the money mentioned in it. And because it cannot be enforced without that construction, it must be taken to be void altogether.

PER CURIAM. Judgment affirmed.

Cited: Davis v. Somerville, 15 N. C., 383; *Sanders v. Bean,* 44 N. C., 319; *Justices v. Simmons,* 48 N. C., 188.

HENRY FITTS, ON THE RELATION OF EDWIN SLADE v. JOHN H. GREEN, EXECUTOR OF SOLOMON GREEN.

1. Where an order of the county court allowed a guardian to renew his bond with A. and B., his sureties, and a bond not drawn according to the statute as an official bond, but good in its form as an obligation at common law, was sealed by A. only and left with the clerk, *it was held* that a delivery could not be inferred, there being no evidence of an actual delivery.

2. Per HENDERSON, C. J. A bond payable to A. B., chairman, and other justices of the court, etc., is in law payable to A. B. alone.

THIS was an action of debt, and upon *oyer* the bond was as follows: "Know all men by these presents that we, Robert R. Johnson, Solomon Green and John C. Johnson are held and firmly bound unto Henry Fitts and other justices of the Court of Pleas and Quarter Sessions for

the county of Warren, in the sum of, etc., to be paid to the said justices, or the survivor or survivors of them in trust, etc., for which payment well and truly to be made we do hereby jointly and severally bind," etc., with the usual condition that Robert R. Johnson should faithfully discharge the duties of guardian to the relator. The bond was signed by Robert R. Johnson and Solomon Green only. The defendant pleaded *non est factum testatoris,* and upon the trial the case was that at the term of the county court at which the bond was taken the following entry appeared upon the minutes of the court: "Robert R. Johnson, guardian to Edwin and Eliza Slade, renewed his bond as such in the sum of four thousand dollars each, with Solomon Green and John C. Johnson his sureties." When the court opened that (292) morning Henry Fitts, Dennis O'Brien, Burwell P. Achford and David Terry were the justices in court, and there was no evidence that other persons were on the bench when the entry was made and the bond taken. The clerk of the court deposed that he or his deputy attested the execution of official bonds, but that he had no recollection whatever touching the execution of the bond in question. There was no attesting witness to the bond. It was proved that both Green and John C. Johnson were the sureties to the former bond of Robert R. Johnson. It was admitted that Robert R. Johnson was a justice of the peace for the county of Warren, when the bond was executed.

It was contended for the defendant:

1. That there was no evidence of a delivery of the bond to be left to the jury; that considered as an office bond there was no evidence that the court had accepted it; that considered as a bond at common law there was nothing from which a delivery to Fitts could be inferred, and that all the circumstances of the case contradicted such inference.

2. That the plaintiff could not recover because the bond was payable not to him alone, but to other persons not joined with him in the action, and that among these persons was Robert R. Johnson, who was also a coöbligor.

For the plaintiff it was insisted that the words "other justices" did not import all the other justices nor define what number or description of them was intended, and being entirely uncertain they ought to be rejected and the right of action would then be in the plaintiff.

At the suggestion of his Honor, Judge Swain, this point was reserved, and the jury were instructed upon the first point made by defendant, that they might infer from the facts of the case a delivery of the bond to the plaintiff. A verdict was returned for the plaintiff, but upon the matter reserved, his Honor being of opinion with the defendant, ordered it to be set aside and a nonsuit to be entered, whereupon the plaintiff appealed.

Hall and Attorney-General for plaintiff.
Seawell, Gaston, Badger and W. H. Haywood for defendant.

(293) (Brief of counsel brought forward because referred to and made part of Court's opinion.)

The most formidable objection to the plaintiff's claim is presented upon the bond itself. The plea of *non est factum* makes it incumbent on the plaintiff to prove the execution of such a bond as is described in the declaration, which states a bond given by the defendant, payable to H. Fitts, chairman. The one offered in evidence in support of this allegation is payable to H. F., chairman, and "other justices of the peace for the county of Warren." The question then is, do the words "other justices," etc., import anything, or are they merely surplusage, and therefore to be rejected as such, leaving it a bond payable to H. F. alone? If the last is the proper construction of the instrument, the action may be maintained so far as respects the objection of variance. If the words "other justices" cannot be rejected as immaterial, but are interpreted to signify other obligees under a general description, the plaintiff must fail, because the bond declared on, if this construction be given, does not agree with that exhibited on the trial, and the variance will be fatal. In answer to the objections of variance, we must show that H. F. is the sole obligee, and this we can only do by rejecting the words that immediately follow his name, to wit, "other justices." The omission of the article "the," before "other justices," is the only circumstance by which the case can be distinguished from the cases decided by the Supreme Court and relied on in the court below. This circumstance is important enough to furnish a ground for saying that the two cases are unlike. A. B., chairman, "and the other justices" of such a county are descriptive of a class of men who may be easily ascertained. That phrase points to *all* the individuals in the county who were justices when the bond was given, and designates them as obligees with as much certainty as if the justices had been named in the bond by their appropriate Christian and surnames, as much so as a note payable to A. B. & Co. does the members of the firm which they compose. But in this case, giving a strict grammatical construction to the words "other justices," it is difficult to determine, upon reading the bond, which of the (294) justices of the county of Warren, in addition to the chairman, were designed to be comprehended under the general denomination, which may embrace all or a less number than all. That term has no *certain* reference to *all* of the justices, as the words in the case decided by the Supreme Court did, but to *all* or *some* of a body of magistrates consisting of many members, but to whom or what number of those members is uncertain. In the case decided the description, though

general, was definite, and marked with unerring certainty who were meant, and by such description the obligees could be ascertained; the rule, therefore, *id est certum quod potest reddi certum* applied, and rescued the instrument from impeachment for ambiguity as to the other obligees whom the parties had in contemplation. But in our case this maxim cannot apply in consequence of the indefiniteness of the expression, "other justices," which, without the article "the" before it, furnish no clue to guide us in our search for the parties intended to make coöbligees with Fitts, but which they failed in doing; the words then being ambiguous, they ought to be rejected and the bond regarded as payable to Fitts alone.

As respects legal certainty and grammatical precision of language, I see no difference between A. B. and other justices of a county, and A. B. and other justices of the State of North Carolina. There would be a greater probability of finding out who were meant in the one case than in the other, if parol evidence were admitted to explain the ambiguity, as the inquiry in the former case would be limited to a smaller compass as respects space and to fewer individuals. But the expressions in both cases, unaided by *matter dehors,* are equally indefinite. I therefore think that the case relied on does not decide this to our prejudice—so far from it, the decisions may be cited in our favor. The reasoning of *Ruffin, J.,* seems to proceed upon the idea that the justices of the county were embraced by the term, "the other justices," which is sufficiently large to include all, and sufficiently definite, with the help of the article "the" to designate each. But the term in our bond is neither extensive enough to include all the justices with *certainty,* nor definite enough to point out which of them were meant, other (295) than or besides H. Fitts. If at the time when this bond was executed the law had required it to be taken payable to all the justices of the county, the Court might presume that the county court intended to do their duty, and might construe it a bond payable to all the justices according to such presumption. This construction it might properly receive, if there was no other alternative between such a construction and declaring it a nullity, *ut res magis valeat quam pereat.* Or if the minutes of the county court set forth who were the justices on the bench when the bond was executed, upon the same presumption (for at that time the law required such bonds to be taken payable to the justices in court on the bench), the word "others" might perhaps be referred to the justices then on the bench; but as it does not appear who were on the bench at the time, the facts will not sustain this construction. And to construe it as a bond payable to *all* the justices (which derives no support from the presumption that the magistrates intended to discharge their duty, for that was not the form which the law prescribed

for the bond at the time), will be explaining or rather aiding a *patent* ambiguity to the destruction of the bond and the rights it was designed to protect. The only remaining alternative is between the last construction and the upholding of the bond by the rejection of the ambiguous phrase as too uncertain to admit of a sensible meaning, and therefore regarding it as inoperative and void.

If there be any doubt or repugnancy in the words of a grant, such construction is to be made as is most strong against the grantor, because he is presumed to have received a valuable consideration for what he parts with. Co. Litt., 314b, 146; 2 Roll. Abr., 65; Plowd., 154, 171. Words, if they cannot operate in one form, shall operate in that which by law will effectuate the intentions. *Goodtitle v. Bailey;* Cowper, 600; *Jackson v. Beach,* 1 Johns. Ca., 399, 402; *Barnes v. Irwin,* 2 Bal., 199, 203. Or they may be rejected where they are merely insensible. *Smith v. Parkhurst,* 3 Atk., 136; *Parkhurst v. Smith,* Willes, 332.

(296) Where it is impossible the grant should take effect according to the letter, there the law will make such constructions that the gift by possibility may take effect. Co. Litt., 183b.

Upon the issue submitted, proof of the handwriting of a party to a deed is strong evidence for a jury to presume a delivery. Peake's Evid., 100; *Lesher v. Levan,* 2 Dal., 96.

Delivery to a third person for the use of the grantee, and without his knowledge, becomes a valid delivery on the subsequent assent of the grantee which relates back to the subsequent time of delivery. 13 Jonhs. Rep., 285; 4 Day, 66; 9 Mass. Rep., 307; 5 Munf., 160; 12 Mass., 456; 18 Johns., 544; 1 Johns. Ca., 388; *ibid.,* 240, 450; 2 Stark, 477.

A deed may be delivered by words, or by acts, and may be good if delivered to a stranger without special authority, if intended for the use of the grantee. 12 Johns., 536; 2 Roll. Abr., 24, 42.

HENDERSON, C. J. I agree with the counsel for the plaintiff that the words *other justices* neither import all the justices nor any definite number of them. It may be satisfied with less than all of them, and therefore may mean any two or any greater number of them. It does not necessarily import all, as the words *the justices* do. Henry Fitts is therefore the only obligee. For it is the same as if it had been payable to him and "other people," or to him and ..... (leaving a blank). And the certain description is not vitiated by an uncertain one. The action is therefore brought in the name of the only obligee. There are no others; and the words "to be paid to the said justices" are also to be rejected as referring to the uncertain and indefinite description *other justices.*

But in this case there is no evidence of a delivery. None was given of an actual delivery to Fitts, for the clerk is his agent for the delivery of official bonds only, which this is not. And from the whole case it is evident that it was intended that John C. Johnson was to (297) sign it also. It is a fair and reasonable presumption, in the absence of all proof of an actual delivery to the obligee, that he whose name is mentioned, both in the body of the bond and the minutes of the court as a coöbligor, I mean John C. Johnson, was also to sign it, and that upon the condition that he also signed and became bound was Green to become bound. Common sense and common experience, and justice to Green, require this exposition of the transaction.

As to the meaning of the words *other justices,* and who is the obligee or obligees, I have expressed my own opinion only, the case being decided by the Court on the other ground; that is, that there was *no evidence of a delivery.*

PER CURIAM. Judgment affirmed.

Cited: Threadgill v. Jennings, post, 387; *Blume v. Green,* 24 N. C., 342; *Iredell v. Barbee,* 31 N. C., 254.

OWEN WILLIAMS ET AL. v. JOHN C. EHRINGHAUS ET AL.

1. Bonds intended to be official, but which are not in conformity to the statute, may be declared on as voluntary bonds at common law.
2. A bond payable to the justices of a court has the same validity as if it described the obligees by name.

(The case of *Governor v. Meilan,* 4 N. C., 346, and *The Governor v. Witherspoon,* 10 N. C., 42, approved.)

AFTER the new trial granted in this case (13 N. C., 511), the cause was tried again on the last circuit, before his Honor, *Martin, J.,* at PASQUOTANK. The only question made in the case was, whether the county court had a right to take the following bond: "Whenever the Court of Pleas and Quarter Sessions for the county of, etc., 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 suit was brought in the names of the survivors of those justices who were in office when the bond was executed.

His Honor being of opinion for the plaintiffs, a verdict was (298) taken accordingly, and the defendant appealed.

Iredell for plaintiff.
Kinney for defendants.

RUFFIN, J. It was not expected that the frequent decisions that bonds intended to be official, which had not that character because of some want of conformity to the statute, were not void, but would be supported as good voluntary bonds at common law, that any question would be again made upon it. *The Governor v. Meilan* (2 Law Rep., 460) was the first case upon the subject. *The Governor v. Witherspoon* (3 Hawks, 42) and many others have followed it. And in the *Justices of Cumberland v. Armstrong* it is plainly declared to be the opinion of the Court that a bond payable to the justices of a particular county is not void, for the obligees are sufficiently identified by that description. It follows that the present bond is valid.

It is said, however, that the county court has no capacity to take such an obligation. Admit it, and what is the consequence? This bond is not taken to be given to the justices, as constituting a court, but given to them as individuals by the description of their office, instead of their names. That is the ground of all the decisions on the subject down to that of *Branch v. Elliott, ante,* 86. Unless, therefore, it is void at common law for uncertainty, it must be supported, and that it is not void for that reason has been settled in those cases. The bond directed by a statute must be taken according to it, to be proceeded on under the statute. But to take such a bond as the present, there is no necessity for a special authority. The distinction is between taking a bond without such an authority and taking it when forbidden, as in the case of bail bonds.

PER CURIAM. Judgment affirmed.

Cited: Reid v. Humphreys, 52 N. C., 260.

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THE STATE v. CATHARINE MORRISON.

On the trial of an indictment under the Act of 1816 (Rev., ch. 906) to prohibit the retailing of spirituous liquors by the small measure, it is incumbent on the defendant to show the existence of a license.

THE defendant was indicted for retailing spirituous liquors by a less measure than a quart. On the trial, before his Honor, *Strange, J.,* at ROBESON, on the last circuit, the charge of selling by the small measure being fully proved by the prosecution, it was contended for the defend-

ant that the State must prove the want of a license. But his Honor charged the jury that it was incumbent on the defendant to show the existence of a license. A verdict was rendered for the State, and the defendant appealed.

Attorney-General for the State.

RUFFIN, J. This appeal seems to rest on the argument that the indictment ought, and does, charge the want of a license, and therefore the State must prove it. It is true there is a known distinction, where an exception is embraced in the enacting clause of a statute, and where it comes in by a proviso, or by distinct enactment. In the former case the indictment must allege, as here, that the defendant is not within the exception, because the negatives are descriptive of the offense, though in the latter it may be silent on that point, and the justification or excuse must be adduced in defense by the party accused. Yet the consequence claimed by this defendant cannot be yielded. The questions are very different. This is not a question of pleading. It is one of evidence. And although it be admitted that the indictment must negative the existence of the license, it remains to inquire upon whom the proof on that point is incumbent, or rather what is proof of the defendant's guilt. The general rule, founded on convenience and common sense, is that the affirmative must be proved. He who alleges a fact to be, is naturally expected to show its existence, and not he who denies it to show that it is not. The few exceptions to this principle, as yet established, do not extend to the case before us. In the case of Lord Halifax (Bull, N. P., 298), who was accused of refusing to deliver to his suc- (300) cessor the papers of his office, it was required that the refusal should be shown. This might be because the law presumes that every sworn public officer will do his duty, until the contrary appears. Or it might be, that as the omission is the criminal act, it must be expressly proved, and it can be done and ought to be done by affirmative evidence to the fact of refusal, as is the case in every instance where a previous demand and refusal are necessary without putting the defendant to show, on his part, performance or a readiness.

There are other exceptions where the affirmative evidence is not within the knowledge, or peculiarly within the knowledge of the defendant, as in *Williams v. The E. I. Co.* (3 East, 162) and *Rex v. Rogers* (2 Camp., 654). In all other cases the affirmative, as being easily, explicitly and directly shown, ought to be proved. This has been held to embrace special qualifications and license to exercise particular trades. In *Rex v. Stone* (1 East, 639), it was admitted by *Lord Kenyon* and *Mr. Justice Lawrence,* that in an action on the game laws, no negative proof

was ever given by the plaintiff, of a want of qualification in the defendant, but the affirmative lies on the latter to show such qualification. It is true the Court was equally divided in that case, but not on the general question of evidence. Those two judges thought that on information before magistrates the negative, a want of qualification, ought to appear on the conviction as having been proved by the prosecutor, while the other judges held differently. I confess I do not perceive why the modes of proof should be different before two legal tribunals, since the same conclusion is sought by each, and would seem to follow from the same evidence before both. But the concession there (in which all agreed) that in an action no negative evidence is necessary, is sufficient for the present case. And in the subsequent case of *Rex v. Turner* (5 M. & S., 206), cited in 2 Stark. on Ev., 627, note h, the distinction between actions and informations before magistrates is disallowed, and the *onus* thrown alike in both instances on the defendant, as alleging the affirmative. This is a strong example, because there are divers (301) disqualifications under the game laws, some of which may involve complicated inquiries into the title to estates, the exercise of manorial rights and the due appointment of game-keepers. But the principle applies much more forcibly where the point in dispute is the existence of a single and simple written document which, if it exist at all must be in the possession of the defendant. In such a case the failure to produce the paper is, according to all experience of the motives and actions of men, proof that there is none such, which consideration induced me to say that the question was rather whether there was legal proof of the defendant's guilt than whether the proof should come from one side or the other. The refusal or omission to exhibit written evidence, which the party alleges to exist, and to be in her exclusive power and possession, containing a plain authority for her acts, creates a legal and plenary presumption against her. It seems, in and by itself, to be conclusive proof. Accordingly in *Rex v. Smith* (3 Bur., 1475) it was held that where a person admits before a magistrate the main fact of trading as a hawker and peddler, he must prove that he had a license. It is remarkable that this was decided by *Lord Mansfield,* upon a conviction on an information, although in the case of *Rex v. Jarvis,* relied on by *Lord Kenyon* in the case of *Rex v. Stone,* he held that negative evidence must be given by the prosecutor on an information under the game laws. This shows that in *Smith's case* he considered the fact of not producing equivalent, as a matter of evidence, to not having the license. It is true the statute on which that conviction was founded, provided both for the party's not having a license and not producing it to a justice of the peace when demanded. But the conviction was for *not having* the license in that case, and the evidence

to prove that fact was stated by the magistrate in the conviction to be the acknowledgment of trading, *and the refusal to produce the license on that trial,* and the court refused to quash.

Such I always understood the rule to be, on trials for retailing without license, when on the circuit.

PER CURIAM. Judgment affirmed.

Cited: S. v. Weaver, 35 N. C., 204; *S. v. Woodly,* 47 N. C., 280, 283; *S. v. Evans,* 50 N. C., 251; *S. v. Atkinson,* 51 N. C., 67; *S. v. McDaniel,* 84 N. C., 805; *S. v. Wilbourne,* 87 N. C., 533; *S. v. Emery,* 98 N. C., 670; *S. v. McDuffie,* 107 N. C., 888; *S. v. Smith,* 117 N. C., 810; *S. v. Glenn,* 118 N. C., 1195; *Cook v. Guirkin,* 119 N. C., 17; *S. v. Holmes,* 120 N. C., 576; *Meredith v. R. R.,* 137 N. C., 486; *S. v. Falkner,* 182 N. C., 796; *S. v. Valley,* 187 N. C., 573.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE TERM, 1832

ALLEN MOBLEY v. LEWIS RUNNELS ET AL., ADMINISTRATORS OF DELILA BUTLER.

1. Where the plaintiff bailed a slave, and after the death of the bailee his executors continued in possession; *it was held*, per HENDERSON, C. J., and HALL, J., that although the plaintiff might declare against the executors as executors, for a detention after the death of the testator, yet as the testator's interest had determined, there was no proof to support the declaration. In the same case, held by RUFFIN, J., that *detinue* will not lie against an executor for a detention after the death of the testator.
2. Although the bailee is not permitted to dispute the title of the bailor, yet if the latter by his own showing has none, he cannot recover.
3. If any interest, however small, passes by a deed, it creates no estoppel.

DETINUE for a slave. No declaration was filed.

Pleas—general issue and the statute of limitations.

ON the trial before his Honor, *Martin, J.*, at SAMPSON, on the fall circuit of 1830, the plaintiff offered in evidence a bill of sale from the defendants' intestate to her daughter, who afterwards intermarried with one Burton, by whom the slave was conveyed to the plaintiff. It was proved that the slave remained with the defendants' intestate, by consent of the plaintiff, until her death, and afterwards came into the possession of the defendants, her administrators.

The defendants offered evidence that their intestate was entitled to a life estate only in the slave, under a decree of the county court of Sampson.

Under the directions of his Honor a verdict was returned for the plaintiff, and the defendants appealed.

(304) *No counsel for either party.*

HENDERSON, C. J. I will not in this case discuss the question, upon which there is a difference of opinion in the Court, whether an action of *detinue,* such as the present is, can be sustained against administrators, as administrators, for a detention by them. The question in principle is fully discussed in *Eure v. Eure, ante,* 206, to which I refer, only observing that administrators may settle an account, may indorse a bill, receive a bill, and promise as administrators. And I can see no reason why they should not detain property in the same capacity, and that it would be unjust in the highest degree to throw upon them the responsibility of reconsidering at their peril a question which has been already determined by their intestate. If there be error in the decision it should fall on him who made it; that is, in such case on the estate and not on them who, as it were, acted in obedience to the intestate's orders as his agents. Nor do I think the argument by any means conclusive, that their letters give them authority to take into their possession what is of the estate of their intestate only and not the property of another. Such rigid construction is not compatible with our nature. For the most astute of us are not gifted with the power of determining, with absolute certainty one-half, nay one-tenth of the questions on which we must decide, if we act at all. And without any great violation of the common intendment of such a phrase, it may well be taken to mean such goods as were *understood* to be of the estate of the intestate; and where his estate is to be the gainer or the loser, the understanding of no one can be so well referred to by the administrator as that of the intestate himself. And further an estate means interest, and although we have not in personals the same divisions of estates or interests as in lands, to wit, the possession in one, and the right of possession in another, and the mere right or title in a third, yet we have something analogous thereto, as possession gives right against all but the rightful owner, or against one whose presumption of rightful ownership is better (305) than the possession. A bailee must deliver possession to his bailor, although he may be the rightful owner, recognizing very clearly a presumptive estate or interest arising from possession. And these words may well justify, nay, direct the administrator to take into his possession, as administrator, all the goods of which the intestate died possessed, for thereby he was presumptive owner. I am speaking now of the construction of those words, as between those interested in the fund and the administrators, not as between the administrators and

mere strangers, for as to them the administrators certainly act at their peril. No authority derived from their intestate can justify them in taking the property of another. They are, if he chooses to consider them so, mere wrongdoers and individually liable; but he may, if he pleases, consider them as acting in obedience to the directions virtually given to them by their intestate. I have endeavored to show that those interested in the fund have no right to complain if they are charged as administrators, for it is to guard their interest that the opposite rule is endeavored to be supported to prevent the wrongful acts of the administrators or executors to be thrown upon the assets. I will therefore consider the declaration as having two counts, one for the detention of the intestate, and one for their own detention as administrators.

I think the evidence supports neither count; not that for the detention of the intestate, for it appears from the plaintiff's own evidence, introduced I suppose to repeal the plea of the statute of limitations, that the intestate held the slaves by consent of the plaintiff. Her detention therefore could be no wrong to the plaintiffs. The proofs not only do not support the first count, but disprove it. As to the latter count the proof is that at the time of her death the intestate set up no title in herself, but that she held possession at the will of the plaintiff, and the defendants show that she had at most but a life estate. Take it therefore either way, this action cannot be supported. For to support the latter count, it must be shown that the possession was in the representative character; that is, but in affirmance and continuance of the claim set up by the intestate. If the intestate held but for (306) life, a detention by the administrators afterwards could not be thrown on the assets. It would be no violation of duty in them *to surrender up the possession immediately.*

I confess I should have some doubts as to the obligation of the administrators, as such, to surrender up the property to the bailor if the plaintiffs had relied upon their bailment alone. But they have exposed their title and shown that, making the most of it, it expired with the life of the defendants' intestate, from whom they derived it. I think this discharges the obligation which the bailee is under to restore the property bailed at the expiration of the bailment, which is founded on the presumption that the bailor has the property, a presumption which in ordinary cases the law will not permit the bailee to controvert by proofs. But when the bailor himself exposes his want of title, the court will not decree the possession to be changed.

As to the question of estoppel arising from the bill of sale to the daughter, under whom the plaintiff claims, disposing of the whole interest in the slave, there is nothing. Estoppels are not to be favored, at least such as arise from the act of the parties. They exclude the

truth and are admitted only for the sake of repose. But there is no estoppel in this case, because some interest passed by the deed, to wit, the life estate. And the same deed never passes an interest, however small, and also creates an estoppel. The reason is not very satisfactory, but the law is certainly so. Co. Litt. *passim* on Estoppel. Put the strongest case. Son, tenant *per auter vie;* reversion in the father. The son makes a feoffment in fee. The *cestui que vie* and the father die; the reversion descends on the son as heir to the father. The son may recover against his own feoffee, and the reason given why he is not estopped by his feoffment in fee is that something (his estate *per auter vie)* passed to the feoffee. But if a son having no interest had made a feoffment, he would have been estopped. So here the intestate, but having an interest she is not.

(307) I will here add an additional reason, why the action of detinue ought to lie against executors or administrators, as such, for a detention in their representative character. The executor may be a poor but an honest man. The estate may be rich. The owner may prefer onerating the assets to a judgment against an insolvent executor who will not but by the direction of the court touch the assets, to pay a judgment recovered against him individually. Although I have no doubt that in such case if the executor did pay out of the assets he would be protected. But I doubt whether the claimant, after he has chosen to sue him in his individual character, could recover against him as administrator. It is right, therefore, for the creditor to onerate the assets if the facts will warrant him.

RUFFIN, J. I think the action of detinue will not lie against the defendants, in their representative character, for a detention commenced by them after the death of their intestate. The act is a wrong by them personally. It cannot affect the estate, but charges the defendants in their own right. The letters of administration go only to the goods of the intestate, and do not justify or excuse the administrator in taking the goods of another, under pretense that they belonged to the intestate. It is like a sheriff seizing under a *fi. fa.* against one, the property of another. The action is not brought against him as officer, but personally, because the act was beyond his duty or authority, and he is a trespasser.

I do not mean to say that *detinue* will not lie against executors, but it must be on the testator's detention. If it were otherwise a charge might be thrown on the assets at the mere will of the plaintiff, without any wrong by the testator, but upon that of the executor acting beyond his rights. Nor do I mean to say that where the executor has detained the property honestly, upon a fair claim of right in his testator, and

defended bona fide by himself, he shall be indemnified for the costs out of the assets as between him and the legatees. That is a different question. But this I mean to say: that for a matter arising *wholly* in the executor's time, no action against him as executor will lie. (308) The contract or wrong is altogether the executor's own.

For the same reasons, I think, counts on the detention of the testator and executor cannot be joined. *Jennings v. Newman,* 4 T. R., 347; *Bridgen v. Parks,* 2 Bos. & Pul., 424.

But if they can, surely it must appear that the testator did set up a right in himself, and that the executor took the possession again, claiming upon that right. Nothing less than that would be allowed by the most liberal confounder of actions.

Here the plaintiff himself shows that the intestate had the possession by his leave during her life. Such evidence was indispensable to prevent the bar of the statute of limitations. The wrong therefore commenced in the defendants' own time, and upon a right or pretended right distinct from their intestate's.

The evidence given did not support the action, if it be founded on the detention of the intestate. If the detention be that of the defendants alone, they cannot be declared against as administrators; and if there be two counts, one on detention by each, I think the declaration would be bad, because they cannot be joined; but if they can, the evidence here goes altogether to a detention of the defendants upon a right and claim different from those of the intestate. Wherefore, my opinion is for a new trial.

PER CURIAM. Judgment reversed.

DANIEL COLTRAINE v. HUGH MCCAIN.

1. Trespass will lie against a deputy clerk for wrongfully issuing an execution, under which the plaintiff's property was sold.

2. The principal only is liable for the mere nonfeasance of his deputy.

3. But for an unlawful act committed by the deputy, *colore officii,* both are liable.

4. An execution *de bonis propriis,* where the judgment affects the assets only, is void.

5. And the fact that the costs for which the administrator was liable were included in the execution, does not render it valid.

(The cases of *Taggert v. Hill,* 3 N. C., 86, and *Wingate v. Galloway,* 10 N. C., 6, approved.)

COLTRAINE *v.* MCCAIN.

TRESPASS VI ET ARMIS, tried before his Honor, *Norwood, J.*, at RANDOLPH, on the fall circuit of 1829. Upon the plea of *not guilty*, the case was that the plaintiff, as administrator of one William Col-
(309) traine, brought an action in the county court of Randolph against one John Ramsour, on a bond made payable to his intestate, in which judgment was rendered in favor of Ramsour. The defendant, who was deputy clerk of Randolph County Court, issued an execution against "the goods and chattels, lands and tenements of Daniel Coltraine, administrator of William Coltraine" for all the costs which had accrued in the cause, as well the plaintiff's as the defendant's. This execution was levied by the sheriff upon a horse, the property of the plaintiff, which was afterwards sold, and the proceeds applied to the satisfaction of the execution. The jury, under the directions of his Honor, returned a verdict for the plaintiff, from which the defendant appealed.

No counsel for plaintiff.
Winston for defendant.

RUFFIN, J. This case was very fully and ably argued for the defendant, and the Court has taken time to look into all the authorities cited. The points were deemed well worthy of consideration, but after reflection none of them seem to be well founded.

The first is, that for no act done by *color* of office, and in the course of its duties, will an action lie against the deputy, but only against the principal. This position is rather inaccurately stated, and when divested of its inaccuracy, is answered by the very stating of it. If an act be done *in the course of the duties of an office*, it must be properly an official act, and no action lies therefor against either a principal or deputy. But the question is, whether for an act, which neither principal nor deputy hath authority to do, and which is altogether unlawful, the action must be against the former. The Court thinks not. The distinction is where the cause of complaint is for nonfeasance or misfeasance. The law does not impose any duty on a deputy as such—does not recognize him as an officer within himself. For omissions to act therefore he is not responsible, for he is not bound to act. When-
(310) ever the plaintiff must state the official character of the party sued, as one of the allegations on which the defendant's liability depends, the principal alone is responsible. But where the *corpus delicti* is a thing of active wrong, and a trespass *per se*, unless justified, then the hand that does or procures the act is liable. True it is, the principal is also liable, for to all civil purposes the act of the deputy, by color of the principal's authority, is that of the principal himself, who must

take care to employ no person who will abuse his authority. But in this last case the principal is not alone liable. The deputy is also, because he is not justified by any authority in himself or his principal. Where the principal is sued for the tortious act of the deputy, the plaintiff must indeed show the connection between them, and therefore the official character of the defendant, because upon that character the connection depends, and upon that again the responsibility of the defendant for the act of the deputy. But where the deputy himself is sued, the plaintiff is under no necessity of showing more than the act of trespass, which constitutes a complete case, unless the defendant shows a lawful authority. This lawful authority does not consist in a deputation to do the duties of an office, but in that and the further fact that the act done was a duty of office; that the officer himself could do it, and consequently that the deputy could also. But if it be an act which is *per se* a trespass, and an authority to the principal be not shown, by parity, none existed in the deputy. A *fi. fa.* against A. does not justify the seizing of the goods of B., and trespass lies against the sheriff, if *he* does it. So it lies against the sheriff if his *deputy* does it. But in the last case it lies also against the deputy himself, because he did the act which was unlawful and not justified. But if the action has been by the plaintiff in the *fi. fa.* for not seizing the goods of A., the sheriff alone could be sued, because the law does not make it the *duty* of the deputy, as such, to make the money, but only that of the sheriff that he should do it or cause it to be done. This reconciles all the cases cited. *Saunderson v. Baker,* 3 Wils., 309; *Ackworth v. Kempe,* Douglas, 40, and *Woodgate v. Knatchbull,* 2 T. R., 148, were actions against the sheriff (311) for the misconduct of his officer, in which it was contended that the principal was not liable because the deputy was for going beyond his duty. It was held that the principal was liable, not because the deputy was not, but because, although he was, the principal was also, otherwise the principal might put anybody, however worthless or insolvent, under him, and so the public would have no security. But where, as in *Cameron v. Reynolds,* Cowper, 403, the *gravamen* is, that the deputy *did not act,* that is, make a bill of sale to the purchaser of goods bought under execution, the plaintiff could sue the sheriff alone. So here, if the action was for refusing to issue a proper execution, the clerk would be the person. But where it is for seizing the plaintiff's property, by virtue of a void execution issued unlawfully by himself, the trespass, the active unlawful act is not purged by the delegated authority, for the same authority would not justify the principal himself. The opinion of the Court, therefore, is that the action well lies if the execution was void.

As to that, an execution without any judgment is certainly void. One not conformable to, and warranted by a judgment stands on the same footing. I need not cite an authority for this, besides the one adduced for the defendant of *Barker v. Braham et al.,* 3 Wils., 268, which, by the way, is strong to the first point, for it was trespass *against the attorney,* as well as the plaintiff, for suing out a void *ca. sa.* That was a *ca. sa.* under which an administratrix was arrested on a judgment *de bonis intestati,* and it was held that *trespass vi et armis* lay against the plaintiff and the attorney both. But it is said that this execution is good for part, since the executors were liable for their own costs, and therefore that the taking is justified. The consequence would follow, if the premises were correct. The executors are liable for their own costs, and if the process had distinguished their costs from the defendant's in the suit, so as to show the defendant in the execution how much he must rightfully pay, this argument would have been sound. It would (312) have then been the party's own fault if he had suffered his property to be seized for the payment of a sum to which it was liable. But when the clerk mixes lawful and unlawful demands in a process, which from its nature compels the sheriff to levy the false as well as the true demand, and puts it out of the power of the party himself to discriminate the demand of one sort from the other, he is a trespasser *ab initio.* It is an abuse of the authority to levy a certain sum, to use it as the means of levying a larger sum, especially under such circumstances as prevent the debtor from avoiding a seizure by payment of the true debt. It comes within the reason and the rule of the *Six Carpenters' case,* 8 Rep., 146. Consistent with this are the cases of *Taggert v. Hill,* 2 Hay. Rep., 86, and *Wingate v. Galloway,* 3 Hawks, 6. The execution was for the true debt, and the defect was that it did not properly set out the items of costs. The sheriff knew precisely how much in law he ought to raise, and for that the process was good, but here the execution is for the whole sum, as costs adjudged to the defendant in the action.

It is however said that this execution justifies until it be set aside, for the writ may be amended, and then contrary proceedings will be going on together. True, a writ may be superseded at the instance of one party or amended at that of the other, as the interests of one or the other may induce him to move in it. And this plaintiff might well have asked the court to set aside the execution before action brought, for fear the amendment might be allowed pending his action, and so defeat him. But there is no necessity for such a motion in the first instance, if the writ in its present state will not justify. The plaintiff proceeds at his risk, and if he chooses to suppose, as well he may, that the court will not allow the amendment against the justice of the case, or only upon

such terms as will promote justice between the parties, there is nothing to prevent his treating a *void* process as void, before the court pronounces it so. If this were not so, where is the necessity to amend in any case. The amendment is asked for the sake of putting the process into a shape to justify. If it justified before, no (313) amendment would be necessary, and all these questions would have come on in the shape of motions to set aside. Yet it is not so. *Brown v. Hammond,* Barnes' Notes, 10, was a *ca. sa.* against the defendant by a wrong Christian name. The court permitted the plaintiff to amend. Why? Because without, the person arrested would have had his action. So *Laroche v. Washborough et al.,* 2 T. R., 737, was a *ca. sa.* against two on a judgment in King's Bench for that debt and costs, and also the costs in the Exchequer Chamber of a writ of error sued out by one. There were counter motions by the defendant to be discharged out of execution; not to set aside the execution; by the plaintiff to amend, so as to make his arrest lawful by relation, and authorize his future detention. The amendment was allowed, and *Buller, J.,* expressly says that in *Brown v. Hammond* the plaintiff would have been liable for false imprisonment if the amendment had not been allowed, though the sheriff would have been justified. The execution, says he, was not warranted by any judgment, but the court said they would make it correspond with the true judgment. Until it was thus made to correspond, it was a nullity. The case from New York, *Bissell v. Kip,* 5 Johns., 89, only decides that the sheriff, in an action for an escape, cannot take advantage of the variance between the judgment and *ca. sa.,* because the writ justified him, and he had recognized and acted on it, and could not then collaterally make the objection.

HENDERSON, C. J., concurred.

HALL, J., *dissentiente:* But few cases are to be found in point to govern the present question. It must therefore be decided upon general principles, and its analogy to other cases.

It was decided by three judges against the opinion of *Lord Holt,* that an action would not lie against the postmaster-general, for the loss of a letter covering exechequer bills, delivered at a postoffice to his deputy. It was said that it was not like the case of common law officers, where the superior answers for the inferior; that every post- (314) master in his office was as much an officer as the postmaster-general. *Lane v. Cotton,* 12 Mod., 477. That an action lies against a deputy postmaster for not delivering letters, and in other respects neglecting his duty, because they are subsisting substantial officers and answerable for their own misfeasances; that the general postoffice is the

center of a large circle; that the deputies' offices are the centers of smaller circles, but they fill up the larger, and extend over the country, and that on account of their distance they are not within the control of the postmaster-general. *Rowning v. Goodchild,* 3 Wils., 443. But this reasoning does not seem to be applicable to sheriff's officers.

It may be laid down as a general position that the sheriff is liable for the misconduct of his deputies, unless where they act criminally. *Sanderson v. Baker,* 2 Bl. Rep., 832; *Ackworth v. Kempe,* Doug., 40; *Woodgate v. Knatchbull,* 2 T. R., 148. The duties of a sheriff are confined to a single county. Those of the postmaster extend over the whole country. With as much, if not greater force, do these principles apply to clerks and their deputies. The duties of sheriffs are limited to the boundaries of the counties in which they act; those of a clerk may be confined within the walls of his office.

Admitting that an action will lie against the principal, for *an official act done by the deputy,* the next question is, will such action lie against the deputy? It may be admitted here that in some cases an action will lie against either. As where the sheriff's deputy took the goods of a stranger instead of the goods of the defendant, under a *fieri facias,* in such case an action would lie against the deputy as well as the sheriff. But the taking of the goods in such case was not an *official act.* Any person might do it as well as the deputy sheriff. *Saunderson v. Martin,* 3 Wils., 509; *Ackworth v. Kempe.* Such a case can have no influence upon the question, whether the deputy is liable to the party injured for an improper official act, or whether the remedy must not be against the principal.

(315) In *Gawdy's case,* 3 Dyer, 278, the Duke of Norfolk, being marshal of England, and having liberty to make a deputy, granted the office to *Gawdy for life.* An action was brought against him for suffering a defendant to go at large. One point debated was, whether *Gawdy* should be chargeable by reason that he was not marshal, but only under-marshal. It was decided, upon great consideration, against him. The circumstance that Gawdy held the office for life no doubt had its influence with the Court. After this decision, in the case of *Smith v. Hall,* 2 Mod., 32, an action for false imprisonment was brought against the sheriff's officer. A writ of *latitat* had issued and was executed. Bail had been tendered but refused. It was decided that such action should be brought against the sheriff and not against his deputy. It was held in *Marsh v. Astry,* Cro. Eliz., 175, that if the under sheriff deceitfully neglect to return a writ of summons, an action will lie against him. In 6 Bac. Abr., 156, 157, a note is subjoined to this case as follows: Under sheriffs are answerable *criminaliter,* but for breach of duty in the office of sheriff, by default of the under-sheriff, the

action must be brought against the high sheriff. So that the case in the text is not law. And for this is cited *Cameron v. Reynolds,* Cow., 403.

In *Lacock's case,* Latch's Rep., 187, it was decided that the high sheriff only was answerable for an escape suffered by his deputy; that he is answerable in all cases in damages for the misconduct of his deputy, unless where he acts criminally, for the sheriff is the officer of the court and the under-sheriff is not, although allowed and noticed by many statutes. It may be thought that this case is affected, or in some degree overruled by the case of *Barker v. Braham,* 3 Wils., 68, where it was decided that an action for false imprisonment lay as well against the attorney as against the client, the attorney having sued a *ca. sa.* illegally against the defendant, whereby she was imprisoned. It is true that the attorney is said to be the agent of the client, but he bears a peculiar relationship to him. "He is put in his place and stead to manage his matters of law." Why so? Because the client is presumed to be and in fact is ignorant of matters of law. Although (316) the client who employs the attorney is in many respects bound by his acts, yet as the attorney acts professionally, and not from the judgment or advice of his client, he should in reason be answerable for his own acts. This view of the case seems to have been taken by *Lord Mansfield* in *Cameron v. Reynolds,* decided a short time afterwards. He says for every breach of duty in the office of sheriff the action must be brought against the high sheriff, as for an act done by him, and if it proceeds from the default of the under-sheriff or bailiff, that is a matter to be settled between them and the high sheriff. It may be added that *Lacock's case* is spoken of by *Buller* in *Woodgate v. Knatchbull,* with approbation. It is true the jailer, who is the sheriff's officer, is liable for an escape, but he is made so by the statutes, 18 Ed., I, ch. 11, and 1 Ric. II, ch. 7; Hardress, 33; 3 Bl. Com., 165.

Although the English authorities may not be uniform on this subject, yet I think the weight of them is opposed to an action against the deputy for a breach of official duty. Nor do the American authorities chime on this subject. It is laid down in *Draper v. Arnold,* 12 Mass. Rep., 449, that for a neglect of duty an action will lie either against the principal or against his deputy. In *McIntyre v. Trumbull,* 7 Johns., 35, it is laid down that the sheriff shall be liable for his deputy in taking unlawful fees, although the latter may be liable *criminaliter.* In *Owens v. Gatewood,* 4 Bibb, 494, it is decided that an action will not lie against a deputy sheriff for a breach of official duty. It must be brought against the principal, although it be for the default of the deputy. The authority of a case reported in 1 Was. Rep., 159, may be adduced in support of the same proposition.

However, I am not aware that *Lacock's case,* or the case of *Cameron v. Reynolds* have been overruled. In both cases the plaintiffs were non-suited because the suits were brought against the under-sheriffs.

In the present case, the act complained of was an official act. The writ of execution was issued by the defendant, the deputy clerk,
(317) by virtue of the authority given to him by the clerk. Had he acted without such authority the act would have been a criminal one, but acting under such authority, the act, when done, became the act of the principal and not of the deputy, as much so as if he had properly authorized him to convey a tract of land. When the conveyance was executed, although executed by the agent, it became the act and deed of the principal. So, when the deputy signed the name of the clerk to the execution, it must be taken to be the act of the clerk, and that it was done by his direction and authority.

The clerk is placed in office by authority of law. He gives security for the faithful discharge of the duties of his office. The law permits him to have a deputy, but the deputy is placed there by the act of the principal, not by the law. It is not to be presumed that the deputy is as well qualified as the principal. He is probably in his novitiate. Neither policy nor justice requires to make him answer for delinquencies proceeding probably from his ignorance and his principal's negligence. I think judgment should be entered for the defendant.

PER CURIAM. Judgment affirmed.

Cited: Skinner v. Moore, 19 N. C., 155; *Satterwhite v. Carson,* 25 N. C., 555; *Miller v. Miller,* 89 N. C., 405; *White v. Hill,* 125 N. C., 200.

DEN EX DEM. OF ANN CLOUD v. JAMES WEBB AND WILLIAM MILLER.

1. Where four sisters were seized of a tract of land in coparcenary, and three of them, who were sole and of full age, conveyed their shares in fee, and the fourth, who was *covert* and an infant, joined with her husband in a deed conveying to the same vendee all their interest in the land, to which the *feme* was not privately examined, and the vendee remained in possession of the whole tract and enjoyed all the rents and profits, without claim or demand, forty years, to the husband's death, and fifteen years after his death; *it was held,* that admitting the deed of the *feme covert* to be the color of title, the vendee and the *feme covert* were tenants in common, and that his possession was not adverse to her.

2. Is the deed of a *feme covert,* without a private examination, color of title, where her coverture appears upon its face? *Quære.*

3. The possession of one tenant in common is the possession of the other.

CLOUD *v.* WEBB.

EJECTMENT, tried before his Honor, *Martin, J.*, at ORANGE, on the spring circuit of 1829. On the trial the case was that Samuel Mooney died intestate in the year 1767, seized in fee of the lands (318) described in the plaintiff's declaration, leaving two sons and four daughters. Both of the sons died seized, and intestate and without issue, whereupon the lands descended upon the four sisters, of which the lessor of the plaintiff was one. In the year 1771 the three sisters of the lessor of the plaintiff conveyed all their estate in the premises to one Robert Neal. In the year 1772 the lessor of the plaintiff, having intermarried with Daniel Cloud, and being under the age of twenty-one years, jointly with her husband executed a deed conveying all their interest in the premises to the said Neal, but the lessor of the plaintiff was not privately examined touching her voluntary assent thereto. Under these conveyances Neal entered into the whole of the land, and remained in possession until his death in the year 1784, when the lands descended to his son Henry Neal, who, in the year 1824, by a deed of bargain and sale, conveyed the land to one Hinton, who, in 1826, by deed of bargain and sale, conveyed the same to the defendants; but Neal continued in possession until his death in the year 1826. Daniel Cloud died in 1812. From the year 1772 until the year 1827 the defendants, and those under whom they claim, enjoyed all the rents and profits, without any demand for an account, and no claim to the premises was made by the lessor of the plaintiff until the year 1827, except an ineffectual attempt in the year 1805, to obtain a partition of the lands, by petition filed by Cloud and wife against Henry Neal in the county court. Between the year 1814 and the year 1824, Henry Neal executed conveyances for parts of the land to different persons, but remained in uninterrupted possession, and before the year 1824 had taken reconveyances of the whole to himself. His widow remained upon the premises until possession was taken by the defendants.

Martin, J., instructed the jury:

1. That the deed of Daniel Cloud and wife was color of title.

2. That if the defendants were in the actual adverse possession for seven years after the death of Daniel Cloud, the statute of limitations was a bar to the plaintiff's right.

A verdict was returned for the defendants, and the lessor of the plaintiff appealed. (319)

Winston and Gaston for plaintiff.
Badger contra.

HALL, J., after stating the case, proceeded: It must be ad- (325) mitted that Robert Neal and Henry Neal have been in possession

of the land from the year 1772 until the year 1826, under a valid title from the three sisters of Ann Cloud, and perhaps a color of title from Ann Cloud herself. But it does not follow that their possession has been adverse to Ann Cloud since her discoverture.

All the title Daniel Cloud had in the land, and no more, was by him conveyed to Robert Neal; the residue of the estate was in Ann, his wife, her deed being inoperative on account of her coverture and infancy. Admitting that deed to be color of title, nothing passed thereby. It could only *as color of title* give efficacy to an *adverse* possession of seven years. It is, therefore, all-important to ascertain whether in this case there has been a possession adverse to the title of the lessor of the (326) plaintiff.

When Daniel Cloud died, how did the rights of the parties stand? Henry Neal was in possession of the land, and had title to three-fourths of it, claiming from Ann Cloud's three sisters. Ann Cloud had title to one-fourth of it, but was not in actual possession. She and Henry Neal, then, were tenants in common; therefore, his possession was her possession. I need not cite authorities to show that the possession of one tenant in common is the possession of the other. It is for that reason that the judges have had recourse to ousters by presumption, as in the case of *Fishar v. Prosser,* Cowp., 217. There the statute of limitation would have been a bar, but *Lord Mansfield* considered the possession of one tenant in common to be the possession of the other, and therefore the statute of limitation did not run. But as there had been a possession of thirty-six years, he said an ouster might be presumed from that length of time, and that the statute would run upon a presumed ouster, although, in point of fact, it was admitted that no ouster had ever happened.

It is a question on which the profession has been much divided, whether an actual adverse possession for seven years, unattended by color of title, was not a bar. That question does not now arise. But it will simplify the case to consider it unencumbered by a color of title, merely upon the defendant's possession, because it is the possession and not the color of title which grows and ripens into a good title. Then, upon the death of Daniel Cloud, the deed as to his wife being a nullity, she had a right of entry, because she had a right of entry in the year 1771, which was preserved by her intermediate coverture. *Zouch v. Parsons,* 3 Burr., 1805. Upon the death of her husband in 1812, she was entitled to one-fourth part of the land, as one of the heirs at law of her brother James. Henry Neal was at the same time entitled to three-fourths of the land, claiming under the other heirs of James. It follows that Henry Neal and Ann Cloud were, in 1812, tenants in common of the land in question, and that Henry Neal, as such tenant,

remained in possession from that time until the year 1826. I think no doubt can be entertained that his possession was the (327) possession of Ann Cloud. Of course, it was not *adverse* to her claim, and as it was not adverse, it is not a bar, even admitting the deed executed by her to be color of title. Therefore, although there has been color of title and a possession of more than seven years in Neal, and those claiming under him, as that possession was not adverse, the plaintiff's title is not barred. I think that the case is not affected by the conveyances made by Henry Neal; possession did not follow them.

PER CURIAM. Judgment reversed.

Cited: *S. c.*, 15 N. C., 290; *Halford v. Tetherow*, 47 N. C., 398; *Day v. Howard*, 73 N. C., 5, 6; *Caldwell v. Neely*, 81 N. C., 117; *Withrow v. Biggerstaff*, 82 N. C., 84; *Ward v. Farmer*, 92 N. C., 97, 98; *Hicks v. Bullock*, 96 N. C., 171; *Locklear v. Bullard*, 133 N. C., 266; *Allred v. Smith*, 135 N. C., 452; *Bullin v. Hancock*, 138 N. C., 201; *Lumber Co. v. Cedar Works*, 165 N. C., 85; *Lumber Co. v. Cedar Works*, 168 N. C., 351; *Alexander v. Cedar Works*, 177 N. C., 142; *Adderholt v. Lowman*, 179 N. C., 549; *Bradford v. Bank*, 182 N. C., 228; *Crews v. Crews*, 192 N. C., 686.

WILLIAM SPEIGHT v. WILLIAM WOOTEN.

1. Under the Act of 1822 (Rev., ch. 1131) for the relief of insolvent debtors, the sickness of the surety is no excuse for the default of the principal.
2. A summary judgment is properly rendered upon a bond given under the Act of 1810 (Rev., ch. 793) upon suing out a *certiorari*.

THE plaintiff had recovered a judgment in the county court of WAYNE against one Stancil, upon which a *ca. sa.* issued. The defendant, under the Act of 1822 (Rev., ch. 1131), became the surety of Stancil for his appearance at the county court for the purpose of taking the insolvent debtor's oath. Stancil made default, and a judgment was rendered on the bond against him and the defendant for the amount of the debt. Afterwards the defendant sued out writs of *supersedeas* and *certiorari*, and stated in his affidavit to procure them that after the execution of the bond, and before the return day of the *ca. sa.*, he, the defendant, was taken dangerously sick, and for that reason was unable to attend at the court and surrender Stancil. At the return of the *certiorari*, before his Honor, *Martin, J.*, on the last circuit, the writ was dismissed on the

motion of the plaintiff, and judgment being rendered upon the bond given by the defendant under the Act of 1810, upon suing out the writ, he appealed.

Mordecai for plaintiff.

(328) *Henry and Badger for defendant.*

RUFFIN, J. The counsel for the defendants properly yield that the judgment of the county court was right, and that the sickness of the surety was no sufficient ground for relief against that judgment. He bound himself for the appearance of the principal debtor. It is indeed his privilege to compel that appearance, if not voluntarily made. But that is between him and his principal; and if he cannot, either by reason of his own illness or the absconding or other fraud of the principal, the surety must submit to pay the debt.

It is, however, objected that there was error in the Superior Court in giving a summary judgment on the bond given for the *certiorari*. The Act of 1810 (Rev., ch. 793) is not entirely perspicuous on this point, but the nature of the subject, as well as the words used, strongly incline us to the opinion that the bond is not only to be taken, but proceeded on "in the same manner and under the same regulations" as those given upon appeals. The *certiorari* is of the nature and in the place of the appeal; the bond is to be transmitted with the record, and a new judgment against the principal is in each case pronounced in the Superior Court. Why send the bond to the Superior Court if it is not to be acted on there? Why put the parties to a new suit when the plaintiff's demand has been finally and judicially ascertained, and the surety cannot discharge himself but by paying the debt? This view is confirmed by the general practice under the act for twenty years, during which period, with few exceptions, all the judges have given judgments on motion.

PER CURIAM. Judgment affirmed.

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(329)

THE STATE v. MARTIN.

In an indictment under the Act of 1823 (Tay. Rev., ch. 1229), "declaring the punishment of persons of color in certain cases," it is necessary to charge that the assault was made with an intent to commit a rape. An allegation that the defendant feloniously attempted to ravish is insufficient.

THE prisoner was tried on the last circuit, at HYDE, before his Honor, *Martin, J.*, upon the following indictment:

"The jurors for the State, upon their oath present, that Martin, a slave, etc., not having, etc., but being moved, etc., on, etc., with force arms at, etc., in and upon one S. H., a white female, in the peace, etc., violently and feloniously did make an assault, and her the said S. H. forcibly and against the will of her the said S. H. then and there did feloniously attempt to ravish and carnally know; against the form, etc."

After a verdict for the prosecution, his Honor arrested the judgment, and *Mr. Solicitor Miller,* on behalf of the State, appealed.

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

RUFFIN, J. The Attorney-General admits in the argument that the guilty will with which the assault was made is a necessary allegation in the indictment. But it is contended that it is sufficiently expressed by "then and there feloniously did attempt to ravish," following the charge of the assault. The statute makes it a capital felony for any person of color to *make an assault with intent to commit a rape* upon the body of a white female. Though in some minor offenses the guilty will (which in all cases is necessary to constitute a crime) is implied from the wrongful overt act, and therefore need not be stated in the indictment; and in other cases the allegation of such criminal purpose, though required in the frame of the indictment, is formal so far as respects the finding of that purpose as a fact by the jury, because the law would prima facie infer it from the act of which it prompted the perpetration; yet generally, even at common law, the intent constituting an act a capital crime must be precisely and specifically alleged. This (330) rule is exemplified by the words of art, *felonice, burglariter,* and the like. Much more is that the case when the indictment is founded on a statute. The terms used by the statute are then necessary in the indictment, not only to denote the disposition of the accused, but also to describe and identify the crime as that for which the particular punishment is prescribed. This may be a good reason why courts should not allow the sufficiency of any other epithet, though equipollent in common parlance. The term *willful,* for example, is indispensable in an indictment for perjury under the statute of Elizabeth, and cannot be supplied by any other. It is a safe rule, therefore, to follow the words of the statute, and because it is safe, the courts have adopted it. If one departure be allowed, it cannot be told how far astray it may lead us. But independent of that consideration, it is the duty of the court to require all pleadings to be expressed in terms as brief and apt as possible. There can be none to denote the intent more apt than that word *intent* itself. It is the language of the common law, of statutes, of

pleading. It is perfectly understood, and ought to be retained. It is said by *Lord Ellenborough,* in *Rex v. Phillips,* 6 East, 472, to be the proper word to convey the specific allegation of intent. It is found in all the precedents within our reach, and there is no other term so expressive and precise. Here the word *attempt* has been used in its stead. We should be justified in rejecting it upon the sole ground that it is not the word of the statute. But it is not even synonymous. *Intent* referred to an act denotes a state of the mind with which the act is done. *Attempt* is expressive rather of a moving towards doing the thing than of the purpose itself. An *attempt* is an overt act itself. An assault is an "attempt to strike," and is very different from a mere intent to strike. The statute makes a particular intent, evinced by a particular act, the crime. That purpose and that act cannot be so well nor sufficiently described as by the words of the statute itself.

PER CURIAM. Judgment affirmed.

Cited: S. v. Ormond, 18 N. C., 120; *S. v. Tom,* 47 N. C., 416; *S. v. Noblett, ibid.,* 432; *S. v. Goldston,* 103 N. C., 325; *S. v. Barnes,* 122 N. C., 1037.

(331)

THE STATE v. WILLIAM ALDRIDGE AND CELIA POOL.

Under the Act of 1805 (Rev., ch. 684), "to prevent vice and immorality," an indictment must charge that the man and woman had not intermarried.

THE defendants were convicted on the last fall circuit, at LENOIR, before his Honor, *Donnell, J.,* under the Act of 1805 (Rev., ch. 684), to prevent vice and immorality. The indictment was in the following words: "The jurors, etc., that W. A., late, etc., unlawfully did take into his house one C. P., and they did then and there have one or more children without parting, etc., contrary, etc." After the verdict, the counsel for the defendants moved in arrest of judgment, which motion being sustained, *Mr. Solicitor Miller,* for the State, appealed.

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

RUFFIN, J. Every indictment must allege every fact which enters into the constitution of a crime, and must also describe it either by way of specific allegation or conclusion, as some crime known to the law. The general and large term "unlawfully" is too indefinite to satisfy the

Court, unless it be used descriptively in a statute. (Hawk., b. 2, ch. 25, sec. 96.) That epithet in the indictment is therefore insufficient. The charge is then one of a man and woman bedding and cohabiting together in his house without an allegation that they had not intermarried, and without applying to such cohabitation the epithet *adulterously,* or concluding that thereby they committed the crime of adulterv. The indictment ought certainly to have alleged such facts as would conclusively show that the cohabitation charged is the cohabitation forbidden by the statute, namely, an adulterous one, which I think can only be done by the express negative affirmation that they thus cohabitated, not being husband and wife, or not being joined together in matrimony; or, perhaps, by the application of the epithet *adulterously* to it. The indictment must always contain such averments, even beyond the words of the statute, as will bring the case within its true con- (332) struction. But here the statute calls the crime adultery, which may well make that epithet necessary. But whether it be or not, this indictment is substantially defective for the want of the averments of fact already mentioned.

PER CURIAM. Judgment affirmed.

Cited: S. v. Dickinson, 18 N. C., 351; *S. v. Gallimore,* 24 N. C., 377; *S. v. Lashley,* 84 N. C., 755.

THE STATE v. FRANCES SILVER.

The court, at the request of the jury, may in its discretion permit a witness who has been once examined to be called again, at any time before the verdict is rendered, notwithstanding the witnesses were separated before their first examination, and had since an opportunity of communicating with each other.

THE defendant was indicted for murder. On the trial, at BURKE, on the last circuit, before his Honor, *Donnell, J.,* the State's witnesses, at the request of the counsel for the prisoner, were separated. After the jury had retired and remained together all night, they returned into court and requested that some of the witnesses, who had been examined the day before, should be called again. The prisoner's counsel objected that the witnesses had had an opportunity of communicating with each other since their examination. But the presiding judge overruled the objection, and permitted the witnesses to be again called and examined by the jury, who were instructed that they ought to give its due weight

to the circumstance that the witnesses had been together during the night. The jury returned a verdict of guilty, and judgment of death being pronounced, the defendant appealed.

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

RUFFIN, J. The separation of witnesses is adopted in aid of the cross-examination, as a test of the truth of their testimony by its consistency or inconsistency. It is not founded on the idea of keeping (333) the witnesses from intercourse with each other. That would be a vain attempt. The expectation is not to prevent the fabrication of false stories, but by separate cross-examinations to detect them. Testimony altogether false might be imposed upon the court as true, because delivered by two or more, trained to the same tale; or, as most frequently happens, because some indubitable and undisputed truth is mingled with much or material falsehood. The great safeguard against such a delusion consists in cross-examination, in which a prompt succession of acute, pertinent, peremptory, and sifting interrogatories, not anticipated, and for which answers have not been provided, surprises and betrays the impostor. And such a cross-examination is most effectual when the witness cannot, by a knowledge of the statements of his predecessor, make his own conform to them. The thing to be avoided, then, is not that the witnesses should be together, but that they should be examined together. When interrogated separately, all the witnesses, constantly apprehensive of the detection of falsehood, and finding no poise or support but in the truth, are constrained to give in evidence the facts as they occurred. I find, therefore, nothing in the rule of law or the practice which forbids the examination of witnesses who have been together after being sworn, or even once examined. Indeed, it is usual to keep them together in the same room, and after a witness has been examined, to send him back, if there be an expectation that he will be called again. Had the party wished to recall such a witness, there is nothing to preclude him from doing so, at any stage when it would be competent for the party to recall any witness.

But even that is a much stronger case than the present. The order of trials necessarily imposes upon the parties the duty of making out their cases, at certain stages of the proceedings. They must close at some time, and after that they cannot be heard again. But it is entirely regular at all times for the witness to correct his own mistake, or to explain his words that have not been correctly understood. No rule can prescribe to the jury the duty of finding a verdict under a (334) misapprehension. So, if the jurors do not understand the words

or meaning of the witness alike, it is competent and proper for them to ask for explanation, before it is too late to act on it. The judge may indeed give it from his notes; or, preferring a direct appeal to the witness himself, as being the best able to repeat and explain his words, and as being again subjected to the ordeal of examination, he may, in his discretion, again place the witness before the jury. When explanations are thus demanded by the judge or jury, they must be considered as asked for the maintenance of truth, and in execution of justice. There is no apprehension of trick or imposition in such cases, as there would be were the same privilege in the party. If, indeed, the inquiries of the jury sought evidence that was incompetent, or to put the case made by the parties upon new points, the court would undoubtedly inform the jury of their impropriety, and interdict them. But here the reëxamination was solely to satisfy the jury of the testimony already given, and the greater detail made necessary only to produce that satisfaction. So we must consider it, for the objection is not taken to the subjects of the interrogatories, or the nature of the answers, but only that the witnesses were examined at all after having been together. In that I see nothing against either practice or principle.

PER CURIAM. Judgment affirmed.

Cited: *S. v. Noblett,* 47 N. C., 425; *Morehead v. Brown,* 51 N. C., 371.

THOMAS AND MEMUCAN FALCONER v. DANIEL JONES.

1. Where a *sci. fa.* on a judgment in detinue issued against a purchaser *pendente lite,* a plea that the defendant purchased at an execution sale against the original defendant, without averring that the title of the plaintiff, though good against the latter, is not good against his creditors, is bad.

2. But a plea that the judgment was confessed to defraud the creditors of the original defendant, is good upon general demurrer.

THIS was a *scire facias,* reciting that the plaintiffs had recovered judgment in an action of detinue, brought by them against one John Holloway, for sundry slaves; that pending the action two of the slaves came to the possession of the defendant, and commanding him to show cause why he should not deliver the said slaves to the plain- (335) tiffs.

The defendant pleaded, first, "That the slaves in question were the property of one Thomas Falconer, and after his death came to the pos-

session of John Holloway, his administrator; that pending the suit by the plaintiffs against the said Holloway, J. and H. Lyne obtained a judgment against Holloway as administrator of Falconer, upon which an execution issued, and was levied upon the said slaves, and that at a subsequent sheriff's sale, one Ann Falconer purchased them, and afterwards an intermarriage took place between the defendant and the said Ann."

The second plea, after setting forth the above facts, concluded with an averment that the judgment in favor of the plaintiffs against Holloway was permitted by Holloway to pass against him, in fraud of the creditors of his intestate.

To these pleas there was a general demurrer, which was sustained by his Honor, *Swain, J.*, at GRANVILLE, on the spring circuit of 1831, and the plaintiff appealed.

Seawell, Badger, and W. H. Haywood for plaintiffs.
Devereux for defendant.

(336) HENDERSON, C. J. It is not intended to impugn the general rule that he who comes to the property in contest from or under the defendant *pendente lite* is bound by the judgment; and if he does not show that he comes in above, he shall be taken as coming in under him.

To this *sci. fa.* there are two pleas, to each of which there is a general demurrer. The first, in substance, is that the defendant's wife purchased the slaves in contest, pending the suit against John Holloway at sheriff's sale, under an execution against the said John, as administrator of Thomas Falconer, deceased, sued out at the instance of J. and H. Lyne, with an averment that the slaves were the estate of the said Thomas Falconer, and that the said John took possession of and held them as of the estate of his intestate.

The second plea I understand to state, in addition to the facts stated in the first, that the judgment was obtained by fraud.

I am rather inclined to think that the first plea is bad, for want of an issuable averment, that although the title of the plaintiff might be good, as between the plaintiff and the administrator, yet it was not so as to the creditors J. and H. Lyne, to whose rights this defendant is substituted, a case which may be easily imagined. In such case, I think the general obligation of the judgment would be admitted, but at the same time avoided. I cannot believe the rule to be that because A. and B. are contesting their rights to certain property, that the rights of all others are suspended, or their hands tied, so as to prevent them from exercising their rights in the usual and ordinary way, and that a reasonable

assurance of satisfaction is given to the plaintiff, by making his judgment conclusive upon all who are parties, or privies, in the proper sense of the word, not upon *quasi*-privies also, who possess some but not all the qualities of a privy. The rule may be, and in this case I think is, founded upon those qualities of a privy which the defendant in (337) this case, without the averment before mentioned, does not possess. I think, however, that the second plea is very clearly good, for neither justice nor policy requires that the rule should embrace fraudulent or covinous judgments. It is said that the defendant is estopped from alleging the fraud as much as the party himself. No person can be concluded by any act, not even his own, from averring a fact which renders a thing null and void. Estoppels conclude from averments, contrary to existing causes, not those which have passed away. And if the truth could not be shown, to avoid a transaction, or rather to show it to be null, it would be the easiest thing to protect the most unlawful transaction by recitals or acknowledgments in a deed. The reason a party to a fraudulent act cannot avoid it by showing the fraud is because, notwithstanding his fraud, it is binding on him if he be a party. It is not fraudulent, and therefore not void as to him. For a man cannot be guilty of a fraud on himself, and those who came in under him are affected in like manner. But one who comes in, not under him, but clothed also with the rights of a creditor, is not concluded. Even in cases where the party comes in entirely under another, he may make an averment which the other could not, if it goes to annul that from which it is contended the estoppel arises. A person makes a fraudulent conveyance of his land; he cannot allege that it was fraudulent. Why? Because, even if it is, it binds him. He afterwards conveys to another bona fide, that is, for value. The vendee, although coming in under the vendor, may aver the deed to be fraudulent. Why? Because it avoids it as to him. I have considered the demurrer, although a general one, not so much as admitting the fact of fraud, as controverting the defendant's right to allege it; which is the effect of a general demurrer, where the cause of the alleged estoppel appears upon the record. I think there should be judgment for the defendant.

HALL, J. I think it is not necessary in this case to raise a question on the doctrine that the privy in estate, from a person against whom a suit is pending, and a judgment is afterwards obtained, is bound by that judgment. This is not the situation of the defendants. (338) They deny that they claim title under John Holloway. If they do not, they are not subject to be called upon in this proceeding. It only professes to bring in privies under Holloway, or persons having no title at all. They plead that they are bona fide purchasers under an

execution which issued against John Holloway, as administrator of Thomas Falconer, deceased. Of course, they claim the property as belonging to the estate of Thomas Falconer. They further plead that the judgment obtained against John Holloway was obtained by fraud. If this were the case, surely it ought not to be obligatory upon them. These pleas the demurrer admits. The consequence is, I think, that judgment should be entered for the defendants.

RUFFIN, J., dissented, but delivered no opinion.

PER CURIAM. Judgment reversed.

Cited: *Haywood v. Sledge, post,* 339; *Mitchell v. Rainey,* 20 N. C., 57.

DELIA HAYWOOD v. JOEL SLEDGE.

1. Where personal property was levied upon by the sheriff, but not taken into his possession, and afterwards an action of detinue was commenced for the same property, against the original defendant, pending which it was sold by the sheriff: *Held*, that the possession of the sheriff related to the levy, and therefore did not commence *pendente lite.*

2. The maxim *pendente lite nihil innovetur*, is not applicable to fraudulent judgments.

(The case of *Falconer v. Jones, ante,* 334 commented upon and approved by HENDERSON, C. J.)

THIS was a *scire facias* against the defendant, which set forth that the plaintiff had recovered certain negro slaves in an action of *detinue* against one Mark Cooke, and that pending the action the said slaves had come into the possession of the defendant. On the fall circuit of 1831, at WAKE, before his Honor, *Swain, J.,* the following case agreed was submitted for the decision of the court.

The plaintiff sued out a writ in *detinue* on 8 August, 1825, against Mark Cooke, to recover certain negro slaves. The writ was re-
(339) turned to August Term, 1825, of Wake County Court, and at August Term, 1828, the plaintiff obtained a verdict and judgment. At August Term, 1824, of the same county court, the defendant recovered judgment in several actions of debt against Cooke. Executions tested of November Term, 1824, issued upon these judgments, and on 16 February, 1825, were levied by the sheriff on the said slaves, and the levy returned at February Term of the same year. The slaves, by

consent of the sheriff, remained in the possession of Cooke, on condition that they should be surrendered up whenever he required, and they had not been removed at the time the action of *detinue* was commenced. On 19 September, 1825, under a *venditioni exponas* issuing upon the judgment against Cooke, the slaves were sold by the sheriff to the defendant, and delivered into his possession.

Upon these facts his Honor gave judgment for the defendant, and the plaintiff appealed.

Hogg for plaintiff.
Badger for defendant.

HENDERSON, C. J. I feel it a duty to myself and the profession to revise what was said in the case of *Falconer v. Jones, ante,* 334. Not that I am dissatisfied with the judgment pronounced in that case. But it may be understood from what was then said that it is a sufficient plea to the *scire facias* for the defendant to show that he *may* have rights paramount to the plaintiff and defendant in the original action, and is therefore not concluded by the judgment. I am satisfied that it is not sufficient to show that the defendant *may* have a paramount title to the plaintiff; but he must *allege, and therefore show,* if required, that his title *is* paramount. In that case, therefore, it was not sufficient for Jones to have alleged and shown that he was a purchaser at an execution sale *pendente lite,* but he should have gone on and shown that the title of the plaintiff was of that character, that although good against the defendant Holloway, yet it was not so as to the creditors of the defendant's intestate, in whose right the suit was defended. That (340) as to those creditors it was fraudulent, or otherwise defective against *them;* or, rather, that creditor to whose rights he was substituted by his purchase at the sheriff's sale, as that confesses and avoids the recovery, and shows its want of obligation on him. But the decision in that case is sustained by the plea that the judgment endeavored to be enforced against the defendant was *fraudulently obtained.* For it is to fair and bona fide judgments, and not to fraudulent ones, that the right of their enforcement against purchasers *pendente lite* is given. For no obligation, either legal or moral, withholds one from setting up his vendor's title against him who has fraudulently combined with his vendor to weaken or destroy it, after he has conveyed the property to him. No principle of policy or convenience requires that such judgment should conclude his rights. But the case before us does not depend on these principles. Here the defendant's possession, or rather the sheriff's, under whom he claims, commenced before the commencement of this suit. For Cooke, after the sheriff's levy, became his bailee at will. He had no

possession as against the sheriff, and therefore the defendant did not acquire the possession after suit brought. It is connected with the sheriff's possession, which commenced by the levy; and *non constat,* that the defendant's title did not arise entirely after the levy. In that suit it was sufficient to show a title against the defendant.

PER CURIAM. Judgment affirmed.

DEN EX DEM. HENRY SASSER ET AL. v. GRADY HERRING.

1. Where the plaintiff and defendant claimed under two different grants, the junior of which called for the line of the elder and a line of marked trees was found, corresponding in age with the junior grant: *Held,* that this fact was not evidence of the boundary of the elder grant.
2. A will cannot be offered in evidence for any purpose without a certificate of the probate.
3. In no case is the declaration of the grantor admissible evidence for one claiming under him.
4. Neither are the calls of a grant to him, though of ancient date, evidence for those claiming under him.

EJECTMENT, upon the several demises of Henry Sasser and John Kethly, tried before his Honor, *Strange, J.,* at WAYNE, on the spring circuit of 1830.

(341) Before the jury was empaneled, the defendant produced and proved a disclaimer executed by the lessor Kethly, and moved the court to strike from the declaration the count upon his demise, which his Honor refused.

Upon the trial the will of one Richard Kethly was offered by the plaintiff as a link in the title, upon that count of the declaration on the demise of John Kethly. This was objected to by the defendant, because the probate was not properly certified, and the objection was sustained by the judge. Evidence was then offered for a descent from Richard Kethly to the lessor John, which was objected to by the defendant, because it appeared that Richard Kethly had published a will, by which he might have devised the land in dispute to some other person. But his Honor ruled that he could not judicially recognize the existence of the will, unless it was produced with a proper certificate of its probate, and that in the absence of such proof it must be taken that Richard Kethly died intestate.

The principal question in the cause was the boundary between two adjoining tracts of land, one of which the defendant claimed under a

grant to one Benton, issued in 1761—the other was claimed by the lessors of the plaintiff under a grant which issued to one Whitfield, in the year 1780, and which called for the line of the grant to Benton. A line of marked trees, corresponding in age to the date of the grant to Benton, was proved to exist, and the lessors of the plaintiff contended that it was the true line of that grant. The defendant contended that this line was marked when the grant to Whitfield was surveyed.

His Honor instructed the jury that even if they were satisfied that the line of marked trees was made as the boundary of the land granted to Whitfield, it was a circumstance, taken in connection with other circumstances, which they might consider in ascertaining the true line of the grant to Benton, in the absence of all proof that there was any dispute as to the true line of the grant.

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

W. H. Haywood for plaintiff. (342)
Gaston for defendant.

HENDERSON, C. J. We have, in questions of boundary, given to the single declarations of a deceased individual as to a line or corner the weight of common reputation, and permitted such declarations to be proven, under the rule that in questions of boundary, hearsay is evidence. Whether this is within the spirit and reason of the rule, it is now too late to inquire. It is the well established law in this State. And if the propriety of the rule was now *res integra,* perhaps the necessity of the case, arising from the situation of our country, and the want of self-evident *termini* of our lands would require its adoption. For although it sometimes leads to falsehood, it more often tends to the establishment of truth. From necessity we have in this instance sacrificed the principles upon which the rules of evidence are founded. But we have never, as far as I know, permitted the declaration of the owner of the land, however ancient, to be used in behalf of those claiming under him, or even of those claiming the same land under a different title. We have also received private deeds and *mesne* conveyances, calling for the line of another tract, when of ancient date, so that the parties to them could not be produced as evidence of boundary, under the idea that they are common reputation. *A fortiori* should grants from the State be admitted, for they are something more than the declaration of private individuals. They are the declarations of the public surveyor, whose duty it is to call for and survey, by old and former lines, and note them in his plot, although in practice we know that his description is very frequently taken from the enterer. But grants are stronger evidences than deeds between individuals.

I apprehend, however, that in no case in analogy to the rule excluding the declarations of the owner would the deed of or even a grant to the owner calling for the lines of another tract be admitted in favor of one claiming under that grant or deed, or even in favor of one claim-
(343) ing under another grant, calling for the lines of that made at the time, when such party to the deed or grant was owner of the other tract. But this case goes even farther than one deed calling for the lines of another tract, as preëxisting lines. For the judge instructs the jury, even if they were satisfied that the marked line was in fact made for the grant to Whitfield (that is, the junior patent, and the one under which the plaintiff claimed, and who insisted on its description as evidence), it was a circumstance which they had a right to consider in connection with other circumstances, in ascertaining the true line of the grant to Benton (that is, the defendant's), in the absence of all proof that there was then any dispute as to the true line of the latter grant. This is making a line where none was before, by the mere act of a party claiming it to be the true line, and making evidence for himself more emphatically than by declaring what a thing is which is already in existence. As to there being then no dispute about it, *this rule relates to hearsay from anyone,* and excludes it, if *post litem motam,* coming *from anyone,* but never lets in the declaration of the *party,* made at any time, whether *post* or *ante litem motam.*

Upon the first point to dismiss the suit we have nothing to do. On the second, with regard to the will, the judge was clearly right, for the reasons which he gave.

PER CURIAM. Judgment reversed.

Cited: Toole v. Peterson, 31 N. C., 185; *Mason v. McCormick,* 75 N. C., 266; *Caldwell v. Neely,* 81 N. C., 116; *Mason v. McCormick,* 85 N. C., 228; *Foy v. Currie,* 91 N. C., 439; *Bethea v. Byrd,* 95 N. C., 311; *Deming v. Gainey, ibid.,* 534; *Roberts v. Preston,* 100 N. C., 248; *Euliss v. McAdams,* 108 N. C., 513; *Shaffer v. Gaynor,* 117 N. C., 20; *Hill v. Dalton,* 136 N. C., 340; *Yow v. Hamilton, ibid.,* 359; *Hemphill v. Hemphill,* 138 N. C., 506; *Hill v. Dalton,* 140 N. C., 16; *Bland v. Beasley, ibid.,* 630; *Lumber Co. v. Branch,* 150 N. C., 241; *Lamb v. Copeland,* 158 N. C., 138; *Sullivan v. Blount,* 165 N. C., 10; *Lumber Co. v. Lumber Co.,* 169 N. C., 95; *Singleton v. Roebuck,* 178 N. C., 203; *Hoge v. Lee,* 184 N. C., 50.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

DECEMBER TERM, 1832

(345)

HARRIET D. EPPES v. JOEL McLEMORE.

1. Where A. agreed to purchase a slave for B., but took the title to himself, and afterwards, the slave being in the possession of B., the purchase money was tendered by him to A., who declined taking it, but did not disclose his title: *Held*, that the jury were properly instructed that they might from these facts infer a subsequent sale.

2. A contract for the sale of a slave, accompanied with possession by the vendee, is valid.

(The case of *Choate v. Wright*, 13 N. C., 289, approved.)

DETINUE for a slave, and on the trial at HALIFAX, on the fall circuit of 1831, before *Swain, J.*, the case was, that the slave in dispute had been the property of the plaintiff's husband, and was sold under an execution against his executor and bought by one Johnston, who paid the purchase money, and to whom the sheriff returned he had sold. The only question was whether the following circumstances vested the title in the plaintiff, so as to prevent the defendant from taking anything under a subsequent sale to him by Johnston. The negro had been in possession of the plaintiff before the sale by the sheriff, and directly after it returned to her house. A witness introduced by the plaintiff, deposed, that before the sale Johnston agreed to purchase the negro for the plaintiff; that after that took place, the plaintiff offered to pay Johnston the price at which he had bought the slave, which he then declined receiving, requesting her to keep it; that at the time this offer was made, the

plaintiff had the money in her possession, but it was not produced
(346) in consequence of Johnston's wish that the plaintiff should retain it. Upon this point the evidence was contradictory, and thereupon counsel for the defendant moved the presiding judge to instruct the jury that if Johnston purchased the slave at the request and for the use of the plaintiff, as the slave was bid off and returned by the sheriff as purchased by him, the legal title vested in him, subject only to a trust for the plaintiff, and that the matters deposed to by the plaintiff's witness were not sufficient to vest that legal title in the plaintiff; and further, that the legal title being in Johnston, could not be passed to the plaintiff without a written transfer, or a sale accompanied with a delivery. But his Honor refused to give these instructions, and charged the jury that if they believed that Johnston purchased the slave at the request of and as the agent of the plaintiff, and delivered the negro to her as her property; that the price bid by Johnston was tendered to him at the time of the delivery, and was not paid because of his request; or if he was satisfied with the plaintiff's promise to pay him the amount, they were at liberty to find that there was a valid sale by Johnston to the plaintiff.

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

Devereux for plaintiff.
Badger for defendant.

RUFFIN, J. I suppose the first instruction prayed on behalf of the defendant to be correct, as far as respects the vesting of the legal title in Johnston by the purchase in his own name, and his becoming responsible to the sheriff for the price, notwithstanding the previous agency undertaken by him. If he chose to violate his engagement and take the title to himself, he might do so. But if he did, that did not prevent a subsequent sale to the plaintiff, and that brings the question to the last part of that instruction, and to the next as asked for, which is, that the
(347) evidence did not establish a sale from Johnston, or that the legal title passed from him in any way.

The Court is of opinion that the jury might find that it did. The possession of the slave was transferred to the plaintiff, who offered to pay an ascertained price, which Johnston agreed to accept. It is true, the witness says this was in reference to the previous agreement of Johnston to buy the negro for the plaintiff, and therefore there was then no proposition about the price. But although the plaintiff claimed upon the score of the agency, because she did not know that the purchase had been made in Johnston's own name, yet when Johnston acquiesced in it, and made the plaintiff believe that she had thus the title in one way, when

in fact she was getting it in another, the plaintiff's mistake as to the mode in which it passed shall not prevent her from acquiring it in any mode, if the acts then done, in their legal operation, passed the title of themselves. Did the plaintiff and Johnston then consider that the right to the slave was in the former, by virtue of what was before and then done? Was everything done that was expected or intended to be done to vest the title in the plaintiff, and was this followed or accompanied by actual delivery? If so, it is a sale. It is an agreement that the property is, or shall be another's, and that agreement consummated by delivery. Suppose Mrs. Eppes had then paid the price, would anybody doubt the character of the transaction? Her agreement to pay is the same thing, if taken by the seller in place of the money, and such the witness said was the fact—upon the conflicting testimony, it was for the jury to determine. Taking that offered by the plaintiff to be true, there was a contract of sale, which, accompanied by possession, is an executed contract and valid. (*Choate v. Wright,* 13 N. C., 289.)

PER CURIAM. Judgment affirmed.

Cited: *Thompson v. Bryan,* 46 N. C., 342.

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(348)

JEFFERSON T. WILLIAMS v. COLIN W. BARNES, ADMINISTRATOR.

Where a child upon his arrival at full age continues to reside with and serve the parent, in an action to recover the value of those services, the relation subsisting between the parties is a circumstance from which the jury may infer that they were gratuitous.

ASSUMPSIT for work and labor done by the plaintiff as the overseer of the defendant's intestate, tried on the spring circuit of 1832, before *Daniel, J.,* at NORTHAMPTON. Plea—*non assumpsit.* The case was, that the plaintiff lived with the defendant's intestate, his mother, until he came of age in the year 1826; that during the two following years he acted as her overseer; that before the plaintiff came of age the intestate had usually hired another person; that the plaintiff had been carefully and tenderly reared by his mother, who had, during his infancy, given him two negroes, besides money and other property; that during the period when he acted as her overseer, he resided in her house, and had taken up articles for his own use, which had been charged to his mother's account and paid for by her. It was also in proof that the defendant's intestate had a large family, and died worth about $2,000. The counsel

for the defendant insisted that where a child had been brought up by a mother, and tenderly and liberally supplied by her during his minority, from his continuing to reside with her after his full age, and rendering her such services as the plaintiff in this case had done, the law did not imply a promise of compensation, but these services were presumed to be rendered in discharge of a duty of filial piety, and therefore that it was incumbent on the plaintiff to rebut this presumption, and if he did not do it, that the law did not imply a promise to pay the value of the services. But the presiding judge informed the jury that where a person renders valuable services to another, the law presumes a promise to pay for them, unless the contrary appears, and that the case of parent and child was in this respect like that of any other person; that upon this presumption the plaintiff was entitled to their verdict, unless
(349) it was rebutted by the other circumstances in evidence, from which they were at liberty to infer that the services were gratuitous.

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

Plaintiff was not represented.
Badger for defendant.

RUFFIN, J. The plaintiff, being unable to show a special agreement, is obliged to rely upon an implied promise, founded on his services. The judge properly left it to the jury to find whether there was or was not such a promise, as they should judge from the circumstances, that it was in the contemplation of the parties that the services were to be gratuitous or compensated. Had the instruction stopped there, perhaps it would be unexceptionable, though I have a strong impression, which may possibly arise from the involuntary emotion of detestation of the odious irreverence and ingratitude of a son, who says to a widowed mother the day he is twenty-one, "pay me now for all I do," that the plaintiff ought to have offered evidence to raise affirmatively a presumption that his time and labor were understood clearly by both parties to be given for a price. In the present case, however, there is no necessity for saying that such is the law. The court, after leaving the circumstances to the jury, told them that the relation of parent and child, with all the incidents thereto, in this case was not one of the circumstances from which they could infer anything. That, I think and feel, is clearly wrong. Compensation is expected from strangers, because they have no right, legal or moral, to another's time. Prima facie, therefore, a promise to pay is presumed. It may be so, likewise, for aught I know, in the case of parent and child generally. But in such a case as the present, the relation is a fact which, among others, the jury have a right to consider in connection with the circumstances in life of the parties,

and their whole conduct before and after the arrival of the child at full age, to rebut the presumption of a promise, which would arise in the case of a stranger. It is a conclusion of fact with the jury, and they have a right to avail themselves of all the circumstances, in- (350) cluding this relation, with the weight they think it entitled to, from their own feelings as sons and fathers and from their knowledge of our state of society. It is not an irrelevant circumstance, but is a strong one. With me, were I on the jury, it would be hard to get over. It is true the son is not bound in law to serve his parent after twenty-one. But is there no bond but that of the law? No gratitude for bounties already bestowed, no filial piety, no affectionate regard—nothing to keep the son under the maternal roof but the prospect of gain? And if gain be the object, does it follow that it was to be in the shape of annual wages and none other? It might be that the son himself did not choose to labor abroad; that he had no other means of livelihood; was not fit for other business, had no estate and would not submit to be overseer from home—in fine that it was a continuation of parental favor to suffer him to remain in, what he had not elsewhere, a comfortable home—by the parent too he might expect his attention, and even his labors to be more fully requited than by any other person, though from the latter he should get wages and from the former none. He might look to further advancement, or to a liberal legacy, the more liberal because his tenderness and assiduities made him a favorite. It cannot be possible that the head of an harmonious household must drive each member off, as he shall arrive at age, or be bound to pay him wages, or for occasional services, unless he shows that it was agreed that he should not pay. Such a position offends the moral sense. If true it would dissolve that connection, the duties and the enjoyment of which are the cement which unites families. It is the interest of society at large to preserve that union and make it as close and cordial as our selfish natures will allow. As yet it has not in practice been deemed, more than it has been established in morals, that years of legal maturity severed altogether the tie between parent and child; legal control expires, it is true, but the relation and all the feelings incident to it remain to give a character to, and raise presumptions concerning their acts towards each other, essentially differing (351) from presumptions from the like dealings between strangers. I do not trust myself to say yet that the want of evidence of an express contract is evidence that there was no contract, though I believe I would, if necessary, in such a case as this, when the son merely continues his residence with his mother, receives his ordinary supplies from her, as proved by articles got for him at stores being put to her account, and when he does not prove that he discharged *all* the severe duties usually exacted from overseers, and may therefore have acted rather as master

than served as man. But this much I must say, that the jury had at least a right to pass upon the weight of the actual presumptions arising from the relation, both in estimating the wages which the plaintiff ought to be allowed, if any, and in determining whether he was to have any, except what the mother chose in her natural kindness to bestow. In other words, whether they were to live together after, as they had done before the son became of age. I think such claims, without probable evidence of a contract, ought to be frowned on by courts and juries. To sustain them tends to change the character of our people, cool domestic regard, and in the place of confidence sow jealousies in families. There must be a new trial.

HENDERSON, C. J., concurred.

DANIEL, J., *dissentiente:* There is a natural and legal obligation on the parent to maintain his child during infancy. The law has fixed the time during which the child shall be considered an infant to the period of twenty-one years. The parent, during this period, has a right to the services of the child to enable him to fulfil his obligations. But after the period of twenty-one years the parent is released from his obligation, and the child is bound to maintain himself, and the law likewise releases the child from the obligation of giving his labor and services to the parent, because it then becomes necessary for him to use his industry for his own maintenance. Therefore when he labors for the parent after the time he arrives at the age of twenty-one years, (352) the law raises a promise by the parent to pay as much as the labor of the child is reasonably worth. The circumstance of the relationship of parent and child, may go to the jury as evidence, with other facts and circumstances, to aid the defense of the parent upon the question whether the labor of the child was gratuitous or not, but it does not operate as an exception to the rule of law. In the case before the court the defendant had the benefit of such a circumstance in his defense. The jury have found a verdict for the plaintiff, by which the allegation of the defendant that the labor of the plaintiff was intended to be given gratuitously is negatived. I therefore think there ought not be a new trial.

PER CURIAM. Judgment reversed.

Cited: Hudson v. Lutz, 50 N. C., 219; *Hauser v. Sain,* 74 N. C., 556; *Dodson v. McAdams,* 96 N. C., 156; *Young v. Herman,* 97 N. C., 284; *Callahan v. Wood,* 118 N. C., 758; *Lipe v. Houck,* 128 N. C., 118; *Hicks v. Barnes,* 132 N. C., 150; *Stallings v. Ellis,* 136 N. C., 72; *Dunn v. Currie,* 141 N. C., 127; *Winkler v. Killian, ibid.,* 579.

SAMUEL C. WILSON v. WILLIAM MURPHEY.

1. Assumpsit will not lie upon a promise to pay a debt when the same debt may be recovered in an action on a specialty, but it is otherwise when from any cause no action on the bond can be sustained.
2. Where land was demised by deed, and the lessor covenanted to pay for certain work done on the premises by the lessee, and after the expiration of the term, the lessor promised to pay the lessee an ascertained balance for the work done: *Held*, that assumpsit for the balance was improper.

ASSUMPSIT commenced by a warrant, in which the plaintiff declared for work done by him upon a plantation of the defendant's. On the trial, at BURKE, on the fall circuit of 1831, before his Honor, *Daniel, J.*, the case was that the plantation upon which the work had been done was, in the year 1819, demised by the defendant to the plaintiff by deed for three years; in the lease which was executed by both parties there was a stipulation on the part of the defendant, "that for all the necessary rails made and put upon the fences he (the plaintiff) is to be allowed fifty cents per hundred out of the rent." After the expiration of the term the parties came to a settlement, when the balance claimed by the plaintiff was found to be due him, which the de- (353) fendant then promised to pay. At the same time the lease, having been deposited in the hands of a third person, an order for its delivery to the plaintiff was executed by the defendant.

For the defendant it was objected that the plaintiff had mistaken the form of action; that covenant upon the lease should have been brought instead of the present action. The presiding judge overruling the objection, a verdict was returned for the plaintiff, and the defendant appealed.

No counsel for either party.

RUFFIN, J. I should very gladly decide this small cause for the plaintiff (who is a pauper) if I could do so without removing the landmarks of the law. We must take it that the sum due him upon the settlement was for work mentioned in the lease to be done on the plantation, namely, getting rails at a particular price. If so, he still had a remedy on the covenant in the lease, which was executed by both parties. Can he have the inferior one of *assumpsit* for the same thing? If one owe money on a bond and engage by parol to pay it on such a day, he cannot be sued in *assumpsit*. This is not a mere technical rule. All the securities which deeds are intended to create, as to the terms of the contract, in favor of the covenantor, depend on it. If indeed there be

no remedy on the deed; if the contract has been rescinded or abandoned before breach; if after breach it has been delivered up or satisfaction entered upon a settlement, then it is different, because there is then but one remedy and that on the promise. If one covenant to build a house for another by a particular day and fail, but builds it afterwards and it is accepted, the deed does not bar an action on the *quantum meruit,* though it may restrict the prices to those specified in it. So if any other executory agreement be rescinded before breach, and in consideration of that, the parties account, *assumpsit* lies for the balance struck. Why?

Because there is no remedy on the deed. That was precisely the
(354) case of *Foster v. Allanson,* 2 T. R., 479, and is the footing on which *Buller, J.,* rests his decision, and this was after the case of *Moravia v. Levy* before him at *Nisi Prius.* A partnership was then formed by deed for seven years, and there was a covenant to account annually, and to account and pay at the end of the term. Before the seven years were out they agreed to dissolve, and then to account and pay. They did account, and the action was brought for the sum acknowledged to be due. On the deed no action could by its terms be then brought, and Buller said the question was, whether the dissolving a previous partnership and settling the account was or was not, in point of law, a sufficient consideration for an express *assumpsit,* which he clearly held in the affirmative. But no instance can be stated in which, after the time limited in a deed for the performance of a duty thereby created, an action can be maintained on a promise to fulfill the covenant, the deed remaining all the while in existence and full force. The reason is, because precisely the same evidence, as to the extent of the demand, and indeed every other matter but the making of the agreements and the terms of them, will support both actions. And whether the law ought, for the certainty of the contract, to take the specialty or the verbal agreement, it is easy for any to judge. Here, for example, the lease fixes the price of the rails. It might be different if that were left uncertain, for fixing the price is in itself a new agreement distinct from any provision in the deed, but in the present case the only further requisite to a full recovery on the deed is evidence of the quantity, and that is susceptible of proof in an action on the covenant by the acknowledgment of the defendant as it is in *assumpsit.* There is then no new consideration for the promise, and the deed remained in force, for it was to be delivered to the plaintiff by the holder, not as far as appears to be canceled, but as properly belonging to the only person who then had an interest in it and could take advantage under it. In such a case I think

no action lies on the promise merged in the existing deed more
(355) than on a promise merged in a deed or judgment subsequently taken for the same debt. The case of *Codman v. Jenkins,* 14

Mass. Rep., 93, is an authority in support of the general reasoning I have adopted, and also of the import of *Foster v. Allanson,* which is cited and commented on by the Court. That was the case of a lease for life and an assignment by the lessor of the reversion; the assignee and the lessee come to an account of the rent in arrear in his time, and the tenant made an express promise to pay it: *Held,* that *assumpsit* would not lie, but that it ought to be debt or covenant. This seems to me to be in point, and I think there must be a new trial.

PER CURIAM. Judgment reversed.

Cited: Burnes v. Allen, 31 N. C., 372; *King v. Phillips,* 94 N. C., 558.

GEORGE CROWELL v. STEPHEN KIRK ET AL.

1. A party is not bound to offer an incompetent witness in order that his adversary may waive the objection and cross-examine him.
2. Per DANIEL, J. An attesting witness may be asked his opinion of the testator's sanity, but the same question to another witness is improper.
3. Per RUFFIN, J. An attesting witness is the witness of the law, and may be discredited by any one who examines him.

THIS was an issue as to the validity of the will of one Buckner Kimball, tried on the last spring circuit, at MONTGOMERY, before *Norwood, J.* The plaintiff and one George Kirk were the attesting witnesses. In the will a legacy was given to Harris Kimball, who was dead, whose daughter the plaintiff had married, after the death of the testator. This fact, together with the nonresidence of Kirk, the other attesting witness, having been proved to account for the plaintiff's not producing them, the case was, on his side, left to the jury, upon proof of the handwriting of the attesting witnesses, and the examination of the person who drafted the will. There being some obscurity in the rest of the statement certified with the record, a literal copy of it is given:

"The defendants called and examined George Crowell (the plaintiff), and he (the witness) also proved the legal execution of the will, and the subscription of the witnesses in the presence of the testator. The defendants examined William Harris, who gave evidence that Buckner Kimball died about two years ago, in old age; that he (356) was very intemperate, and always drunk when he could get liquor, and when drunk talked much, and was wilder than drunken men usually are; that he was sometimes sober and sometimes drunk, and

when sober was in his proper mind and talked but little; that he saw him sometimes at home, in the latter part of his life, sober and in his senses. The defendant's counsel then asked the witness, 'Is it your opinion that Buckner Kimball was at the time, etc., capable of making a will?' This question was objected to and overruled by the court, with an observation that it could not then be asked, as there was no evidence before the jury that the testator was insane."

An affirmative verdict was returned and the defendant appealed.

Plaintiff was not represented.
Gaston for defendants.

DANIEL, J. By the Act of 1789, Rev., ch. 308, contested wills shall be proved by all the living witnesses if to be found, and by such other persons as may be produced to support it. In the present case one of the subscribing witnesses had removed from the State, and the other had become interested, by marrying a woman who claimed an interest in a legacy given by the will, if it should be established. When one of the attesting witnesses is abroad, it seems to be sufficient, as in other instances of instrumentary proof to give evidence of his handwriting. Starkie Ev., 1693; *Jackson v. Van Dusen,* 5 John. R., 144. It is, upon this testimony, left to the jury to presume that the witness subscribed the will in the presence of the testator. *Croft v. Pawlet,* Str., 1109.

The defendant's counsel asked his own witness, Harris, if, in his opinion, the testator was capable of making a will. An objection being made, the witness was not permitted to answer the question. I do not think that the judge erred in this. The opinions of witnesses, in England, are confined to persons of science, art or skill in some par-
(357) ticular branch of business, and they have to give the reasons upon which their opinions are founded. All other witnesses are to state the facts, and the jury make up their opinion on the facts thus deposed to. In this country the courts have said that the law placed the subscribing witness about the testator to ascertain and judge of his capacity. *Heyward v. Hazard,* 1 Bay., 335; *Chase v. Lincoln,* 3 Mass. R., 237; *Poole v. Richardson, ibid.,* 330. But no case has gone the length of permitting the evidence of opinion, offered in this case, to go to the jury. The judgment should be affirmed.

RUFFIN, J. I do not perceive the force of the objection to the opinion of the court upon the first question of evidence. It is said that the plaintiff ought to have offered George Crowell, and left it to the other side to object to his competency, because it puts the defendant to a disadvantage when obliged to bring him forward as his witness, instead of

cross-examining him. I do not know any rule which obliges a party to tender a witness, known and proved to be incompetent, and the result proves that then there was no improper design, for the witness' testimony was such as the plaintiff would have wished to offer had it been in his power. He was interested at the time of the trial, and became so by the act of God, namely, the death of his father-in-law, after his attestation and marriage. Nor is it correct to say that a person who calls a witness to a will is bound to take his testimony as true. He is not his witness, but that of the law. The party is obliged to call the subscribing witness; another to the same fact will not answer. Therefore, he may contradict and discredit him, and so may any person who uses him as the subscribing witness. This was done in the case of *Lowe v. Jolliffe,* 1 Bl. Rep., 366; Bul. N. P., 964.

The Court is unable distinctly to comprehend the object, or indeed the meaning of the question, which the defendant was not permitted to ask the witness Harris. It is stated with an *et cetera,* which perhaps does not entirely convey the idea of the party to us, and it is not the better understood, when taken in connection with the reasons which, as stated, induced the judge to reject the evidence. There (358) is, probably, some mistake in transcribing the case. As far as we perceive any meaning, we suppose the attempt was to get the opinion of the witness, whether the supposed testator had capacity *to make a will.* It could not be whether he thought him in possession of ordinary faculties, when he executed the instrument, because the witness did not profess to have been present, and because he had just said that when sober he had his proper mind and senses. If this was the purpose of the inquiry, it was properly refused, for the witness is not to decide what constitutes mental capacity or a disposing mind and memory, that being a matter of legal definition. He might state the degree of intelligence or imbecility in the best way he could, so as to impart to the court and jury the knowledge of his meaning, that they might ascertain what was the state of the testator's mind and memory, but whether that was adequate to the disposition of his property by will did not rest in the opinion of the witness.

PER CURIAM. Judgment affirmed.

Cited: Old v. Old, 15 N. C., 502; *Bethel v. Moore,* 19 N. C., 314; *Clary v. Clary,* 24 N. C., 80; *Bell v. Clark,* 31 N. C., 242, 243; *Boone v. Lewis,* 103 N. C., 43; *In re Peterson,* 136 N. C., 30; *Taylor v. Security Co.,* 145 N. C., 396; *In re Will of Margaret Deyton,* 177 N. C., 505; *S. v. Journegan,* 185 N. C., 705.

DANIEL B. GRIFFIN v. JACOB ING.

A general jurisdiction is not ousted except by plain words or a necessary implication; and, notwithstanding the Act of 1828, ch. 9, giving a justice of the peace jurisdiction in cases where the debt and interest exceed one hundred dollars, and the Act of 1826, ch. 12, authorizing the courts to dismiss a suit for less, yet as there are no words in those acts ousting the jurisdiction of the Superior Courts in cases of debt for one hundred dollars and interest, it remains.

DEBT upon a single bond, for $100, payable 1 January, 1828, executed by the defendant to the plaintiff. The writ was sued out 21 May, 1829, returnable to the ensuing term of Wake Superior Court. At the return term the defendant pleaded in chief. The cause came on to be tried on the last spring circuit before his Honor, *Daniel, J.,* (359) when the counsel for the defendant moved that it be dismissed for want of jurisdiction. His Honor sustained the motion, and the plaintiff appealed.

Attorney-General for plaintiff.
Badger and Devereux for defendant.

RUFFIN, J. The Act of 1820, ch. 1045, extends the jurisdiction of a justice of the peace to all sums not exceeding one hundred dollars, and by the third section enacts that all suits in the Superior or County Courts, on any bond, etc., for a less sum than $100 shall be abated on the plea of the defendant. Before that act the courts had jurisdiction of all the sums not under £30. There is nothing contradictory in the possession, by two courts, of jurisdiction of the same matter. In most respects the jurisdiction of the Superior and county courts is concurrent in civil cases. Nor can a general jurisdiction be ousted but in plain words or as plain implication. Such an implication I should deem to arise if a special court were constituted to try conclusively and finally a particular set of controversies. Perhaps this would be so, although such controversies were not then existing, though if they were the argument would be the stronger that the cognizance was exclusive. But the inference is the other way generally, because it is for the benefit of the citizen to give him the choice of his forum. We cannot go beyond the words of the Legislature in destroying the jurisdiction. It may possibly have been the purpose of the acts enlarging that of a justice of the peace, absolutely to exclude all others, but we must say that it is only exclusive as far as it is expressed. Under the Act of 1820 both the justices and the courts have jurisdiction of the sum of $100, the former because it is raised to all sums *not exceeding* that, and the latter because the act takes

it away in all cases for *a less* sum. At the point of $100 they meet, and their jurisdiction is concurrent. The Act of 1826, ch. 12, repeals the section giving a plea, and substitutes an authority to the (360) court to dismiss the suit if brought for a sum *under* $100. This left the concurrent jurisdiction as it was, in respect of the sum, but changed the mode of taking advantage of the want of it by a court. Then comes the act of 1828, ch. 9, which confers on a justice of the peace jurisdiction in cases where the principal money may not exceed $100, although that and the interest together may. In this act no plea or motion to dismiss is given, if a suit be brought in such case. The bond on which this suit is brought is of the character described in the Act of 1828; it is one of which jurisdiction is thereby given to a justice of the peace, but there is nothing to deprive the courts of jurisdiction, even by remote implication. We are authorized to dismiss only when the sum is *under* one hundred dollars, and the plea being taken away, and the motion to dismiss being the only mode given by the statutes as to suits for sums above £30, the jurisdiction of the courts, upon the purview of all the statutes, is concurrent with that of a justice of the peace as to suits for the sum of $100 or exceeding that sum, in cases where that sum is the principal money due. If the contrary was the intention of the Legislature, it is yet to be expressed, and without their sanction the complaint of a citizen cannot be dismissed unheard.

The judgment must therefore be reversed and the cause removed to the Superior Court to be tried on the issues joined.

PER CURIAM. Judgment reversed.

Cited: Birch v. Howell, 30 N. C., 469; *S. v. Perry,* 71 N. C., 526; *Patton v. Shipman,* 81 N. C., 348.

BARNABAS JONES v. MINTON JONES.

A judgment of a single magistrate for a sum above his jurisdiction is void, and no action can be maintained on it.

THIS suit was originally commenced before a justice of the peace by a warrant sued out 23 May, 1831. The plaintiff declared upon a former judgment which was dated 10 March, 1827, and was for "$75, with interest from 25 December, 1818." At the trial on the last (361) spring circuit, before *Daniel, J.,* at WAKE, a verdict was taken for the plaintiff, subject to the opinion of the court upon the question

whether the judgment having been rendered before the passage of the Act of 1828, ch. 9, giving justices of the peace jurisdiction where the principal and interest exceeds $100 was not void.

His Honor being of opinion with the defendant, set aside the verdict and entered a nonsuit, from which the plaintiff appealed.

Devereux for plaintiff.
W. H. Haywood contra.

DANIEL, J., after stating the case as above, proceeded: The first judgment being for a larger sum than a justice of the peace had jurisdiction of it is void, and no action can be maintained upon it.

PER CURIAM. Judgment affirmed.

Cited: Morgan v. Allen, 27 N. C., 157; *Branch v. Houston,* 44 N. C., 88; *Dalton v. Webster,* 82 N. C., 282; *Noville v. Dew,* 94 N. C., 46.

THE GOVERNOR, UPON THE RELATION OF JOSHUA WITHERSPOON, v. SAMUEL W. DAVIDSON ET AL.

1. A constable who is charged with the collection of a debt, ought to see that good surety is given for the stay of the execution, and if he, being insolvent, becomes the surety, it is a breach of his official bond.
2. The case of *Keck v. Coble,* 13 N. C., 489, approved.

DEBT upon the bond given by one Cook upon his being appointed a constable. The breach assigned was that Cook had failed to collect and account to the relator for a note put by the latter in his hands, made by one Jarvis. On the trial, before *Donnell, J.,* at WILKES, on the last spring circuit, it appeared that Cook's office expired in January, 1830; that he received the note in October, 1829, and in a few days obtained a judgment thereon; that the defendant Jarvis prayed a stay of
(362) execution, which was granted, and that Cook, the constable, became his surety; that Cook was then insolvent, and that the stay did not expire until after Cook's term of office. It was contended for the plaintiff that Cook, in becoming the surety for the stay, had failed to use due diligence, and had by his own act impeded the collection of the debt, and thereby committed a breach of his official bond. But the presiding judge informed the jury that as the stay was allowed the debtor by law, the constable's becoming his surety for it was not such a

departure from duty as to subject the sureties to his official bond and, further, that as the stay of execution did not expire until after the constable's term of office, upon the authority of the case of *Keck v. Coble,* 13 N. C., p. 489, it was unnecessary to inquire what steps had been taken by Cook in relation to the debt after that time. The plaintiff, in submission to this opinion, suffered a nonsuit and appealed.

No counsel for either party.

DANIEL, J., after stating the case as above, proceeded: We think it was the duty of Cook, as the agent of the relator, to have objected to the justice accepting any surety offered by Jarvis, the defendant in the warrant, who was not good. In relation to this duty, he being then insolvent, became the surety himself, thereby depriving the relator of the benefit of his execution or of a good and sufficient surety for the stay of it. We think such conduct in Cook, under the relation he then sustained to the relator, was evidence of negligence in endeavoring to collect the money on the judgment, and that the relator has a right to recover if the facts shall so appear to the jury. The case of *Keck v. Coble* does not militate against this decision. That case turned on different principles and was correctly decided. The judgment of nonsuit should be set aside and a new trial granted.

PER CURIAM. Judgment reversed.

Cited: Harding v. Chappell, 51 N. C., 352.

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ROBERT CANNON v. A. W. BEEMER ET AL.*

The exercise of a discretionary power, in the Superior Court, cannot be examined upon an appeal.

THIS was an action of debt, tried on the last spring circuit at WAKE, where the plaintiff obtained a verdict, which was set aside, upon the payment of the costs of the term. Directly after the rule was made absolute, one of the defendants applied to the clerk, and paid him his costs; during the term several witnesses, who were examined on the trial, proved and filed their tickets. The defendant, who paid the cost, made no inquiry of the clerk as to the costs of the witnesses; neither did the clerk give him any information relative to them. No notice of the tickets being filed was given to any of the defendants, and in no way,

except by inference, did it appear that they knew the tickets would be filed. Upon these facts the plaintiff, on the last circuit, moved for judgment upon the verdict, insisting that the condition upon which the new trial had been granted had not been performed. The defendant resisted the motion, and paid the costs of the witnesses into the office.

His Honor, *Norwood, J.*, directed judgment to be entered upon the verdict, and the defendants appealed.

Badger and W. H. Haywood for plaintiff.
Manly for defendant.

DANIEL, J. We do not agree with the plaintiff's counsel that the terms of the rule import that the costs should be paid at that time. Upon the second point, we think that the questions, whether the terms of the order had been complied with or whether a new trial should be granted, were addressed solely to the discretion of the judge below. We are of opinion that he was too rigid with the defendant, yet as he exercised a discretionary power, we cannot disturb his judgment.

RUFFIN, J. The granting a new trial, and the terms of it, were altogether in the discretion of the Superior Court, where the rule was made, and so also was the enlarging the rule, or the refusal to enlarge it, (364) at the subsequent term. We should indeed in the case stated in the record, if that be all, have been disposed to enlarge the rule in this case; but I am not as capable of forming as correct an opinion as the judge who presided and knew the value of the controversy, and all other circumstances, and as it is a matter of discretion, his must determine the question, and not ours. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Bright v. Sugg, 15 N. C., 494; *Phillips v. Lentz,* 83 N. C., 243; *Henry v. Cannon,* 86 N. C., 25; *Long v. Logan, ibid.,* 538.

ROBERT W. SNEED v. EDWARD LEE.

The Superior Courts have a discretion to expunge an order made during the term, and an error in its exercise cannot be examined upon appeal.

IN this case the plaintiff, on the first day of JOHNSTON Superior Court, went to the clerk's office, paid the costs of the suit, and directed him to dismiss it, which was accordingly done. Afterwards, by the

direction of *Daniel, J.*, the entry was expunged, and the cause placed on the trial docket. The defendant, by leave of the court, appealed under the Act of 1831, ch. 34, allowing appeals from interlocutory orders.

Badger for plaintiff.
Devereux contra.

DANIEL, J. The records of the court are the memorials of its transactions. Those transactions, thus entered, can be altered or expunged by the court any time during the term they are entered, as in its discretion it may think proper, just or right. The order made in the present case was one of those which the Superior Courts have a discretion to allow or refuse. It is an order which this Court cannot interfere with, and must stand. I myself, as judge of the Superior Court, made it, but now, on further reflection, I think I erred in so doing, as it (365) did not appear that the plaintiff was induced to consent that the clerk should make the entry by any fraud or contrivance practiced on him, or that it was made under any mistake of his rights. A *procedendo* must be awarded.

PER CURIAM. *Procedendo* awarded.

Cited: Bright v. Sugg, 15 N. C., 494; *Halyburton v. Carson,* 80 N. C., 17; *Cook v. Telegraph Co.,* 150 N. C., 429.

ALFRED M. SLADE ET AL. v. THE GOVERNOR.

1. A sheriff who was elected in June, 1826, and who went out of office in June, 1827, is bound to collect and account for the taxes due the treasury in October, 1827, although the tax lists were not handed him until after his office expired.

2. The case of *Fitts v. Hawkins*, 9 N. C., 394, approved.

At the fall term, 1827, of WAKE Superior Court, a judgment was entered up against the plaintiffs, at the instance of the Treasurer, for the amount of public tax due on 1 October of that year by one Griffin, the sheriff of Martin. A rule was obtained by them upon the Attorney-General to set aside that judgment. At the fall term, 1831, the case was submitted to *Swain, J.*, on the following facts: Griffin was appointed sheriff of Martin 4 June, 1826, and gave the bond upon which the judgment was entered; on 13 June, 1827, one James was elected his successor,

and commenced discharging the duties of the office, having executed the necessary bonds; on the 16th of the last-mentioned month the county court of Martin passed an order directing Griffin to collect the taxes for the year 1826, and that the clerk should furnish him with the tax lists.

Upon these facts his Honor vacated the judgment, and the Attorney-General appealed.

Attorney-General for the Governor.
Hogg and Badger contra.

(366) DANIEL, J. In England the office of collector of the taxes is distinct from that of sheriff and filled by a different person. In this State the office of collector of the taxes is thrown upon the person who shall be elected sheriff. By the Act of 1784, Rev., ch. 219, it is enacted that "over and above the usual bonds directed by law to be given by the sheriff of each county, before his entering into office, he shall enter into a distinct bond, with two sureties; to be approved of by the county court, in the sum of two thousand pounds, to the Governor, conditioned for the due collection, payment and settlement of the public taxes," which bond the clerk is directed to forward to the Treasurer of the State, together with a list of the taxable property. By the Act of 1801, ch. 3, sec. 7, the clerks of the several county courts shall, within twenty days after the justices have made their returns, issue to the sheriff, on application, an accurate copy of the returns of the list of taxes, and the sheriff shall proceed to collect the same, and shall complete the collection and account therefor with the public Treasurer on or before the first day of October in every year. By the Act of 1817, ch. 1, sec. 5, it is enacted that the clerks of the several county courts shall, within forty days after the justices shall have made their returns, deliver to the sheriffs of their several counties a copy of the returns of the lists of taxes made by the justices. The justices who take the list of taxables are to make their returns to the first county court which may happen after the last day of July in each and every year. In forty days thereafter it is the duty of the clerk to have copies of the lists of taxes prepared and delivered to the sheriff. The law for greater security makes it the duty of the sheriff to make application to the clerks for the tax lists. By the aforesaid act of Assembly of 1817 the sheriffs shall proceed, after the first day of April in each and every year, to collect the taxes, and shall account for the same on or before the first day of October thereafter in each and every year.

The office of collector of the taxes does not expire when that of sheriff does; the last terminates at the end of twelve months from the time he qualified as sheriff, whereas the former does not begin (except where

a person liable to pay a tax is about to move away) until (367) the first day of April in the year after he has been appointed sheriff, and by law he is not compellable to collect the taxes even until after the office of sheriff expires. As collector of the taxes he must account with the Treasurer on or before the first day of October in the year following that in which he qualified as sheriff. Griffin was elected to the office of sheriff of the county of Martin at June sessions of the county court in the year 1826. He gave bond and surety to perform the duties of sheriff. He also gave another bond with surety to perform the duties of collector of the public taxes. His office of sheriff began immediately on his qualification and expired at the end of one year from that time. His office of collector of public taxes began immediately, so far as related to taxes that might be due and not listed as, for instance, those imposed on peddlers, showmen, and vendors of slaves brought from other states, etc., but he had no right to enforce payment of the dues on the lists of taxes (except where a person was about to remove) before the first of April in the year next after his appointment, nor was he bound to settle with the Treasurer before the first day of October thereafter. No breach of his bond for the due collection of the taxes could take place until a failure to settle with the Treasurer on the first of October, 1827. In case of failure, the condition of the bond was broken, and the Treasurer had a right by law to enter up judgment against him and his sureties for the amount of those taxes, which he should have collected before that time. Griffin was authorized and bound by law to collect the taxes. The order made by the county court of Martin directing him to collect them was a mere nullity; it gave him no more power than he had before it was made. The sureties to his bond, for the collection of the taxes and settlement with the Treasurer, were bound until those duties were performed. On Griffin's failing to settle for the public taxes, the Treasurer could not have taken judgment on any other bond than the one to which the plaintiffs are sureties. The succeeding sheriff had no (368) right to collect the taxes that were due for the time that Griffin was appointed collector. Nor would the sureties of the succeeding sheriff have been liable if their principal had collected those that were due during the year that Griffin should have collected. *Fitts v. Hawkins,* 2 Hawks, 294. The Act of 1784, ch. 2, sec. 12, authorizes sureties to the sheriff's collection bond to receive the taxes if he should die during the time appointed for their collection. By the Act of 1792, ch. 69, all persons who are authorized to receive the public taxes may collect and distrain for the same within one year after such sheriff or collector is accountable for said taxes in as full and ample a manner as they could have done when they became due. By the Act of 1800, ch. 4, sheriffs are

allowed one year after the day prescribed by law for the settlement of their public accounts to finish the collection of the taxes they are bound by law to account for, with a proviso that they still must settle with the Comptroller and Treasurer as heretofore. The obligation in the bond given by the plaintiffs in this case did not terminate when Griffin ceased to be sheriff of Martin County, in June, 1827, but those obligations continued until payment should be made to the Treasurer for the public taxes due 1 October, 1827. The taxes were not paid, and the Treasurer had a judgment entered up against Griffin and his sureties, which judgment was properly and legally rendered. The judgment of the Superior Court should be reversed.

RUFFIN, J. The case of *Fitts v. Hawkins,* 2 Hawks, 394, seems to be an authority upon every point that can be made in this case. We do not go through the acts of Assembly about taxes, because they were looked into and received a construction in that case. It was there decided that the sheriff appointed in 1826 was the proper officer to collect the tax of that year, and that if the successor had actually collected them *his* sureties were not bound. That suit was against the sureties for the
(369) year in which the taxes were collectable and collected, and it was decided for them. This of itself goes far to establish the liability of the sureties for the preceding year, for it is incredible that the Legislature should mean that, upon a change of sheriffs, there should in any possible case be no authority to collect the taxes, or no security for them when collected.

But it is said that here there is a difference, because the authority to the sheriff, namely, the tax list, which is his warrant of distress, was not delivered until his official term had expired, and then he could not begin to act on it, and therefore his sureties are not liable.

It does not appear in *Fitts v. Hawkins* whether the lists for 1820 were delivered before or after May, 1821. But the case is clear that it could make no difference, for the *Chief Justice* states that if the new sheriff receive the lists and collect the taxes, it must be in consequence of a private arrangement between him and his predecessor, which would not bind his sureties and make them responsible for two years instead of one. The new sheriff then has no authority to collect the taxes, even if the lists be delivered to him. He is not the sheriff to whom they are directed, and it is the same as if he were to take them, not being sheriff at all. This, I have said, nearly establishes the power and the duty of the former sheriff, for the law must intend that the tax shall be collected by somebody. But it is put beyond doubt by the provisions which authorize the sheriff to make those collections and distrain for them at any time

within a year after he is accountable at the treasury. Thus, for this purpose, his official term is extended beyond his first year, during which only his ordinary official duties continue. The argument that the duty must begin during the year, and here it did not, because the list was not delivered to him within it, is fallacious. The duty commenced when he ought to have received the lists. It is true he cannot distrain without the lists, but that is for the benefit of the citizen, that he may see what he is to pay. But the sheriff is the agent of the public to demand the lists, and it is his duty to do so, as much as of the clerk to deliver them, and he cannot avail himself of his own laches. Indeed (370) the public is not to suffer by the laches of either, and might go on to collect the tax, though the clerk refused to deliver, or the sheriff to receive the lists; whether indeed the sheriff would be liable, if the clerk upon his demand refused the lists, is a different question. No doubt he would not, and probably after a refusal by the clerk the sheriff might not afterwards be bound to receive them, unless offered at a time which would allow a reasonable period for the collection before he had to account. But here there is nothing of that sort. It is not pretended that the sheriff might not have collected, or did not in fact collect the tax. The only ground is, that he had no authority to collect it or receive the list at the time he did. And upon that it is clear that as no other officer then had, or could have that authority, and the tax list was delivered to Griffin and accepted by him at a time when, by law, he could distrain, his sureties are responsible. Griffin was the person designated by law to collect, and the previous negligence of himself and the clerk, or either of them, did not prejudice the right of the public, as against the citizens, to levy the tax, nor that against Griffin to account for the tax, the warrant to collect which he thus accepted while he yet had power to enforce it. It is not like process from an individual, of which the officer can know nothing until he receives the writ. But the sheriff knows that by law a tax is levied and that he is to collect it, and in what manner he is to get or complete his authority, and it is a breach of his duty to fail in any particular.

PER CURIAM. Judgment reversed.

Cited: Kelly v. Craig, 27 N. C., 131; *S. v. Hankins,* 28 N. C., 429; *S. v. Woodside,* 30 N. C., 117; *S. v. Long, ibid.,* 419; *Dixon v. Comrs.,* 80 N. C., 119; *Comrs. v. Bain,* 173 N. C., 379.

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THOMAS D. CRAIN v. RICHARD H. LONG.

1. A discharge of an insolvent, under the Act of 1822 (Taylor's Rev., ch. 1131), protects him from arrest by those creditors only who had notice of his intention to apply for it.

2. The case of *Burton v. Dickens*, 7 N. C., 103, approved.

THE defendant had been arrested upon a *ca. sa.* at the instance of the plaintiff, and on the last circuit, at HALIFAX, applied for a discharge, upon the ground that he had been arrested at the suit of one Bullock, and had then taken the insolvent debtor's oath and surrendered his property. It was admitted that the debt of the plaintiff was due at the time of that surrender, and that he had no notice of the defendant's intention to take the oath of insolvency. His Honor, *Norwood, J.*, discharged the defendant, and the plaintiff appealed.

No counsel for plaintiff.
Devereux for defendant.

RUFFIN, J. The case of *Burton v. Dickens*, 3 Murph., 103, was decided expressly on the grounds that the Act of 1773, Rev., ch. 100, provides for notice to the imprisoning creditor only, and divested the whole of the debtor's property. Although it was deemed just that every creditor to be affected by his discharge should have notice, yet as the Legislature had, after the adoption of the Constitution, made no regulation to that effect, and the Act of 1773 contained none, the court was obliged to say that a discharge of the motion provided under that act should operate against all creditors, because the debtor might be perpetually imprisoned by successive executions by different creditors against whom he had no power by the act of protecting himself. But the Act of 1822, Taylor's Rev., ch. 1131, expressly requires notice and makes the discharge good only as against those to whom it is given. It puts it in the power of the debtor to protect himself if he chooses, and if he will not give notice it is his default and not the defect of the law. He is not imprisoned after a surrender of his property "in such manner as
(372) by law shall be regulated." In this statute the great principle that every man shall be heard, before his rights are concluded, is enforced. When the expression "duly discharged" is so emphatically commented on by the counsel, the question is begged. It remains to inquire, against whom? It is a due discharge as to the parties in court, but it is not so as against those not heard and excluded from a hearing by the act or omission of the debtor himself. It is plain that an issue

is given to "any creditor" to be affected by the order of discharge, and that the assignment is of the estate in the schedule only—nothing else is divested out of the debtor—and every creditor ought to be at liberty to show that the debtor has kept some back. In fine, the Constitution gives to the Legislature the discretion to regulate the manner in which the debtor shall deliver up his property, and their will is conclusive when expressed. It only restrains them from saying that when delivered up he shall not be discharged. If a statute therefore takes all away, without providing for a notice to particular creditors, the debtor has a right to say that he shall not be liable for debts, the means of satisfying which he is deprived of by law, and that the Legislature is bound to authorize a notice to all creditors, or the Constitution binds them without it. But when the law does provide for such notice, there can be no complaint against it, for its omission is the voluntary fault of the debtor himself.

PER CURIAM. Judgment reversed.

Cited: Williams v. Floyd, 27 N. C., 660; *Norment v. Alexander,* 32 N. C., 71; *Griffin v. Simmons,* 50 N. C., 148.

THE STATE v. THE BANK OF NEW BERN.

Stock standing on the books of the Bank of New Bern, in the name of the President and Directors of the Literary Fund, is stock held by the State within the meaning of the Act of 1814 (Rev., ch. 870, sec. 11), extending the charter of that bank, and therefore not subject to taxation.

A DIFFERENCE of opinion having arisen between the Treasurer and the Bank of New Bern, as to the obligation of the bank to pay the tax of one per cent upon shares in the bank held by the president and directors of the literary fund, the bank contending that the (373) stock held by the latter was, to all intents stock held by the State within the meaning of the eleventh section of the Act of 1814, Rev., ch. 870. The question was submitted to *Norwood, J.,* at WAKE, on the last spring circuit in the shape of a case agreed. His Honor, holding that the stock of the literary fund was the stock of the State, gave judgment accordingly, and the Attorney-General, in behalf of the State, appealed.

Attorney-General for the State.
Gaston for bank.

RUFFIN, J. There is but a single question submitted in this case, and upon that no doubt is entertained by the Court. No tax can be levied on or for any stock holden by the State, by the express terms of the eleventh section of the Act of 1814, which imposes the tax of one per cent on the stockholders in the banks of New Bern and Cape Fear. The remaining inquiry is whether this stock, which stands in the name of the president and directors of the literary fund, is stock held by the State within the meaning of the charter. We think it is. The Act of 1825 was passed to create a fund for the establishment of common schools. The object is one of general and public concern, and is to be effected by the general and public treasure. It is the legislative will that the income arising from certain sources of revenue shall be set aside for that purpose until it shall, in the opinion of the Legislature, have sufficiently accumulated for division and particular appropriation amongst the several counties. To facilitate the keeping of the accounts of it as a separate fund, and to promote its accumulation, certain of the high officers of the State are appointed trustees of it, with directions to invest it from time to time in stock, and to that end are endued with corporate powers. But it is still a public fund, received by the Treasurer and accounted for by him. It is under the control of the Legislature, and may be by their will increased, diminished, divested or annihilated. No private rights have attached to the fund, or vested
(374) under the law creating it, or any one subsequently passed. It is to all intents the common property of all the citizens of the State, and therefore belongs to and is held by the State. It was not the legislative design to vest it in a corporation for private uses, but simply to distinguish it from other parts of the public property, as ultimately designed for a special public use. That this might be conveniently done, it received the designation given to it in the act, but that does not change its character or ownership. If it be not the property of the State, whose is it? If by the Act of 1814 the tax is on each individual stockholder, to be paid by the president or cashier out of the funds arising from or constituting his share or shares, it is plainly absurd to require a particular portion of the public property to contribute to the fund for general expenditure. If, on the other hand, the tax is to be paid by the corporation out of the aggregate profits or funds, and the amount only ascertained by the number of private stockholders, that amount must be diminished by one per cent per annum upon each of these shares which are not private property. It is not necessary to decide which is the true construction of the charter on this point, for upon either the judgment ought to be affirmed.

PER CURIAM. Judgment affirmed.

THOMAS TROTTER v. MARGARET SELBY.

Where the heir has land descended from both parents, a creditor cannot sell that descended from the mother, under a judgment against that descended from the father, although the mother held as devisee of the father.

THIS was a petition for partition, which was submitted to *Daniel, J.*, at BEAUFORT, on the last circuit, upon the following case agreed:

The demandant had obtained a judgment against Benjamin M. Selby, the executor of Maurice Jones. Selby having wasted the (375) assets, the demandant in 1822 brought a *sci. fa.* against Sarah and Mary E. Jones, the wife and daughter, and devisees of Maurice, seeking to obtain satisfaction of his judgment from the devised lands. In 1823 Sarah, the widow of Maurice, died intestate, leaving Mary E. Jones, the daughter of Maurice, and the defendant, a daughter by a second marriage, her only children. No notice of her death was taken upon the record of the demandant's suit by *sci. fa.* In 1825 the demandant amended his *sci. fa.* filing a new one as a substitute for the former, and as of the same *teste* (1822) against Mary E. Jones alone, which suggested "that Maurice Jones died seized of land which descended to the said Mary" and summoned her "to show cause why the said Thomas Trotter shall not have execution for his said debt against the said lands so descended as aforesaid." Upon this *sci. fa.* final judgment was given, "that the plaintiff have execution against the lands that were of Maurice Jones, of which he died seized"; and execution issued against those lands "in the hands of Mary E. Jones, the heir of Maurice Jones." Under this execution the plaintiff purchased the land in dispute, which was a tract devised by Maurice Jones to his wife Sarah. Upon these facts his Honor gave judgment for the defendant, and the demandant appealed.

Hogg and J. H. Bryan for demandant.
Gaston contra.

RUFFIN, J. It is argued for the plaintiff that the sale was good, because the land was liable in the hands of Mary E. in whatever manner it came to her, and therefore the pleadings need not show how she was heir, or how she otherwise claimed the land; that the proceeding against real estate is considered to be *in rem*, and the only reason for bringing in the person is to contest the debt, the state of the personal assets, or the insolvency of the executor.

The principles asserted are not clearly perceived by the Court to be entirely correct, for it may be that the devisee paid debts to the value of the land, and would have a right to show that, although she could

(376) not plead generally "nothing by devise." But it is unnecessary to pursue that investigation, because if the proceeding be regarded as *in rem,* as strictly as if it were on a statute or recognizance in England, the process must be served on and bring in the person *then* claiming and enjoying the thing sought to be condemned. That person is the one to defend it; hence, those who are the terre-tenants must be summoned. When this suit was brought Mary E. was not seized of these lands. They belonged to her mother, and could not have been sold under a judgment against the daughter, if the mother had survived the judgment; neither can they as against any person succeeding to the mother's estate. They never have been defended. It is true Mary E. was before the court, but the lands which descended from her father to her may not have been worth a contest, or may have been sold for other debts; or indeed none may have descended to her, and so she could not have been injured. It may be that the heir need only be named as terre-tenant, but if one having a several interest die pending the suit, his share cannot be sold under the judgment, unless the suit be revived against his heir, which may be done, I suppose, though the heir of the one dying be not also the heir of the first debtor.

But if the process and judgment could have been so framed as to extend to these lands, thus acquired by the defendant in that suit pending it, they have not. They embrace in terms only, "lands of which Maurice Jones died seized, and which descended from him to Mary E. Jones, the heir of Maurice." Now although it might not have been necessary to name her as heir of Maurice, and allege that the land came to her in that character, yet when she is named as heir of one, and the pleadings do not designate the land by boundaries or other means than as being held by her as the heir of the particular person mentioned, the plaintiff is bound by the description and cannot sell under that judgment land claimed in another right, and especially when that right has accrued after action brought.

PER CURIAM. Judgment affirmed.

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ZACHARIAH ELLIOTT v. WILLIAM HOLLIDAY.

Ignorance of the Act of 1777 (Rev., ch. 115, sec. 75), requiring appeal bonds to be executed in the court where they were allowed, will not entitle the appellant to a *certiorari.*

A CAUSE between the parties had been tried in the county court of GREENE, where judgment was rendered for the plaintiff, and the de-

fendant prayed an appeal, which was granted, and his sureties allowed. At the ensuing term of the Superior Court, before *Martin, J.*, the plaintiff moved that the appeal be dismissed, because the appeal bond was not executed until after the term of the county court at which it had been allowed. This fact being established, his Honor sustained the motion. The defendant then filed an affidavit in which he swore that he was ignorant of the rule requiring the appeal bond to be executed during the term of the county court; that he thought it sufficient if the appeal was allowed by the court, and that the bond might be executed at any time; that he had brought his sureties to the clerk during the term, but finding him busy he had, in consequence of his erroneous impression, requested them to attend after its expiration. The affidavit concluded with an averment of merits. His Honor, upon these facts, awarded a *certiorari,* from which order the plaintiff appealed.

W. C. Stanly for plaintiff.
Mordecai for defendant.

DANIEL, J., after stating the substance of the affidavit, proceeded: The Act of 1777, Rev., ch. 115, sec. 75, requires the appellant to enter into bond with two sufficient sureties before obtaining his appeal. The court is not only to judge of the sufficiency of the sureties, but to take the bond. The defendant does not come within any of the cases decided in this State. *Chambers v. Smith,* 1 Hay., 366; *Collins v. Nall, ante,* p. 224. There does not appear to be any misconduct either in the court or the clerk, no management, fraud, or contrivance by the adverse party, nor any inability in the applicant to give sureties during the term. The only reasons offered are that the defendant (378) was ignorant of the law, and that the clerk was very busy, and he did not wish to disturb him. It is a rule that ignorance of the law excuses no man. If we were to sustain the *certiorari,* it would be opening the door for great negligence and fraud in parties applying for appeals, and perhaps perjuries in making affidavits. We think the order awarding the *certiorari* should be reversed.

PER CURIAM. Judgment reversed.

Cited: Smith v. Abrams, 90 N. C., 23; *Winborn v. Byrd,* 92 N. C., 9; *Griffin v. Nelson,* 106 N. C., 238; *Johnson v. Andrews,* 132 N. C., 380.

ARTHUR JONES v. LEWIS SASSER.

1. Notwithstanding the Act of 1806 (Rev., ch. 701) requires deeds of gift for slaves to be registered within one year of their date, yet if registered within the time prescribed by the acts allowing longer time for that purpose, they are valid.

(The case of *Scales v. Fewel*, 10 N. C., 18, approved.)

DETINUE for a slave, tried on the last circuit, at WAYNE, before *Daniel, J.* Plea—*Non detinet.* A number of points were intended to be presented by the case certified with the record, none of which it is necessary to state except the following: The plaintiff claimed the slave in dispute under a deed of gift from his father, Arthur Jones, Sr., dated 5 April, 1827, which was not registered until 20 February, 1830. The defendant claimed under a deed from the same person, dated 5 August, 1829, which was registered 10 January, 1830. His Honor instructed the jury that as the plaintiff claimed under a deed of gift, no title passed by it until it was registered, and until that took place that the title remained in his father; that if the latter retained the possession until the deed of August, 1829, the execution of that deed and its prior registration gave the defendant title, which would not be divested by the subsequent registration of the deed to the plaintiff.

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

(379) *J. H. Bryan and Mordecai for plaintiff.*
Gaston and W. C. Stanly contra.

RUFFIN, J. By the Act of 1806, Rev., ch. 701, no gift of slaves is good or available unless made in writing. "Neither," the act continues, "shall such gift be valid, unless the writing shall be proven or acknowledged and registered within one year after the execution thereof." These words seem to denote a purpose in the Legislature, then to make the registry acts effectual, at least, in reference to the gift of slaves. Perhaps no purpose could be more politic, for registration is now scarcely of any use except as a means of preserving the instrument for the benefit of the person claiming under it, in case of the loss of the original, as the party may keep the deed in his pocket as long as he pleases and place it on the register's books only when it becomes his interest to defeat some claimant who has, ignorant of his deed, acquired a right. Probably these strong reasons induced the judge in the court below to lay down the rule he did. But they are reasons which address themselves rather to the discretion of the Legislature than to ours. The Legislature has certainly the power to enlarge the time for registration

and to pronounce its effect, and if to them it seem good, the courts must execute their will. From time to time acts giving further time for registration have been passed, and in each deeds of gift, and indeed all conveyances except mortgages and deeds of trust, are expressly included, and it is enacted that they shall be as good and valid as if they had been proven and registered within the time before allowed by law. Such are the words of the acts of 1827, ch. 30, and 1829, ch. 26, which embrace the case now before us. Acts of this character have always received a literal construction; in fact, they are susceptible of none other. The only exception is the case of *Scales v. Fewel,* 3 Hawks, 18, in which there was an hiatus of one year between the extending acts of 1818 and 1821, and during the interval rights vested in other persons. The Court thought the last act was not intended to defeat such vested rights. But in every other case deeds registered at ever so remote a period have been held, by force of the new registry acts, to be as opera- (380) tive as if registered within the periods prescribed by the acts of 1715 or 1806, or any other general statute. Here there was no interval.

PER CURIAM. Judgment affirmed.

Cited: Gregory v. Perkins, 15 N. C., 51; *Spivey v. Rose,* 120 N. C., 165; *Dew v. Pyke,* 145 N. C., 304.

GABRIEL SHERWOOD UPON THE RELATION OF THE STATE BANK v. PROBATE COLLIER.

1. Where a surety in a joint note paid it, but took no assignment from the creditor of a judgment previously obtained upon it against the principal debtor: *Held,* that the payment satisfied the judgment.

2. An assignment of a security to one of the parties to it, is a satisfaction; if it is intended to keep it on foot, the assignment should be to a stranger.

(The case of *Scales v. Fewel,* 10 N. C., 18, approved.)

DEBT upon a bond, given by one W. B. Green, upon taking out letters of administration upon the estate of Benjamin W. Caswell, to which the defendant was surety. The breach assigned was the nonpayment by Green of a judgment recovered against him by the relators, upon a note of his intestate. Plea—*Performance.*

On the trial, during the last spring circuit, before *Martin, J.,* at WAYNE, the case was as follows: The intestate died in 1815, indebted to the State Bank by a note for $630, to which one Hooks was surety.

In the year 1816 judgment was recovered by the bank upon this note against the administrator, W. B. Green, and an execution issued, which was returned *nulla bona.* In the year 1818 the bank also recovered judgment against the surety Hooks, which was satisfied by him in the year 1823. This action was commenced in the year 1829. Upon these facts his Honor instructed the jury that the payment by Hooks barred the action. The plaintiff, in submission to this opinion, suffered a nonsuit and appealed.

(381) *J. H. Bryan and Mordecai for plaintiff.*
Gaston and W. C. Stanly contra.

RUFFIN, J., after stating the case, proceeded as follows: I suppose the present action is brought for the benefit of the surety, Hooks, to avoid the effect of the statute of limitations, or a disbursement of the assets subsequent to the judgment of the bank against Green, which might prevent an effectual recovery in a suit in Hooks' own name.

But in the case stated, I think the present action equally ineffectual. Since the statute of 4th Ann, payment discharges a judgment as effectually as entering satisfaction of record. Here there was full payment. It was intended as such by Hooks, and so received by the creditor. A payment by any one of two or more, jointly, or jointly and severally bound for the same debt, is payment by all, and any of the parties may take advantage of it and plead it to an action brought by a satisfied creditor, or in his name by the sureties. It is true that if a payment be not intended, but a purchase, there is a difference. But that can only be by a stranger, or by using the name of a stranger, to whom an assignment can be made when there is but a single security, and that one upon which all the parties are jointly liable. This is upon the score of intention, and because the plea of payment by a stranger is bad upon demurrer. If the assignment of a joint security be taken by the surety himself, there is an extinguishment, notwithstanding the intention, because an assignment to one of his own debt is an absurdity. Where the securities are separate, as several bonds, or a several judgment upon a joint and several note, which is the case here, probably an assignment may be made to the surety himself, since he is no party to the
(382) judgment. But if that can be, clearly nothing but a plain intention, evinced by an assignment, to keep up the judgment, can have that effect. Upon the face of the transaction it is a payment on which Hooks could have maintained assumpsit in his own name. That shows that this suit is barred; for if it be not, the original creditor and the surety may both recover the same debt.

This case is just the reverse of *Hodges v. Armstrong, ante,* 253. That suit was brought in the name of the surety, who had taken an assignment to a stranger and did not intend a satisfaction. This, in the name of the first creditor who had received payment and did intend a satisfaction. Both decisions are on clear grounds, and are supported by numerous authorities, amongst them I recollect *Church v. Bishop,* 2 Ves., 371, and *Wattington v. Sparks, ibid.,* 569.

PER CURIAM. Judgment affirmed.

Cited: Foster v. Frost, 15 N. C., 429; *Bailey v. Sugg,* 21 N. C., 368; *Null v. Moore,* 32 N. C., 327; *Brown v. Long,* 36 N. C., 192; *Runyon v. Clark,* 49 N. C., 54; *Hanner v. Douglas,* 57 N. C., 265; *York v. Landis,* 65 N. C., 537; *McCoy v. Wood,* 70 N. C., 129; *Rice v. Hearn,* 109 N. C., 151; *Liles v. Rogers,* 113 N. C., 200; *Peebles v. Gay,* 115 N. C., 41; *Burnett v. Sledge,* 129 N. C., 120; *Davison v. Gregory,* 132 N. C., 396; *Bank v. Hotel Co.,* 147 N. C., 598; *Liverman v. Cahoon,* 156 N. C., 188.

ENOCH COBB v. GRADY HERRING.

Where, upon the case stated, the judgment of the court below is correct, points which were intended to be presented do not arise, and will not be examined; as where in trespass, the plaintiff was in possession, and the defendant had no title, defects in that of the former will not be noticed, he having recovered upon his possession.

TRESPASS *quare clausum fregit.* Plea—*not guilty,* and *liberum tenementum.* The plaintiff claimed under one Whitfield, to whose title the case stated several objections, which it is unnecessary to mention. Whitfield had been in possession for many years, and in January, 1830, sold to the plaintiff, who took immediate possession, but no conveyance was stated in the case to have been made by Whitfield to him. The defendant offered no evidence of title in himself. The trespass complained of was, in entering an enclosure and throwing down a fence. *Martin, J.,* before whom the cause was tried at WAYNE, on the last (383) spring circuit, after charging the jury as to the alleged defects in the title of Whitfield, informed them that if the plaintiff had actual possession, and not constructive possession merely, and the defendant entered upon him, in the manner stated in the case, without even a color of title, they ought to find for the plaintiff. A verdict was returned accordingly, and the defendant appealed.

W. C. Stanly and *J. H. Bryan,* in opening the case, were asked by RUFFIN, J., if the questions intended to be presented as to Whitfield's title were open upon the case certified with the record? Upon a clear intimation of the opinion of the Court, they gave up the cause.

Mordecai for plaintiff.

RUFFIN, J. Most of the points on which the jury were instructed would have been material if the action had been brought by Whitfield, and had turned on his having a better title than the defendant. But they are out of the present case, because it is immaterial whether the title was in Whitfield or not, since no conveyance is stated from him to the plaintiff. The right of the present plaintiff to recover must, therefore, have depended solely on his actual possession at the time of the trespass committed; and the judge properly said, upon that point, that if he had not such possession, he could not recover, but if he had, then without title he had a right to a verdict against the defendant, who was a mere wrongdoer.

It may be possible that it was intended to take the opinion of the Court upon Whitfield's title, and to that end, to state a conveyance from him to Cobb, which would have brought that title in issue, in case the plaintiff had not the actual possession. But a case is not made to call for that opinion, for it is only stated that Whitfield sold to Cobb, but whether he conveyed, or by what species of conveyance, does not appear. As, therefore, the jury have found a verdict for the plaintiff, which, in the case stated, and under the instructions given by the judge, they (384) could have done upon the single ground of his own possession, and upon that alone, we must presume that such possession was proved to them; and, if so, the verdict and judgment was right. The case as to that states that the plaintiff purchased from Whitfield in January, 1830, and the trespass was on 2 February, and that the plaintiff "had been in possession since the time he purchased." If this means "ever since," the plaintiff was entitled to recover, and since the verdict under this charge, we must take it to mean that.

PER CURIAM. Judgment affirmed.

THOMAS THREADGILL UPON THE RELATION OF HEZEKIAH HOUGH v. HIRAM JENNINGS ET AL.

A bond to the chairman of the county court, his "executors, etc.," is not an office bond for want of the words, "successor, etc." But it enures as a private bond, and a delivery to the clerk is sufficient, unless the obligee refuses it, although the clerk is the agent of the chairman as to the office bonds only.

THREADGILL *v.* JENNINGS.

DEBT upon a bond given by John T. Scott and Hugh McKenzie, upon taking out letters of administration upon the effects of one Samuel Knox. Plea—*non est factum*. On the trial, before *Daniel, J.*, at ANSON, on the last circuit, the plaintiff produced the bond, which turned out to be made payable to "Thomas Threadgill, chairman, his executors, administrators, etc.," instead of "his successors in office," as prescribed by the Act of 1791 (Rev., ch. 342). There was no attesting witness to it; the plaintiff proved the handwriting of the obligors, and the deputy clerk of the county court swore that he found it among the files of the office, but that he recollected nothing of its execution. For the defendant it was objected that, as the bond was not an official bond, but only a private obligation, entered into with the plaintiff as an individual, there was no evidence of an actual delivery to him, or to anyone for him; that although the clerk of the county court might be presumed to be (385) the agent of the chairman in accepting the delivery of official bonds, he could not be so presumed in respect to bonds payable to him in his natural capacity. His Honor, being of this opinion, nonsuited the plaintiff, who appealed.

No counsel for either party.

DANIEL, J. Two questions arose on the trial of this cause in the court below: first, whether the bond declared on was an official bond, and might be sued on by the successors of Threadgill, who, it appears, was chairman of the county court of Anson. On this point, I was of opinion that it was not an office bond, as it was not made payable to Threadgill and his successors in office, but to him and his personal representatives. The anonymous case in Haywood's Reports (2 N. C., p. 144), is not an authority against that opinion, as there the instrument declared on was intended to be an office instrument, and no one but the successor could have sued on it, as the instrument had on its face no words which denoted that it was intended to be an individual covenant. In the present case the bond has such words in it, and the word "successors," which, if inserted, would have made it a good office bond, is omitted. The second question was, whether the delivery of the bond to a stranger, with an intent that it should be delivered by the stranger to the obligee in his official capacity, would nevertheless, upon its delivery, make it a good individual obligation. A deed is good if delivered to a stranger, to the use of the obligee. But if it be delivered to a stranger without any such intention (unless it be delivered as an escrow), it seems this is not a sufficient delivery. (Sheppard's Touchstone, 57, 58; 2 Thomas' Coke, 225, note m.) The case of *Fitts v. Green, ante,* 291, was relied on for the defendant in the court below, and it had great influence in deter-

mining the case. But upon more mature reflection, I think that it was immaterial in what character the obligee was to take the bond. The question for the jury to determine was whether the obligor deliv-
(386) ered the instrument to any person (be that person a stranger or not), with an intent that it should be delivered to the plaintiff. If the intent was that the plaintiff should receive it, and he did thereafter receive it, the bond then was good from its delivery to the stranger. The direction to the jury to inquire whether the obligors intended the instrument should be delivered to the plaintiff, and if they did, whether they intended that it should, after its delivery, operate in law as an office bond, and not as an individual bond, I now think was improper. The jury should have been simply instructed to inquire whether the instrument was placed in the hands of the clerk with an intention by the obligors at the time it was thus delivered that it should be delivered over to the plaintiff. If the jury should find the fact of intention to deliver, and that in pursuance of that intention it was delivered to the plaintiff, then the effect which the law would afterwards give the instrument ought not to have been regarded by them in ascertaining the isolated fact whether or not the obligors intended the plaintiff should have the instrument as their deed. If the obligors intended to deliver the instrument to the plaintiff as their deed, and if it afterwards came to his hands, it then was their deed, notwithstanding their ignorance of the fact that in law it was not an office bond. The obligors are not to be heard to say they were ignorant the law would make it good as an individual bond when it was invalid as an office bond. I think a new trial should be granted.

RUFFIN, J. It is not certain that the jury could not infer that the clerk was the agent of the plaintiff for accepting the delivery of the bond, although it be not strictly in the form required by the statute. The purpose of giving it is obvious from its terms. It was intended to have the same operation as one which conformed to the act of Assembly; and it is no great stretch to presume that the chairman of the court authorized the clerk to accept any obligation made to secure the faithful administration of the assets. But this case does not depend upon
(387) the agency of the clerk; if he be a stranger, the bond was the deed of the obligors at the time of the plea, as the obligee had not before that time refused it. That is the rule laid down by *Lord Coke* in *Butler and Baker's case,* 3 Rep., 28, and again in *Whelpdale's case,* 5 Rep., 119. It is founded on the presumed assent of the party to whom the deed is made, from the advantage accruing to him under it. There is a very strong case of the application of this principle. If a deed be made to a married woman, she can neither expressly assent or dissent

during her coverture. She has not capacity for either, but may dissent when she becomes discovert, which avoids the deed *ab initio*. Yet in the meanwhile the deed operates and vests the title in her, because the law presumes for her benefit that she will assent when she can—at all events, until it be refused, it is a deed. The case of *Fitts v. Green, ante,* 291, was decided upon the ground that the bond was not complete; that is, that it was not what all the parties intended it should be, before it was delivered by one or accepted by the other. Something more was to have been done, and therefore, without express evidence of delivery in the state in which it then was, none could be presumed.

PER CURIAM. Judgment reversed.

Cited: Vanhook v. Barnett, 15 N. C., 271; *Creech v. Creech,* 98 N. C., 158; *Robbins v. Rascoe,* 120 N. C., 81; *Buchanan v. Clark,* 164 N. C., 63; *Lynch v. Johnson,* 171 N. C., 612.

DEN EX DEM. WILLIAM R. SMITH v. JOHN M. GREENLEE.

1. Rules made by consent, after an order for the removal of a cause, but before it is removed, are not erroneous.
2. An affidavit for the removal of a cause, adjudged to be sufficient.

EJECTMENT, tried on the last spring circuit, at RUTHERFORD, before *Donnell, J.*

The cause was originally commenced in Buncombe, and notices were served upon James M. Greenlee, Henry Anderson and Stephen Edwards, the tenants in possession. Greenlee alone entered into the consent rule, and was made defendant. At the return term, the following affidavit was filed by James M. Greenlee, upon which the cause (388) was removed to Rutherford.

"The defendant swears that he cannot have a fair and impartial trial in this county, owing to the great prejudice existing against him; that the lessors of the plaintiff are men of great influence in this county, and this affiant believes they will exercise their influence to his prejudice."

Immediately after the order for removal, the following entry appeared upon the record:

"And afterwards, to wit, on the same day and year, came John M. Greenlee, by, etc., and by and with the consent of the plaintiff's attorney, and by and with the assent of the court now here, the said John M.

Greenlee is admitted to defend the cause in the room and stead of the said James M. Greenlee."

A verdict was returned for the defendant, which the plaintiff moved to set aside:

1. Because the affidavit for the removal was not filed by or for the defendant of record.

2. Because the affidavit was insufficient to warrant the removal.

3. Because John M. Greenlee was improperly made a defendant, as the court had no power over the cause after the order of removal was made.

The presiding judge overruled the motion and gave judgment upon the verdict, and the plaintiff appealed.

No counsel appeared for plaintiff.
Badger for defendant.

DANIEL, J., after stating the entries above set forth, proceeded as follows:

As to the first point, it appears that James M. Greenlee was the defendant at the time he made the affidavit, and when the order of removal was entered.

Upon the second point, we are of opinion that the affidavit contained matter sufficient to justify the removal of the cause. The record (389) of the cause was not to be sent from Buncombe to Rutherford until the ensuing term of the Superior Court of the latter county; the Superior Court of Buncombe could, while the cause remained there, make any orders in it by consent; this appears to have been the case with the order now complained of. Were it erroneous, the consent of the parties prevents them from objecting to it now. Upon looking through the record, we think the judgment should be affirmed.

PER CURIAM. Judgment affirmed.

SPIER WHITAKER v. JOHN B. CAWTHORNE.

An unsealed memorandum given by the owner of land, stating that A. is the owner of a house upon the premises, and authorizing its removal, is a mere license to enter, and is revoked by a subsequent conveyance to B.

TRESPASS *quare clausum fregit,* and upon *not guilty* pleaded, on the trial before *Daniel, J.,* at WARREN, on the last spring circuit, the case was that one Robert Ransom, in the year 1826, bought the premises in

dispute of one Robert R. Johnson, from whom he received an absolute deed, and to whom he gave the following memorandum, which was without a seal: "I, Robert Ransom, agree that the stable next, etc., which belongs to Robert Johnson, may be removed at any time he pleases, which stable was reserved by said Johnson in his sale, etc." The plaintiff claimed under an absolute deed from R. Ransom to James Ransom, and the defendant under a sale of the stable from Johnson's administrators. The trespass consisted of an entry by the defendant, and the removal of the stable.

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

Devereux for defendant.
Badger contra.

DANIEL, J., after stating the case, proceeded: The word "land (390) legally includeth all castles, houses and other buildings, so as passing the land or ground, the structure or building thereupon passeth therewith." (1 Thomas' Coke, 197.) "If a man grant all his lands, he grants thereby all his mines of metal, and other fossils, his woods, his waters, and his houses, as well as his fields and meadows." (2 Bl. Com., 18.) The word "land" includes not only the face of the earth, but everything under it or over it. The stable was fixed to the land, and was in law a part of it. It could not be, nor was it severed by the unsealed writing which Ransom gave to Johnson. It remained as part of the land, and passed under the deed to James Ransom, and again it passed with the land by the deed to the plaintiff. The written license given by Ransom might have excused a trespass committed in entering and taking the stable, whilst he was the owner of the premises. It did not operate as a conveyance of the stable, for the stable being a part of the realty, could not pass, except by such a conveyance as would pass the land. A license to commit a trespass is a very different thing from a conveyance, which will pass the land, or any of its appurtenances. When Ransom sold the land, the stable passed, and the license to enter was revoked; it was not incorporated in the deed to Ransom, and it was therefore, as to his bargainee, a nullity.

PER CURIAM. Judgment affirmed.

Cited: Dills v. Hampton, 92 N. C., 571; *McCoy v. Lumber Co.,* 149 N. C., 3.

CALVIN WASHBURN v. PETER O. PICOT ET AL.

In an action upon a promissory note, a total failure of consideration may be given in evidence to defeat it; but it is otherwise where there is only a partial failure, that can only be remedied by a distinct suit.

ASSUMPSIT upon a promissory note, given by the defendants upon an exchange of vessels.

Plea—general issue. On the trial at WASHINGTON, on the last circuit, before *Donnell, J.,* the defendants offered to prove that the vessel (391) which they received from the plaintiff was not seaworthy; and it was insisted for them that this evidence should be received to reduce the amount which the plaintiff claimed. But his Honor refused to receive the evidence, observing that where there was a total failure of consideration, the evidence was proper, but where the failure was partial, it was the ground of a cross-action.

Verdict for the plaintiff, and appeal by defendants.

Iredell for plaintiff.
No counsel for defendants.

DANIEL, J. The law authorizes the defendant, in an action on a promissory note, or on a bill of exchange, where the suit is between the original parties, to give in evidence a total failure of the consideration as a defense. *Greenleaf v. Cook,* 2 Wheat., 15. But when the failure of consideration is partial, it is otherwise. The case of *Morgan v. Richardson,* 1 Camp., 40, note, was an action brought against the acceptor of a bill of exchange, at the suit of the drawer, the bill being payable to his own order; defense that the bill had been accepted for the price of some hams bought by the defendant from the plaintiff, to be sent to the East Indies, and that the hams had turned out so very bad that they were not marketable. The sum for which they actually sold was paid into court. *Lord Ellenborough* held that, although an entire failure of the consideration of the bill would be a defense to an action upon it by the original party, yet it was otherwise where the failure was partial, and that then the drawer must take his remedy by an action against the person to whom it was given. *Tyre v. Gwyne,* 2 Camp., 346, was an action by the drawer and payee of a bill of exchange against the acceptor; the defendant proposed to prove in mitigation of damages that the bill had been accepted for the price of a quantity of cheese sold by the plaintiff to the defendant for exportation; that the cheese was of a bad quality, and improperly packed, and that the consideration for (392) the acceptance had in a great measure failed. *Lord Ellenborough*

said: "Sitting here, I shall certainly adhere to the judgment of the Court in *Morgan v. Richardson.* There is a difference between want of consideration and failure of consideration. The former may be given in evidence to reduce the damages or defeat the plaintiff's action; the latter cannot, but furnishes a distinct and independent cause of action. There is a distinction between the *contract* and the *security.* If part of the contract arises on a good consideration, and part on a bad one, it is divisible. But it is otherwise as to the security, that being entire." We think the judgment should be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Purtel v. Morehead, 19 N. C., 241; *McEntyre v. McEntyre,* 34 N. C., 302; *Hobbs v. Riddick,* 50 N. C., 81; *Johnston v. Smith,* 86 N. C., 501; *Jones v. Rhea,* 122 N. C., 724; *Lumber Co. v. Buchanan,* 192 N. C., 774.

LUKE HUGGINS v. BRICE FONVILLE.

1. A sheriff who is special bail may, under the Act of 1777 (Rev., ch. 115), surrender the principal to himself, and if, after the surrender, he detains the principal and notifies the plaintiff thereof, his liability as bail ceases.
2. If a sheriff, who is bail, surrenders the principal to himself as sheriff and afterwards there is an escape, the remedy is by debt or case.

SCIRE FACIAS against the defendant, the sheriff of ONSLOW, as special bail of one James Eslick, who had been arrested and suffered by the defendant to go at large, without giving bail.

The only question in the cause arose upon plea *puis darrein continuance,* filed by the defendant, the substance of which was that Eslick had surrendered himself in exoneration of the defendant as his bail, and had been committed to the public jail, where he remained until discharged under the insolvent debtors' act, of all of which the plaintiff had notice.

On the trial, before *Martin, J.,* on the last circuit, the plea was fully supported by the evidence, but it appeared that at the time of the surrender and discharge of Eslick the defendant was still sheriff of Onslow.

The presiding judge informed the jury that if they believed the defendant elected to hold Eslick in custody as sheriff after the arrest, and had notified the plaintiff thereof, that it was in law a (393) bar to the action.

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

J. H. Bryan for plaintiff.
No counsel for defendant.

DANIEL, J., after stating the plea and evidence as above, proceeded: It is evident that our Legislature intended to allow to bail greater privileges than were afforded by the common law. By the Act of 1777 (Rev., ch. 115, sec. 20), a surrender made at any time before final judgment against the bail discharges them. The same act allows a surrender to be made either in court or to the sheriff in the recess of the court, and when the bail pleads a surrender, he should set forth whether the surrender was in court or to the sheriff, that the plaintiff may know how to reply, for if it be alleged that the surrender was in court, the replication is *nul tiel record;* if out of court, the fact is denied, and an issue to the jury tendered. The defendant, as bail in this case, surrendered his principal to himself as sheriff, and in the latter character, committed him to the common jail of the county. He gave express notice of all these facts to the plaintiff. The defendant had the same privileges as any other person who should happen to be bail. He had a right as bail to surrender his principal to himself as sheriff, in the recess of the court, and notify the plaintiff. The law, in permitting the sheriff to be special bail, did not intend to deprive him of any of the rights which are allowed to other bail. Woeful would be the situation of sheriffs in this State if the law was otherwise, for it is a well known fact that they are the special bail of a large number of the defendants arrested on writs of *capias ad respondendum.* After the defendant had confined his principal in his jail, if an escape had taken place, we can see nothing to prevent the plaintiff from maintaining an action for that escape against the defendant as sheriff. The principle of law that one who is bail may surrender to himself as sheriff is not controverted in any of the
(394) cases on the subject. It appears to be recognized in *Davidson v. Mull,* 1 Hay., 364, and *Tuton v. Sheriff of Wake,* 1 Hay., 486.

If the surrender was properly made, and from the finding of the jury under the correct charge of the court we think it was, then if the prisoner was discharged illegally, the remedy cannot be by *sci. fa.,* but must be by an action of debt, or on the case against the defendant, as sheriff, for an escape. Therefore, it is unnecessary to consider whether Eslick was discharged legally or not, as the plaintiff cannot recover if the discharge was improper.

PER CURIAM. Judgment affirmed.

Cited: *Troy v. Williamson,* 18 N. C., 253; *Blue v. Blue,* 79 N. C., 73.

DEN EX DEM. THOMAS SOUTHERLAND ET UX. v. JOHN COX.

1. A devise to two, but if "either of them die, leaving no issue, that the whole should go to the survivor," is a good executory devise, and the devisees take as tenants in common in fee, with a contingent limitation to each of them, of an estate in severalty.
2. An executory devise in land is not destroyed by a sale under an execution against the first devisee.
3. A sale of the estate of one tenant in common under an execution against all, does not divest the estate of the others.
4. An executory devise has no right of entry until the contingency happens upon which his estate vests.

EJECTMENT, tried at WASHINGTON, on the last spring circuit, before *Swain, J.*

On the trial the lessors of the plaintiff claimed under the will of Miles Hardy, which was in the following words: "I give and bequeath to my son Henry and my daughter Harriet Lee Hardy all the lands I may be possessed of at my death. It is, however, my will and intention that if either of my children aforesaid, at their death, should leave no issue lawfully begotten, that the whole of my estate, both real and personal, should descend to the survivor, and if they should both die, without," etc. They then proved that the testator died in 1816, and that in 1819, under an order of the county court of Washington, a partition of the land in dispute, which passed under the will, was made between the devisees, by which 199 acres were allotted to each of them, and that Henry Hardy died in 1830 without issue, and claimed the title to be in the female lessor of the plaintiff, who before her marriage (395) was Harriet L. Hardy. The defendant insisted that under the will of Miles Hardy his son Henry took an estate in fee; he objected to the partition as being informal, but for reasons which need not be stated. He claimed title to part of the land in dispute against both the devisees, under an execution issued at the instance of the officers of Washington County Court, whereby the sheriff was commanded to sell the estate of both in the land. But from the return of the sheriff it appeared that the estate of Henry only was sold, and by his deed to the purchaser nothing but Henry's title was conveyed. The defendant claimed the residue of the land under execution sales of Henry Hardy's property, and proved that he took possession of the land in dispute after those sales, and had continued it for more than seven years. Lastly, it was objected by the defendant that notice to quit had not been given him before the writ was sued out.

His Honor instructed the jury that the will of Miles Hardy was a valid limitation by way of executory devise to Harriet Hardy; that upon the death of her brother, without issue, she became entitled to the land in dispute; that if before the death of Henry the interest of Harriet was subject to be sold under an execution against her (which his Honor did not decide); that neither the levy of the sheriff, as set forth in his return, nor his deed to the defendant would affect her title; that the possession of the defendant was not adverse to the title of the lessors of the plaintiff, until Henry's death in 1830, and that her right of entry was in no manner impaired by it; and, finally, that no relation existed between the lessors of the plaintiff and the defendant whereby the latter was entitled to notice to quit.

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

Gaston for defendant.
Badger contra.

DANIEL, J., after stating the case, proceeded: The first question for us to decide is whether Harriet Lee Hardy, who married Souther-
(396) land, took the land in question under the will of her father, Miles Hardy, by way of executory devise. Executory devises have generally been distinguished into three kinds: two relative to real, and one to personal estate. An instance of the first kind is one where the devisor gives the fee, but upon some contingency that disposition is qualified, and an estate limited on that contingency, as where a testator devised to B., his son, in fee, but if he died without issue, living A., then to A. in fee. It was held that B. took a vested fee simple, and that the limitation over to A. was good as an executory devise, to take effect upon B.'s dying without issue in the lifetime of A. *Pells v. Brown,* Cro. J., 590; 1 Eq. Ca. Ab., 187. Again, where a testator devised lands to his son B. in fee, and other lands to his son C. in fee, with a proviso that if either of them should die before they should be married, or before they should attain the age of 21 years, or without issue of their bodies, then he gave all the lands which he had given to such of his sons, so dying, etc., unto the one who should survive: It was held that the sons took in fee, subject to a limitation to the survivor, in case either died unmarried or under the age of 21 years, without issue. *Hanbury v. Cockerell,* Fearne, 396. According to these authorities, it appears to me that Henry Hardy was a tenant in common in fee of the lands in question, with a contingent limitation to his sister Harriet, and she held the same estate with a contingent limitation to her brother Henry. The testator, by his will, says, "If either of my children aforesaid, at their death, should leave no issue lawfully begotten, that the whole of my estate, both real and personal,

should descend to the survivor." Here the event must necessarily happen, if ever, within a life in being, and immediately on the death of a person in being at the time of making the will, and the survivor is entitled to take, by way of an executory devise, the whole estate in the land. The event on which the contingent limitation was limited must necessarily take place within the period fixed by law for executory devises to vest; the event has taken place, Henry has died, leaving no issue lawfully begotten "at his death," and Harriet, as sur- (397) vivor, on that event had a vested estate in fee simple in the whole of the land. As Henry, by the will of his father, had a base fee in the land, on which estate there was created by the will an executory devise to his sister, no conveyance which he could have made in his lifetime would have destroyed that executory devise, so neither will it be affected by an execution sale, and a deed from the sheriff to the purchaser. It is a rule that an executory devise cannot be prevented or destroyed by any alteration whatever in the estate out of which or after which it is limited. *Romilly v. James,* 1 Eng. C. L. R., 379.

The second objection made by the defendant is altogether immaterial in this case. Harriet, on the death of her brother without issue, was entitled to the whole land, and whether partition was or was not made does not affect the case. If a regular and legal partition had been made, and the defendant had purchased Henry's share, then Harriet's right of entry into that part would not have accrued until the death of Henry, which was in the year 1830. If no partition was made, then the defendant, after his purchase, was tenant in common with Harriet, and his possession was the possession of both. The third objection has no force in it; the sale under the execution, at the instance of the officers of the court, against Henry and Harriet Hardy, being of the estate of Henry alone, as appears by the return of the sheriff and the recitals in his deed to the purchaser. Harriet's estate in the undivided moiety of the lands which had belonged to Henry never vested until the year 1830, her right of entry as to that part did not arise before that time, and she is entitled at least to recover that moiety. But did the sheriff's deed pass her undivided moiety? I think the estate which Henry Hardy had, passed by the sheriff's deed, and that the deed conveyed nothing in Harriet's share, nor is it color of title as against her.

The fourth objection is without weight, as the defendant (provided the sheriff's deed did not convey the moiety belonging to Harriet) was tenant in common with Harriet, and a possession of one ten- (398) ant in common is, in contemplation of law, the possession of all the tenants in common, and is so considered until something shall evince an actual ouster, and nothing of that kind appears in this case; a bare perception of the profits for so short a space of time as the defendant

has had the possession is not sufficient evidence of an actual ouster. Henry died in the year 1830; his interest under the executory devise did not vest in his sister until that time, and this action was brought in a short time thereafter; the entry of Harriet is not barred by the act of limitations. The fifth objection will not avail the defendant. There was not any such relation between the lessors of the plaintiff and defendant as required a notice to quit.

PER CURIAM. Judgment affirmed.

Cited: *Knight v. Leak,* 19 N. C., 136; *Rowland v. Rowland,* 93 N. C., 217; *Fleming v. Motz,* 187 N. C., 594.

JAMES LUCAS v. PATSEY WASSON AND JOHN HARDIN.

Joint tenants of a chattel have equal rights to its possession, and cannot maintain trover against each other unless the joint property is destroyed. But a disposition of a perishable article by one joint tenant, which prevents the other from recovering it, is equivalent to its destruction.

TROVER. Plea—*not guilty,* and on the trial before *Swain, J.,* at RUTHERFORD, on the last circuit, the case was, that the plaintiff and the defendant Wasson were joint owners of a quantity of cotton; that the defendant Hardin, by the directions of the defendant Wasson, carried the cotton away and disposed of it in some place not known. His Honor instructed the jury that if they were satisfied that the cotton was removed by the defendants entirely beyond the reach and control of the plaintiff, so as to be wholly lost to him, it was such a destruction of the property as would entitle him to recover.

A verdict was returned for the plaintiff, and the defendants (399) appealed.

No counsel for either party.

DANIEL, J. One tenant in common of a personal chattel has as much right to the possession of it as the other; therefore, one tenant in common cannot maintain trespass or trover against his cotenant without showing that the cotenant has destroyed the joint property. *St. John v. Standring,* 2 John. R., 468. It is not sufficient to show that the defendant took forcible possession of the chattel and carried it away. *Heath v. Hubbard,* 4 East, 121, or that he changed its form by applying it to the use it was intended for. *Fennings v. Greenville,* 1 Taunt., 241. In the present case it was in evidence that the defendant Wasson did not retain

the possession of the cotton, but caused it to be sent off by the other defendant to a place unknown to the plaintiff, so that as to him it is wholly lost, and from its perishable nature, must be destroyed as far as his interest in it is concerned. We think the charge of the judge was correct, and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Cole v. Terry, 19 N. C., 254; *Bonner v. Latham,* 23 N. C., 275; *Guyther v. Pettijohn,* 28 N. C., 389; *Weeks v. Weeks,* 40 N. C., 119; *Moore v. Love,* 48 N. C., 222; *Grim v. Wicker,* 80 N. C., 344; *S. v. McCoy,* 89 N. C., 468; *Newby v. Harrell,* 99 N. C., 156; *Moore v. Eure,* 101 N. C., 15; *Waller v. Bowling,* 108 N. C., 294; *Thompson v. Silverthorne,* 142 N. C., 14; *Doyle v. Bush,* 171 N. C., 12.

LOVET MERRITT ET UX. v. WILLIAM WINDLEY.

1. An assent to a legacy by an executor may be presumed from his holding the legacy for five years, claiming it as next of kin to the legatee, and selling it as his own.
2. An assent to a legacy of a slave by the executor of a will made by a *feme covert* under a power does not vest the legal title in the legatee.
3. And this, although the trustee in the marriage articles be also the executor, unless he assent by deed or by actual delivery.

DETINUE for a slave, and upon the general issue pleaded, the cause was tried before *Martin, J.,* at BEAUFORT, on the last spring circuit. The slave in dispute was formerly the property of one Dorcas Campbell, and upon her marriage with one John Chapman was, with the rest of her estate, conveyed to one William Worley, in trust for her sole and separate use, with a power to dispose thereof by any writing in the nature of a last will, attested in a prescribed manner. In the (400) year 1822 Mrs. Chapman duly made an appointment, and thereby gave the slave in dispute to the wife of the plaintiff; she appointed Worley executor of her will, who proved it. In 1827 Worley conveyed this slave to a trustee to secure the payment of his own debts. On the trial, to prove an assent to the legacy by Worley, the plaintiff offered testimony that Worley had written to him, at his residence in Georgia, to come after the slave; on the other side, proof was made to repel this assent, and especially that the letter was written after the conveyance by Worley to secure his creditors, and that he had, when he made that conveyance, declared that the slave was his, as the appointee, and all her

family had been killed by the Indians, and that he was her next of kin. After the conveyance made by Worley to secure his debts, he had sold the slave to the defendant, and he being released, swore that he never had assented to the legacy to the plaintiff's wife.

His Honor instructed the jury that the legal title to a chattel bequeathed was in the executor; that an assent to the legacy was the transfer of that legal title to the legatee; that to constitute such assent, the executor must manifest an intent to part with his title in favor of the legatee; that this intent might be manifested by words or acts; that slight circumstances were, in some cases, sufficient for that purpose; that the executor saying that the slave belonged to the legatee, and that he had written to him to that effect, would in law be an assent, unless at the time of making those declarations the slave had been sold to the defendant, who was then holding him adversely; that if the executor had sold the slave, no assent which he could give would vest the title in the legatee; and as to the declarations of the executor, when about to convey the property as above stated, the judge stated it in the form of an interrogatory, and asked the jury whether that declaration manifested an intent to part with, or that he had parted with, the legal title.

In submission to this opinion, the plaintiff suffered a nonsuit, and appealed.

(401) *Gaston for plaintiff.*
J. H. Bryan contra.

DANIEL, J., after stating the principal facts as above set forth, proceeded as follows:

Whether the executor had assented to the legacy, so as to enable the plaintiffs to maintain their action, was a question submitted to the jury. The judge correctly stated in his charge that "the executor must manifest an intent to part with the legal title in favor of the legatee; this intent might be manifested either by words or acts; that slight circumstances were in some cases sufficient for that purpose." But in commenting on the declarations of the executor, proved to have been just before he executed the deed for the benefit of his creditors, the judge stated it to the jury in the form of a question, "Did such a declaration manifest an intent to part with, or that he had parted with, the legal title?" Instead of charging in that manner, we think he should have told the jury that the length of time which had elapsed from the probate of the will to the period when the executor stated that he held the slaves as next of kin to the legatees, taken in connection with the fact of his selling them, claiming to be the owner, was sufficient evidence, if they believed it, to authorize them to find that an assent had been given by the executor.

There is another point apparent in the case which renders it improper to send the case back for a new trial, as the plaintiffs clearly have no right to recover in a court of law, if all the points made in it were determined in their favor. Dorcas Chapman had, by the settlement, only an equitable interest in the slave. The power only enabled her, "by writing in the nature of a will, or other writing duly attested," to make an appointee to take that equitable interest which she herself had by virtue of the settlement. The legal estate remained in the trustee until the sale made by him to the defendant. Whether the plaintiffs can recover the slave in a court of equity is not for us now to determine. (402)

Although the testatrix appointed an executor, and he had the will admitted to probate in the county court, which by law he ought to have done, yet that did not displace the legal title in the slave and place it in the executor. The legal title remained in the trustee, and as the testatrix had only the equitable estate, she, by her will, could not invest her executor with any other interest than she had herself. The assent of such an executor transfers no title. The circumstances of the testatrix making Worsley, who was the trustee in the settlement, also her executor, does not alter the case; he still held the slave as trustee, and as such, an assent would not pass him to the plaintiff; the law would not divest the trustee of the legal title, unless he had made an actual delivery, or had executed a bill of sale to the plaintiff, which was never done. A writing in the nature of a will by a *feme covert,* under a power, is not a proper will, for she cannot make a will by the rules of law, but in equity it is an appointment, and the appointee takes under the power, coupled with the writing. We think the plaintiffs in this case have no title at law, and therefore the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: *Jones v. Strong,* 28 N. C., 368.

ANGUS MORRISON v. ALEXANDER MORRISON, ADMINISTRATOR.

In debt upon simple contract, a replication of a new promise within three years is no answer to a plea of the act of limitations.

DEBT, upon an unsealed engagement of the defendant's intestate, to convey to the plaintiff a tract of land. Plea—the Act of 1814 (Rev., ch. 879), requiring actions of debt, grounded upon any lending or contract without specialty, to be brought within three years next after the cause of action.

On the trial at MOORE, on the last spring circuit, before *Norwood, J.*, the plaintiff's action being barred by the above recited act, he (403) offered evidence of an acknowledgment of the debt by the intestate within three years, and his Honor instructed the jury that if they were satisfied that the intestate had acknowledged the debt within three years, the plaintiff's action was not barred.

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

Mendenhall for plaintiff.
No counsel for defendant.

DANIEL, J., after stating the case, proceeded as follows: What would be our opinion if the evidence had amounted to an acknowledgment of a subsisting debt by the defendant's intestate, and the action had been brought on that acknowledgment instead of the original contract, we are not called on to say. But it is sufficient in the present case to say that the action is not founded on any subsequent acknowledgment of indebtedness, or promise to pay, or to settle a debt by the defendant's intestate, but it is brought on the original contract. The action of debt being founded on the original contract, the plea of the act of limitations is a bar. The replication that the defendant's intestate promised to pay the debt within three years next before the time of suing out the writ is not good. In actions of assumpsit, where the plaintiff replies to a plea of the statute of limitations, a promise made by the defendant within three years next before suing out the writ, the action is now said to be on the new promise, and the recovery is effected on that, and not on the original promise; and the moral obligation resting on the defendant to pay the old debt is the consideration to support the action on the new promise. However the law may be on this question, we give no opinion, namely, whether in assumpsit the recovery is on the new promise, or whether the new promise removes the statute, and the recovery is had on the original promise. In the case of *A'Court v. Cross,* 11 Eng. C. L. Rep., 124, *Best, C. J.*, commenting on the statute 21 Jas. I, ob- (404) serves that the "statute says that actions on the case, account, trespass, debt, detinue, and replevin shall be brought within six years after the cause of action, and not after. In all of them, except assumpsit, the six years commences from the moment there is a cause of action, and that time cannot be enlarged by any acknowledgment. But in assumpsit it has been holden that although six have elapsed since the debt was contracted, if the debtor promises to pay it within six years, he cannot avail himself of this statute—because this promise, founded on a moral consideration, is a new cause of action." The same learned judge then proceeds and remarks that in assumpsit the plaintiff

should declare on the new promise, for the old one was barred by the statute. According to this authority, it is evident that the judge below was mistaken in informing the jury that a new promise or acknowledgment of the debt would take this case out of the act of limitations; this action is not brought on the debt arising under the new promise, but it is brought on the original contract, and the action on that was barred by the act of limitations at the time the writ was issued. We think the judgment must be reversed, and a new trial granted.

PER CURIAM. Judgment reversed.

Cited: *Wagstaff v. Smith,* 39 N. C., 4; *Thompson v. Gilreath,* 48 N. C., 495; *Brannock v. Bushinell,* 49 N. C., 34; *Hewlett v. Schenck,* 82 N. C., 235.

DEN EX DEM. OF MARTHA JONES v. REBECCA RUFFIN.

1. Where A. conveyed his estate to a trustee to secure B., his surety, who agreed to purchase the estate at a sale by the trustee, and upon a resale, after indemnifying himself, to hold the surplus for C., another creditor of A.: *It was held* that a conveyance by B. of the surplus to satisfy C. was not voluntary, and fraudulent as to his creditors, although there was no written memorandum of the agreement between him and A.
2. A registration of a deed of trust made upon proof of its execution by an attesting witness, who was interested under it, is valid.
3. A pecuniary consideration mentioned in the first part of a deed of bargain and sale extends to any land conveyed in the deed to the person who paid that consideration.

EJECTMENT, tried before *Norwood, J.,* at HALIFAX, on the last (405) circuit.

The lessor of the plaintiff claimed under the following deed:

"This indenture, made, etc., between James Grant and Eli B. Whitaker, witnesseth: that the said J. G., for and in consideration of the sum of $12,000 to him in hand paid by the said E. B. W., the receipt, etc., hath bargained and sold, etc., unto the said E. B. W., his heirs and assigns forever, all the land which I am seized and possessed of (describing other lands not in dispute); also, the following negro slaves, etc., to have and to hold the said property to him the said E. B. W., his heirs and assigns forever; and the said James Grant doth, etc. (then followed a covenant for quiet enjoyment); also, I further convey unto him, the said E. B. W., his heirs, etc., a certain tract of land lying, etc. (describ-

ing the land in dispute), which land I purchased at the trust sale of Thomas Bustin, the said land to go to satisfy in full a certain power of attorney by me held in favor of Martha Jones, and the balance, if any, to be applied to another power of attorney in favor of Fanning Jones. The first-named property in trust for the following purposes;" then followed a declaration of trust in favor of sundry of Grant's creditors and directions to the trustee as to the mode of selling, which are not material.

This deed was proved before his Honor, *Daniel, J.*, by one William Bustin, an attesting witness, and was registered within six months. The defendant objected to the reading of the deed, and offered to prove that the witness upon whose testimony it was ordered to be registered was a creditor who was secured by it, but his Honor held the probate to be sufficient, and the deed was read.

The defendant then objected that the legal title to the land in dispute (that mentioned in the deed as bought of Thomas Bustin), did not pass to the trustee, Whitaker, because no consideration was expressed in the deed upon which a use arose as to it. But his Honor, thinking the consideration of $12,000 extended to all the land mentioned in the deed, overruled the objection. A verdict was then taken for the plain-
(406) tiff, subject to the opinion of the court upon the following case:

Thomas Bustin being largely indebted, applied to Grant, the bargainor in the above deed, to be his surety, who consented, upon condition that Bustin would convey all his property to a trustee for his security, which was accordingly done. At the time of making this conveyance, Bustin was the executor of his mother, and had wasted the assets, and Martha and Fanning Jones, two of the legatees, had given Grant powers of attorney to collect their legacies. Bustin being insolvent, a sale of his property was advertised for the purpose of indemnifying Grant. Before this sale, Grant knowing Bustin to be insolvent, agreed with him that he, Grant, should purchase all the property, and if, upon a resale of it, anything remained after paying the debts for which Grant was surety, it should be applied to the payment of the debts due Martha and Fanning Jones. In pursuance of this agreement, Grant bought the whole of Bustin's property, and after fully indemnifying himself, the land in dispute remained in his hands unsold. Afterwards, Grant became insolvent, and executed the deed to Whitaker for the purpose of securing his debts; at its date he had collected nothing from Bustin, and was not indebted to either Martha or Fanning Jones, but conveyed the land in dispute for the purposes mentioned in the deed, in execution of his agreement with Bustin, by which he felt himself morally bound. The defendant claimed under an execution sale of Grant's property. If these facts made Grant's deed to Whitaker fraudu-

lent, then the verdict was to be set aside, and a nonsuit entered; otherwise, judgment was to be rendered for the plaintiff. His Honor being of opinion for the plaintiff, judgment was entered upon the verdict, and the defendant appealed.

Gaston and Devereux for defendant.
Badger contra.

RUFFIN, J. The principal question is whether the deed from Grant is void against his creditors as being, in reference to this tract of land, voluntary; for if it be gratuitous, it is of course fraudulent. The morality of the case is certainly with the plaintiff, and has been (407) so admitted, for no imputation of actual fraud is made.

I think the deed may be supported upon the ground of a valuable consideration. Bustin had a resulting trust in the estates, after the satisfaction of Grant's claims, which was of value, as is proved by the proceeds of the ultimate sales being more than sufficient to satisfy those claims. Grant and he treat for that interest, and if the former had agreed then to pay Bustin a certain sum for it, the promise would have been obligatory, although it formed part of the agreement that Grant should take his title under a sale by the trustee, and upon that sale the estates were bought at a sum less than Grant's demands. After such a contract, Bustin would have no interest to make him look out for purchasers, or to endeavor to raise the money himself, and it would be a complete fraud on him, did it not bind Grant. It is the same thing as agreeing to pay Bustin a price, for Grant, as the agent of another creditor, to agree that the value of the resulting interest, to be ascertained by a resale, should be applied in discharge of the debt of that creditor, whose agent he was. It seems to me that the question is a plain one, when viewed in this light, and that it is only embarrassed by considering the conveyance to Grant by the trustee as the only evidence of the contract of purchase. Whereas that is only the mode of executing the contract and getting the title into Grant. It might create a difficulty in proving the real contract if it were denied upon a bill founded on it; but if it were admitted by the defendant, I think a court of equity would certainly establish it as a sale of the resulting trust of Bustin; and upon a question of fraud, the objection to receiving parol evidence does not arise, when the party bound by the agreement has acted on it in good faith. I conceive that Grant in his own right agreed to give the true value of the estates for them, though at the sale then to be had, he might bid them off for less, and as agent he agreed to receive as payment to the Joneses the excess of the value above his own claims. It is like a purchase from a defendant in execution at a certain price, (408)

with a further agreement, that in order to complete the title and make it good against other execution creditors, the sheriff's sale shall take place, and the purchaser buy at it.

Suppose in this case that Jones sued Bustin on the original debt, is not the latter entitled to credit for the value of the estate conveyed to Jones? And if so much of Jones' debt be discharged by the conveyance, how is it voluntary? The case of *Williams v. Howard,* 3 Mur., 74, is much like this, as between Grant and Bustin, and if Grant was bound to Bustin, it is the same, as a consideration for the deed, as if he was bound to Jones, though I think there was an obligation to both.

The conveyance of all the estates being to the same trustee, from whom the consideration mentioned in the beginning of the deed moved, that consideration extends to the whole, especially when the words *"also I further convey,"* connected with the grant of this tract, are taken in.

The objection to the probate has been abandoned in the argument, and, therefore, upon the whole case I think the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: *McKinnon v. McLean,* 19 N. C., 85; *Holmes v. Marshall,* 72 N. C., 41.

CYRUS STOWE AND JOHN WHITTIER v. THE BANK OF CAPE FEAR.

In an action by the holders of a bill of exchange against a bank for not giving the drawer notice of a nonpayment by the acceptor, the fact of the drawer's insolvency may be estimated by the jury in assessing the amount of damages.

ASSUMPSIT, and upon the general issue pleaded the case was as follows:

The plaintiffs had a bill of exchange drawn by a person resident in Wilmington, upon a house in Fayetteville, which they sent to the Branch Bank of Cape Fear at the latter place for collection. At the time
(409) the bill was due the parties to it were insolvent, and the office at Fayetteville neglected to notify the drawer of its nonpayment.

The plaintiffs insisted that they had a right to recover the amount of the bill, but his Honor, *Norwood, J.,* informed the jury that in estimating the damages of the plaintiffs they ought to take into consideration the insolvency of the parties to it.

A verdict was returned for the plaintiffs with nominal damages, and they appealed.

Gaston for plaintiffs.
Badger contra.

DANIEL, J. The plaintiffs left with the bank a bill of exchange for collection when it should become due, and if it should not be paid at maturity to notify the drawer thereof. This action is brought to recover damages for a breach of promise, in neglecting to demand payment and giving notice of nonpayment to the drawer, by means of which neglect the latter was discharged from his liability. There is no doubt but that the bank is liable to the plaintiffs as any other agent or bailee would have been, but it is liable in no other way. The plaintiffs are entitled to recover such damages as they have sustained by the defendant's breach of promise. The amount of the bill of exchange is not the criterion to govern the jury in assessing them, unless it appears that the plaintiffs had lost that amount of money by the misconduct of the defendant. The evidence that the drawer was insolvent was proper to be left to the jury. If it was probable that the drawer would again become solvent, by any chances or means whatever, the plaintiffs should have offered such testimony to the jury for the purpose of enhancing the damages. I think the judge was correct in his charge, and the case was properly decided. The judgment below must be affirmed.

RUFFIN, J. There being no special contract proved, it must be (410) taken to be such an one as the law infers from the circumstances, which seems reasonably to be to pay to the plaintiffs the loss arising from the failure of the defendant to perform any act agreed to be done. It is the ordinary case of an agency undertaken, and the actual damage is the measure common to this and other cases. Policy requires a different rule in certain cases of public employments, because of the opportunities on the one part for the concealment of the misfeasance, and the difficulty of obtaining proof of the actual fact on the other. Hence arises the liability of carriers, and hence the statute gives debt against the sheriff for an escape. But those reasons do not extend to an undertaking of this sort. It may be more than ordinarily difficult for the jury to ascertain the loss, but that does not authorize the court arbitrarily to fix it in all cases at the greatest possible amount. And the difficulty here is not greater than in many other cases of like agencies, as if an attorney neglect to sue an insolvent party to a note. It is not like the contract of an endorser or drawer of a bill; that is, to pay the debt if notice be given; if no notice, he pays nothing. But I believe this has not been applied beyond the parties, and as to them it is founded on the special agreement. No precedent of such an action has been cited or found by the Court, and

we cannot make one without altering what has been generally considered the established law of principal and agent. If the bank be liable at all, we think the Superior Court adopted the proper rule for assessing the damages, and the judgment is affirmed.

PER CURIAM. Judgment affirmed.

Cited: Bank v. Kenan, 76 N. C., 345.

LIVINGSTON ISBELL v. SALATHIEL STONE.

Where judgment is rendered in the court below upon a case agreed, which is defectively stated, it will be reversed upon appeal.

THIS was an action on the case against the defendant, as sheriff of Stokes, for making a false return to an execution which issued at
(411) the instance of the plaintiff against one W. H. S. The record certified to this Court contained no entry of any pleas by the defendant.

On the fall circuit of 1831 a case agreed was submitted to *Daniel, J.,* who gave judgment for the defendant, and the plaintiff appealed. It is not thought to be necessary to state the facts set forth in the case.

No counsel for either party.

DANIEL, J. The case agreed by the parties is so imperfectly made up that we deem it improper to give an opinion upon the points made in it. If we should come to the conclusion that the plaintiff was entitled to a judgment, the case states no sum for which it should be entered. We cannot say that the slave concerning whom it is alleged the defendant made a false return is worth the sum claimed by the plaintiff. There is no verdict of the jury; no sum of money agreed by the parties that the judgment should be entered up for in case the plaintiff should be entitled to recover. The case is imperfect in another respect; it states that Stults and Hauser contracted with Wm. H. Sheppard for the slave in the county of Surry, but does not state whether the contract was then executed, by a delivery of the slave, or whether there was a bill of sale given in Surry, or whether the contract was barely executory. For these defects we think the judgment should be reversed and the case remanded.

PER CURIAM. Judgment reversed.

Cited: Brown v. Kyle, 47 N. C., 444.

DEN EX DEM. THIRZA HATCH v. HENRY W. THOMPSON.

1. A deed to the children of A., reserving to him the use and benefit of the land, vests in him an estate for life.
2. A consideration of blood appearing upon a deed, inoperative as a bargain and sale, will make it inure as a covenant to stand seized.
3. One tenant in common may declare for all the joint estate, and recover his proportion.

THIS was an ejectment on the several demises of five persons as tenants in common, tried on the last circuit, before *Strange, J.*, at ONSLOW.

It did not appear how all the lessors of the plaintiff claimed title, but the plaintiff declared for one hundred and thirty acres (412) of land, part of a tract of six hundred and forty acres, of which one Abner Battle and three others had been tenants in common. The plaintiff attempted to prove a partition between Battle and his co-tenants, but failed. Battle devised his land to his wife for life, with a remainder to his daughter Susannah, who married one Lot Humphreys. Humphreys and wife, in the year 1808 executed the following deed to their daughter Thirza, one of the lessors of the plaintiff:

"To all people, etc., know ye that we, Lot Humphreys and Susannah, his wife, for and in consideration of the love, good will and affection which we have and do bear towards our loving daughter Thirza, have given and granted to the heirs of her body, on the terms hereinafter particularly described, a certain tract of land which, etc. (setting out the above devises and descents and the boundaries of the land); and by these presents do give and grant freely the above-described and descended land, containing one hundred and thirty acres, to the said Thirza's body heirs, reserving particularly the use and benefit of said gifted land to said Thirza, discretionary in herself, whether or not, during her natural life, but should said Thirza Humphreys die, without leaving living heirs of her body, then the above gifted land shall return to her whole blooded brothers and sisters."

The defendant objected that Thirza Humphreys took nothing under this deed, but if she did, then he objected that as she had not declared as a tenant in common, with other cotenants of Abner Battle, and as the deed covered land held by him in common with others, she only acquired by the deed a right to Abner's undivided interest in the land described in the declaration, and could not therefore execute a lease which would enable her lessor to maintain this action. His Honor, however, thought that the deed from Humphreys and wife to Thirza took effect as a covenant to stand seized for her use either for life or in fee, and that

it enabled her to make a lease of the one hundred and thirty acres, which would be good against all the world but her co-tenants.

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

J. H. Bryan for defendant.
Gaston contra.

DANIEL, J. Whether the deed accompanying the case is good as a covenant to stand seized is the first question to be determined. Uses may be raised upon what is called a good consideration, which is that of blood or marriage. Conveyances raising uses upon a good consideration are termed covenants to stand seized. The consideration of blood causes the operation of the conveyance. The words *covenant to stand seized* are therefore not essential to its validity. A conveyance in the form of, but void as a grant, feoffment or release, may still take effect as a covenant to stand seized. If the consideration appear, though it be not particularly expressed, yet it is sufficient to raise a use. Therefore, if a man covenant to stand seized to the use of his wife, son, or cousin, without saying in consideration of the natural love which he bears towards them, the covenant will raise the use. *Milboun v. Simpson,* 2 Wils., 22; *Bedell's case,* 7 Co., 40; 2 Saun., 80, 81. A *feme covert* can stand seized to a use. 1 Saun., 56. In the case before us, Humphreys and wife in the deed express the consideration to be for the love and good will which they had for their daughter, Thirza Hatch. This consideration raised a use to her at least for life, by that part of the conveyance which follows, "reserving particularly the use and benefit of said gifted lands to the said Thirza, discretionary in herself, whether or not, during her natural life, but should said Thirza die, without leaving living heirs of her body, then the above lands to return," etc. The statute of uses executed the possession to the use, and the legal estate is as extensive as the use. It is unnecessary at present to determine whether the conveyance would be a good covenant to stand seized to the use of Thirza in *fee tail,* which by the Act of 1784

(414) (Rev., ch. 204), would be converted into a fee simple. As to the second question, we have always understood that one tenant in common may bring an ejectment, declaring upon a several devise of the whole tract of land, and recover possession of such an undivided portion of it as he proved title to on the trial. Whether the lessor of the plaintiff had been seven years in the adverse possession of the one hundred and thirty acres, under the deed from Humphreys and wife, so as to ripen her possession into a good title to the whole tract of land, does not appear; but from what does appear in the case, she is entitled to

recover the undivided one-fourth part of the one hundred and thirty acres of land mentioned in the declaration, and for that portion the judgment below is affirmed.

PER CURIAM. Judgment affirmed.

Cited: *Bruce v. Faucett,* 49 N. C., 393; *Exum v. Lynch,* 188 N. C., 396.

DEN EX DEM. WILLIAM G. MHOON v. JOHN DRIZZLE.

Where the owner of land agreed that A. should cultivate it during his life, or as long as he pleased, with a restriction as to a sale of it: *Held,* by HENDERSON, C. J., and DANIEL, J., that a tenancy at will was created, and that the estate might be determined by either party. By RUFFIN, J., that no estate vested in A.

EJECTMENT, tried on the fall circuit of 1831, before *Martin, J.,* at BERTIE.

The plaintiff claimed under a judgment and execution against the heirs of one William Maer, and having made out his case, the defendant produced and proved the following deed:

"Articles of agreement entered into between William Maer and John Drizzle, both of, etc., witnesseth: that the said William Maer does agree on his part to let the said Drizzle tend, use and occupy a certain field in the low-grounds (then followed a description of the land), being the field he, the said Drizzle, has now in possession, during his natural life, or so long as the said Drizzle may wish to tend it himself, and no longer. In consideration of which the said John Drizzle does agree on his part to clear and get under cultivation as much of said land, between, etc. (describing the land to be cleared) as he conveniently can, and it is understood by both parties that if the said Drizzle should at (415) any time hereafter decline tending said land himself, that he shall have no right to rent, lease, or in any manner whatever put it in the possession of any other person, but at the time of so declining to use it himself it shall return to him, the said Maer, or in case of his death, to his estate.

"In witness whereof, we have hereunto set our hands and seals, this 20 December, A.D. 1813.

"W. MAER, (L. S.)
"JOHN DRIZZLE. (L. S.)

"Witnesses:
"HENRY BATES,
"A. COPELAND."

At the time the defendant took possession, a small field of about ten acres was cleared; since that time he had cleared about sixty acres, and had continued the possession from the date of the above instrument up to the trial.

His Honor instructed the jury that the obligation produced by the defendant was, upon its face, voluntary; that a valuable consideration purported either a present or future advantage to the grantor or a present or future loss to the grantee; that the instrument under which the defendant claimed puported neither; that the stipulation that the defendant should clear land, *"if convenient,"* imposed no obligation upon him, but left it simply as a matter of choice whether he should or should not clear more land.

The jury returned a verdict for the plaintiff, and the defendant appealed.

Badger for defendant.
Gaston, Iredell, and Hogg contra.

DANIEL, J. The defendant contends that he has a life estate by virtue of the deed executed by Maer to him. If the deed can be considered as a feoffment at common law, and the defendant entered under it, yet if there was no livery of seizin made to him, he would only be tenant at will. (Lit., sec. 70; 1 Thomas' Coke, 637.) If the declaration on the face of the deed that the defendant was then in possession, coupled with the fact that the deed is subscribed by witnesses, would authorize an inference (which I think it does not) that livery of seizin had (416) been made, yet as the conveyance is without any consideration or any use declared, a use would be raised to the feoffer, since the statute of *quia emptores* (1 Saun., 62), and the possession would be executed to the use by the statute of uses. Maer would, in that event, have the freehold estate, and the defendant be his tenant at will. Again, if the deed is viewed as a lease, it must be considered as a lease at will. "It is regularly true," says *Lord Coke,* "that every lease at will must in law be at the will of both parties, and, therefore, when the lease is made, to have and to hold at the will of the lessor, the lease implieth it to be at the will of the lessee also, for it cannot be only at the will of the lessor, but it must be at the will of the lessee also. And so it is when the lease is made to have and to hold at the will of the lessee, that must be at the will of the lessor." .(1 Thomas' Coke, 637.) The defendant had a right to put an end to his tenancy whenever he pleased, and Maer had the same right.

If the defendant was tenant at will of the land by a parol lease, before the date of the deed, as no consideration was paid, or intended to be

paid, and no use declared, the deed, operating as a release, cannot enlarge the estate so as to give a life estate to the defendant; a release for life on such an interest would, since the statute *quia emptores,* only raise a use to Maer in the same manner as would a feoffment without consideration (*Loyd v. Spillet,* 2 Atk., 148; 2 Doug., 745, note), which use would in like manner have the possession drawn to it by the statute of uses. So, in whatever light the case is viewed, the defendant could hold only as tenant at will. The death of Maer put an end to the tenancy at will, and the land was subject to be sold for his debts, and as the deed would not have operated as an estoppel to Maer in his lifetime, neither will it so operate against the lessor of the plaintiff. If the instrument is to be considered as a personal covenant, of course it would be no defense to the action. I think the judgment should be affirmed.

HENDERSON, C. J. An estate at will is an estate at the will of either party, and if at the will of one, it must be at the will of both. There can be no such estate as one at the will of one party only. (417) In this case, the fact that Drizzle was authorized to put an end to his tenancy whenever he pleased, conferred the same right on Maer, and Maer's will was determined when his estate was sold, for he had no longer a will on the subject. It appears to be a hard case, but it was the defendant's folly or misfortune to make such a contract. I am instructed by *Ruffin, J.,* to say that he concurs in the opinion principally because he thinks the writing a mere personal contract, not attaching to the land, or passing, or intended to pass an estate in it, but resting entirely in contract.

PER CURIAM. Judgment affirmed.

Cited: *Kitchen v. Pridgen,* 48 N. C., 53.

RICHARD HARRISON, CHAIRMAN, ETC., ON THE RELATION OF BARNES AND ENOS AMASON v. LAMOND WARD AND JONATHAN ELLIS.

1. Where the same person is administrator, and also guardian of the next of kin, his returning an account of his administration, and acknowledging a balance due his ward, is not a performance of the condition of his administration bond. But it is otherwise if the money to pay the balance is identified, and retained by the guardian as the property of the ward.

2. In such case, are the bonds cumulative? *Qu.*

3. Where an act is rightful in one capacity, and wrongful in another, without proof to the contrary, it is taken to be in the first.

(The case of *Clancy v. Dickey*, 9 N. C., 497, approved.)

DEBT, upon a bond executed by the defendants, as sureties of Elisha Amason, on his taking out letters of administration upon the estate of Woodward Amason.

After *oyer,* the defendants pleaded several pleas, and amongst them, performance of the condition of the bond by the administrator.

On the trial, before *Swain, J.,* at EDGECOMBE, on the fall circuit of 1831, the defendants relied upon the following facts in support of their plea:

At November sessions, 1821, of the county court of Edgecombe, Elisha Amason was appointed guardian of the relators, and of their brother Woodward, the intestate, and gave the usual bond, with sufficient (418) sureties. The intestate, Woodward, died in 1825, and at February sessions, 1826, letters of administration upon his estate issued to Elisha Amason, who then gave the bond upon which the action was brought. At November sessions, 1828, Elisha Amason returned an account current as administrator of Woodward, which showed a balance due the relators, who were his next of kin, and which was claimed in this action. At February sessions, 1828, Elisha Amason renewed his bonds as guardian of the relators, and gave sureties, who were then and at the time of the trial insolvent.

Upon these facts, his Honor ruled that the guardian and administration bonds were cumulative securities for the benefit of the relators, and that they had a right to elect on which of them to sue, and that if the bonds were not cumulative securities for the relators, they had, upon the facts in evidence, a right to recover upon the administration bond.

Verdict for the plaintiff, and appeal by the defendants.

Attorney-General for defendants.
Hogg and Mordecai contra.

HENDERSON, C. J., after stating the case as above, proceeded: The bond is in the proper and usual form of an administration bond. The defendants rely on the fact that the conditions of the bond were performed by the administrator's rendering an account current as above stated, he being then also the guardian of the relators; that is, that the money acknowledged to be due to the relators in that account, by its rendition, *ipso facto,* passed from the possession of Elisha as the administrator of Woodward, and vested in him as the guardian of the relators. Had this been specific property, and in the actual possession of Elisha,

his possession more than two years after his appointment as administrator would unquestionably, according to the case of *Clancy v. Dickey,* 2 Hawks, 497, have been as guardian, and would so far have been a performance of one of the conditions of his administration bond, viz.: a payment or delivery to the persons entitled. I presume (419) the rule to be a sound one that when a person has two or more capacities in which to take and hold, and takes and holds without a declaration in which capacity he does so, it shall be taken that he holds in that capacity in which he ought of right to take and hold. He takes in the one capacity or the other; not in both. It is, therefore, reasonable that he should hold in the rightful capacity, and so, in the absence of proof to the contrary, the law presumes. But this rule cannot apply to money not identified or separated from other money, by putting a mark upon it, as in the case before us, where it was not made the ward's money; until this is done, the condition of the bond is not performed. In this case, it remains a mere debt or duty owing to the relators, and that it should be paid to them, or some person for them, was the object of taking the bond now in suit. Whether the admission upon the record made by the administrator amounts to enough to charge the sureties to the guardian bond, it is unnecessary to decide. If they are charged, it will not be by proof of any fact, but by the admission of one who is charged upon that admission by an estoppel, without regard to the actual state of the facts. As, for instance, they would be charged in the present case without proof that the guardian had so much money of the estate of the intestate in his hands. On no other state of facts, either actual or by estoppel, can the sureties of the guardian be charged. The estoppels of Elisha Amason do not affect the relators; they may insist on new rights arising on the *actual facts,* not on those which others are concluded from denying. It will be understood that I give no opinion whether the guardian bond is or is not cumulative.

PER CURIAM. Judgment affirmed.

Cited: Clancy v. Carrington, post, 530; *Foyer v. Bell,* 18 N. C., 478; *S. v. Jones,* 68 N. C., 555; *Harris v. Harrison,* 78 N. C., 213; *Ruffin v. Harrison,* 81 N. C., 217.

(420)

RICHARD YARBOROUGH v. STEPHEN MONDAY.

Two parties may adopt the same seal, and in that event it is the deed of both, otherwise, it is the deed of one, and the simple contract of the other. But the question whether both parties adopted the seal is one for the jury, not for the judge.

AFTER the new trial granted in this cause, at December Term, 1830 (13 N. C., 493), it came on to be tried again at PERSON, on the last spring circuit, before *Strange, J.*, when the action was in *assumpsit*, and upon the objection of the defendant that the contract of apprenticeship was under seal, and that *debt* was the proper action, the testimony was, that the brother of the plaintiff wrote the contract, and at the bottom of it made a scrawl, and wrote the word *seal* within it; that immediately afterwards, by the directions of both the parties, he signed their names to the contract, putting the name of the plaintiff opposite to the scrawl, but he did not make another scrawl, nor add anything purporting to be a seal, opposite to that of the defendant.

Upon this testimony, his Honor ruled the contract to be the deed of the defendant, and thereupon the plaintiff submitted to a nonsuit, and appealed.

Winston and W. A. Graham for plaintiff.
No counsel for defendant.

DANIEL, J. The law permits two or more obligors to adopt one seal, and it will be the deed of both of them. *Ball v. Dunsterville*, 4 Term, 313; 1 Starkie, 332; 2 Thomas' Coke, 234. If the plaintiff sealed the instrument and delivered it, then it became his deed, but if the defendant signed the same instrument and did not seal it himself, nor adopt the seal of the plaintiff, then the instrument, as to him, would not be a deed, but a simple contract in writing, and assumpsit would be the proper action to be brought on it. Evidence was introduced as to that point, and it was a proper question for the jury whether the defendant intended to adopt the seal thus affixed, and did adopt it as his seal, or not; if he did, then it was his deed; if he did not, then it was his simple (421) contract, and the action was properly brought. The judge decided both the law and the fact; he should have left it to the jury to determine whether the defendant intended to adopt the seal, and did adopt it, for these were questions of fact. Whether the scrawl affixed was in this state a seal certainly was a question of law to be determined by the court; but whether the defendant placed it there, or adopted it as his seal if placed there by the plaintiff or any other person, were questions for the jury. We think the judgment should be reversed.

PER CURIAM. Judgment reversed.

Cited: Davis v. Goldston, 53 N. C., 30; *Pickens v. Rymer*, 90 N. C., 283; *Baird v. Reynolds*, 99 N. C., 472.

THEOPHILUS FALLS ET AL., EXECUTORS OF ROBERT SIMONTON, *v.* JAMES MCKNIGHT.

1. Where A. owed B. and made him a payment, taking his acknowledgment with a promise to refund in case the payment exceeded the amount due, and upon a reference the arbitrator found that B. was overpaid: *It was held*, in an action upon the acknowledgment, that the statute of limitations did not begin to run until the award was made.

2. Is a submission to arbitration a waiver of the statute of limitations? *Qu.*

ASSUMPSIT, upon the following accountable receipt:

"Received of Robert Simonton, executor of James Heart, $953.24, which I have received as an heir of James Heart, and if it is too much, I am to return the balance. "JAMES MCKNIGHT."

Plea—the statute of limitations.

On the trial, before *Daniel, J.*, at IREDELL, on the fall circuit of 1831, the defendant having made out a prima facie case in support of his plea, the plaintiffs, to rebut the defense, proved that a petition was pending in the county court of Iredell against Simonton, by the next of kin of James Heart; that in the year 1828 it was agreed between the plaintiffs and the next of kin, of whom the defendant was one, that the suit by petition should be referred to an arbitrator, "with power and authority to allow the said executors (the plaintiffs) such credits (422) for all receipts in their hands which, in his opinion, they would be allowed by law or equity"; that in pursuance of this submission, the arbitrator by his award found that the defendant had been overpaid the sum of $905. Judgment was entered according to the award, which was made within three years of the commencement of the action.

His Honor instructed the jury that the submission and award prevented the defendant from availing himself of the statute of limitations, and a verdict being returned for the plaintiffs, the defendant appealed.

Badger for defendant.
Gaston contra.

HENDERSON, C. J. The receipt given by the defendant to Simonton contains a promise to account with him if the sum received by the defendant exceeded that due by Simonton. We will leave out of the question what would be the effect of a long delay on the part of Simonton, and his then by his own motion without the coöperation of the defendant, fixing the amount of these claims, and demanding the balance

according to the terms of the receipt. I say it is unnecessary to examine such a case with respect to the statute of limitations, for this is a very different one. So far from the adjustment of those claims, and the proof of the fact that they fall short of the defendant's accountable receipt, being the sole act of Simonton or his executors, they were forced on his executors by the active agency of the defendant, who was a plaintiff in the petition for an adjustment of the accounts, and brings to view by his act the fact which shows conclusively the amount of his claim on Heart's estate, viz.: by an award of an arbitrator of his own choosing, according to which a judgment was entered in the suit wherein the defendant was one of the plaintiffs, and the present plaintiffs were defendants, which judgment stands in full form. After this, can the defendant say that a cause of action did not accrue upon that receipt within three years next before the bringing of the action, when it (423) was brought within a few months after the confirmation of the award? I disregard all that was said about the effects of agreeing to submit, upon Heart's estate, to arbitration. It is sufficient to state that in this case there is a promise to pay, should the sum mentioned in the receipt exceed the defendant's interest in that estate, and that has been ascertained by the defendant. When it was thus ascertained, the present cause of action arose.

PER CURIAM. Judgment affirmed.

Cited: Moore v. Commissioners, 87 N. C., 213.

JOHN WADE v. JOHN ODENEAL.

The records of a court cannot be explained by parol testimony.

THIS was an action of debt, upon the Act of 1774 (Rev., ch. 105), directing the duty of sheriffs with respect to insolvent taxables, and imposing a penalty of £20 for collecting taxes of one whom the sheriff has returned an insolvent.

The cause was tried before *Martin, J.,* at ROCKINGHAM, on the last circuit, when, upon *nil debet* pleaded, the clerk of the county court produced a list of the insolvent taxables in the handwriting of the defendant, the sheriff of Rockingham, in which was the name of the plaintiff. The list was endorsed *"allowed,"* and the clerk swore that no other order was ever made by the county court concerning the insolvents of that year, and that the defendant had settled the county taxes by that list.

The defendant objected to the clerk's giving any parol evidence, but the objection was overruled, and a verdict being returned for the plaintiff, the defendant appealed.

No counsel for plaintiff.
W. A. Graham for defendant.

RUFFIN, J. The Acts of 1774 (Rev., ch. 105) and 1786 (Rev., ch. 255, sec. 2), and all the subsequent statutes providing for a credit to sheriffs for insolvents, refer to an allowance to him of them in (424) the first instance by the county court. This was provided for by the two old statutes of 1760, ch. 2, and 1768, ch. 6. Down to this time the sheriff passes his list of insolvents at the treasury only upon the authority of the order of his county court at home, specifying each insolvent, and the amount of the whole. The mischief intended to be remedied by the Act of 1774, under which this action is brought, is that of the sheriff collecting, and putting in his private purse, moneys which he had not paid, and was not liable to pay, into the treasury. Unless, therefore, an order be passed by the court which would exonerate the sheriff from accountability for these taxes, the case has not arisen in which he incurs a penalty for collecting them, because they remain due to the public. The order or judgment of the court is the efficient protection both to him and the taxables.

The question is, How is this judgment to be proved? Courts of record speak only in their records. They preserve written memorials of their proceedings, which are exclusively the evidence of those proceedings. If they choose to keep minutes, which they understand and can act on to their own satisfaction, it is well. If from them they can afterwards undertake to draw out the record to perpetuate it to their successors, or to communicate its contents to another court, I know nothing to prevent them but the difficulty in their own minds of being sure they make it what it was intended originally to be. But, until the record be so framed, another court cannot know more than the words of the minutes in themselves import. The records may be identified by testimony, but their contents cannot be altered, nor their meaning explained by parol. The acts of the court cannot thus be established. Here the testimony of the witness was indispensable to make out a case. Had he sent a transcript under the seal of his office of what was deposited there, nothing could have been made of it. It was necessary to prove that the list itself was in the handwriting of the defendant, to show what it was, and to explain what "allowed" meant. The objection taken to the evidence was a good one, we think, and (425) therefore there must be a new trial.

PER CURIAM. Judgment reversed.

Cited: *S. v. McAlpine,* 26 N. C., 147; *Harrell v. Peebles,* 79 N. C., 30; *Kerr v. Brandon,* 84 N. C., 132; *S. v. Warren,* 95 N. C., 676; *Mobley v. Watts,* 98 N. C., 286; *Taylor v. Gooch,* 110 N. C., 392; *Hopper v. Justice,* 111 N. C., 421; *Forbes v. Wiggins,* 112 N. C., 125; *Gauldin v. Madison,* 179 N. C., 464.

GEORGE W. MORDECAI v. JOHN PARKER.

1. The estate of one who holds in trust for creditors, with a resulting trust for the grantor, is not within the Act of 1812 (Rev., ch. 830), subjecting equitable interests to sale by execution.
2. At law, a trustee is for all purposes seized in fee, and may sue for an injury to his estate without reference to the interest of the *cestui que trust.*
3. Where the defendant must finally prevail, a new trial will be granted, although the judgment below was for the plaintiff, and he appealed.
4. The vendee of land bound by a *fi. fa.* cannot maintain an action against the sheriff for selling that land under the writ, instead of the chattels of the defendant.
5. Such an action is personal to the defendant in the *fi. fa.*

THIS was an action on the case, in which the plaintiff, in substance, declared that the defendant being the sheriff of EDGECOMBE, and having in his hands sundry writs of *fieri facias* against one Roderick Amason, intending to injure the plaintiff, levied the said writs upon a tract of land which had been conveyed by Amason to the plaintiff, after the *teste* of the said executions, when the said Amason had personal property in the county of Edgecombe sufficient to satisfy them.

Plea—*not guilty.* At the trial at EDGECOMBE, on the last spring circuit, before *Daniel, J.,* the plaintiff produced a deed of bargain and sale to him, dated 25 August, 1829, whereby Roderick Amason conveyed a tract of land to him in trust to secure his, Amason's, sureties in a bond for $10,000, given upon his being appointed guardian to several infants. At the date of this deed, judgments for about $4,000 were outstanding against Amason, executions upon which had a priority over it. These judgments were satisfied by the sale of the land conveyed to the defendant, together with that of other land belonging to Amason, and several of his slaves. But there remained in the possession of Amason personal property, amounting in value to $947, which was sold under executions upon judgments against him which were subsequent to the deed to the plaintiff. No evidence was offered by the plaintiff of any injury to his *cestui que trust,* by a breach of the condition of the guardian bond, to

which they were sureties; neither was the deed to the plaintiff (426) impeached by the defendant.

For the plaintiff, it was contended that he was seized in fee of the land conveyed to him, and that the defendant, having sold that land wrongfully, was liable to him for the value of the personal property which he had neglected to sell. But his Honor charged the jury that the plaintiff, being a mere trustee, and not showing any special injury to his *cestui que trust,* was entitled to nominal damages only. A verdict was returned for the plaintiff, with sixpence damages, and he appealed.

Hogg for plaintiff.
Attorney-General and Gaston contra.

RUFFIN, J. Taking the deed to the plaintiff to be valid, he is tenant in fee, and a court of law cannot say that his fee is worth less than that of another. The argument for the defendant supposes that an interest remained in the maker of the deed. That is the case where there is a pure trust for a debtor, which can be sold under execution; but then the legal title is worth nothing, and is wholly divested by the sale. It has been held that such a case as the present does not come within the Act of 1812 (Rev., ch. 830), and the reason was that courts of law were incompetent to ascertain and value the trusts. That reason applies equally here, and therefore the plaintiff was not called on for evidence upon that point. But the strong ground is, that we do not at law see that the plaintiff is a trustee. We cannot take notice how he got the fee, nor what he intends to do with it. He has it, and that determines the value of his interest. The existence of the debts intended to be secured by the deed, or their nonexistence, has a material operation upon the question of fraud in the conveyance, and to that end they may be entered into. That determines the validity of the deed; in other words, whether the grantee is tenant in fee. Admitting him to be so, he is entitled to recover the whole estate. There must, therefore, be a new trial.

But a new trial would not be granted if the jury had not found a verdict for the plaintiff for sixpence damages, which carried the costs. For although the court erred as to the rule of damages, a (427) verdict for the defendant would have stood, because the record shows that upon another trial the defendant must have a verdict. This action cannot be maintained for any purpose.

It was necessary to sell the land upon the plaintiff's own showing, since the chattels were not sufficient had they been applied to this execution. To whom would the sheriff have to account for the surplus, if any? To Amason, and not the plaintiff.

But if the chattels had been fully sufficient, it would have made no difference. The conveyance was absolutely void to all intents and purposes as against the judgment and execution. If one make a fraudulent deed, his creditor may at law seize the thing conveyed, although there may be other property, because the whole is void as to him. The creditor cannot, indeed, go into equity to clear the title from an alleged fraud, without showing that it is necessary for his satisfaction, because that court is not to be put into action, if the party can get justice without it, and by the ordinary means of legal process. But where the party can establish the fraud at law, and thus show the deed there to be void, he is at liberty to do so in the first instance. He asks no favors, and stands on his preferable right. Now a conveyance after the *teste* of a *fieri facias* is void upon the ground that it is fraudulent. So conclusive is the argument that it is in fraud of the process that nothing will be heard against it. The fact establishes the intent. The estate, then, as respects the plaintiff in the execution and the sheriff, remained to every intent the estate of Amason, the defendant in execution; and neither he nor anybody claiming under him after execution can allege anything to the contrary. If, indeed, the defendant in the execution (admitting that the land remained his) could show that the sheriff had injured him by selling that before chattels, he might. But this is personal between them. It can injure the *legal* rights of no other person. And here, since it took all the property of both kinds to satisfy the executions, there could be no injury even to the defendant in the execution. Indeed,

(428) the sheriff acted in good faith, and made only a just use of his lawful authority, in arranging the property so as to get satisfaction of all the process, as every good sheriff will always do.

PER CURIAM. Judgment reversed.

Cited: *O'Daniel v. Crawford,* 15 N. C., 205; *Simpson v. Hiatt,* 35 N. C., 473.

DEN EX DEM. OF G. W. MORDECAI v. SAMUEL SPEIGHT.

1. A sale of land, under a *fi. fa.*, made after the return day of the writ, but before it is returned, is valid—although the sale be not opened on the return day, and then postponed.

2. Purchasers at a sheriff's sale are not required to see that the sheriff has complied with his duty.

(*Lanier v. Stone,* 8 N. C., 329, and *Pope v. Bradley,* 10 N. C., 16, approved.)

MORDECAI *v.* SPEIGHT.

EJECTMENT, tried on the last circuit, before *Norwood, J.*, at PITT. The plaintiff claimed under a deed executed by one Roderick Amason during the term of Edgecombe County Court, beginning on the 4th Monday of August, 1829. The defendant, under an execution issued from the same court, against Amason, *tested* the 4th Monday of August and returnable the 4th Monday of November following, and the only question was whether the defendant's title was affected by the following facts: The sheriff of Edgecombe, having the execution against Amason in his hands, advertised his property, together with that of many other persons, for sale on the 4th Monday of November, the return day of the writ; thinking that Amason had money to discharge the execution, the sheriff did not sell his property on that day, but postponed the sale without opening it to the next day; the next day, viz.: Tuesday, after the return day, the land in dispute was sold, and purchased by a person under whom the defendant claimed.

His Honor charged the jury that as the sheriff's sale did not commence on Monday, the return day of the writ, his authority expired with that day, and that a sale made by him on Tuesday was void.

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

Attorney-General and Gaston for defendant. (429)
Hogg contra.

RUFFIN, J. There are two questions in this case distinct in themselves, though relating to the same subject. The first is, whether the sale of land under a *fi. fa.* be good if made on the day after the process is made returnable, and before it be returned, and during the term of the court to which it is returnable. This is answered by the case of *Lanier v. Stone,* 1 Hawks, 329, affirmatively, and we see no reason for being of a different opinion.

The second is, whether the acts of Assembly directing the manner in which sheriffs shall sell lands and slaves (Taylor's Revisal, chs. 1096 and 1153) do not render such a sale as this void. This, we think, is answered negatively by *Pope v. Bradley,* 3 Hawks, 16. That case is said not to be in point, because the sale was opened, and because the reason for adjourning it was a good one. Those circumstances were adverted to for the purpose of establishing the propriety of the sheriff's conduct, even had he been called on to answer in that action; but not as establishing the purchaser's title. For the *Chief Justice* plainly says that on no principle could an irregularity in the adjournment annul the sale, and he founds himself in this on the act being directory to the sheriff, and giving a penalty against him. And those are the grounds of the opinion we entertain. It would be dangerous to purchasers, and ruinous

to defendants in execution, to require bidders to see that the sheriff had complied with all his duties. It is said, however, that this will allow sales to be made at other places besides the courthouse, as the same section fixes both the place and the day. The difference is this: a purchaser knows, and is bound to take notice, that the sheriff cannot sell but at the courthouse, and that a sale elsewhere must be void. But the sheriff may sell on Monday, or in certain cases, and under certain regulations; he may also sell the next day. Now, a bidder can no more know whether those provisions have been complied with than whether
(430) the sale has been duly advertised. We think, indeed, that postponing the sale entirely by proclamation is the same for this purpose as beginning and then adjourning it. But that respects the remedy against the sheriff, and is not the principle which governs this case. For these reasons, the instructions given in the Superior Court are deemed erroneous, and the judgment is reversed.

PER CURIAM. Judgment reversed.

Cited: Collins v. Nall, post, 458; *Kelly v. Craige,* 27 N. C., 135; *S. v. Rives, ibid.,* 314; *Brooks v. Ratcliff,* 33 N. C., 326; *Reid v. Largent,* 49 N. C., 454; *Woodley v. Gilliam,* 67 N. C., 239; *Mayers v. Carter,* 87 N. C., 147; *Burton v. Spiers,* 92 N. C., 505; *Williams v. Dunn,* 163 N. C., 212.

JOHN E. WOOD v. RICHARD BROWNRIGG, EXECUTOR.

Under the Act of 1816 (Rev., ch. 925), a guardian is not authorized to recover compound interest, unless the ward can demand it of him.

Debt, upon a bond made by the defendant's testator, payable to the plaintiff as the guardian of a female infant. The ward married before this action was brought, and the only question on the trial was whether the plaintiff was entitled to recover compound interest, after the marriage. *Swain, J.*, at BERTIE, on the last spring circuit, ruled he was not, and judgment being entered accordingly, he appealed.

No counsel for plaintiff.
Iredell for defendant.

RUFFIN, J. The question arises on the construction of the Act of 1816 (Rev., ch. 925), and I think there cannot be a doubt as to the meaning of the act. It does not change the rate of interest by reason

of any stipulation as to the rate, expressly introduced into the contract, so as to attach to it through all time and in all hands. But it only provides that all *guardians* may recover compound interest on bonds payable to them in that capacity. Why? Because they are generally liable for such interest; when that liability ceases, that is, when the wardship is at an end, the interest returns to the ordinary legal standard, because it is then a common debt, and not one which the guardian is compelled to make in the discharge of his duty to keep money (431) out. As long as the money is the property of a ward, compound interest accrues, and no longer, for then the late ward, or late guardian, may get it in. This was said before, in the case of *Hooks v. Sellers,* at December Term, 1829, and substantially held in *Ryan v. Blount,* 1 Eq. Rep., 382.

PER CURIAM. Judgment affirmed.

Cited: Mitchell v. Robards, 17 N. C., 479; *Whitford v. Foy,* 65 N. C., 273; *Winstead v. Stanfield,* 68 N. C., 43.

JOHN MOODY v. WILLIAM STOCKTON.

1. Bail may surrender their principal after a verdict, but before final judgment against them.
2. The act authorizing such a surrender necessarily authorizes some mode of averring it; it should be by a plea, framed so as to enable the plaintiff to deny the surrender and contest the identity of the principal.

THIS was a *scire facias* against the defendant, as the bail of Joseph W. Stockton. The defendant pleaded several pleas, which were tried before *Daniel, J.,* on the morning of Wednesday of the fall term, 1831, of IREDELL Superior Court. All the pleas being negatived, judgment was then rendered for the plaintiff. In the afternoon of the same day the defendant brought Joseph W. Stockton, the principal, into court, and moved to surrender him in his discharge. This was opposed by the plaintiff, but his Honor set the judgment aside, and permitted an entry of the surrender to be made. The bill was prayed in custody by the plaintiff, without prejudice to his right, to insist upon his claim against the defendant. Afterwards his Honor gave final judgment in favor of the defendant, and the plaintiff appealed.

Gaston for plaintiff.
Iredell for defendant.

HENDERSON, C. J. The law which gives to the bail the right to surrender the principal before final judgment, gives necessarily therewith the means of making that right effectual, if the surrender be after (432) verdict and before judgment. Although we know of no such plea, as one between the verdict and judgment, yet one must necessarily be allowed, for the verdict concludes all facts up to it, and if the surrender be at the same term in which judgment was rendered, a plea since the last continuance will not do. In this case, the surrender was after verdict and before judgment, the court having set aside the judgment previously entered during the same term, as it rightfully could do, having power over the records during the whole term. The bail had the right to plead it, and, properly speaking, should have pleaded it to give the plaintiff an opportunity of controverting both the surrender in that cause and the identity of the principal, which might possibly be denied upon the plea of a surrender. But in this case there was no need of a plea, as the plaintiff moved to commit the principal, which admitted all that he could deny by a replication. It appearing, therefore, upon the record, that the principal has been surrendered before final judgment in the cause, the judgment must be affirmed, but I repeat, it would be more regular to plead the surrender.

PER CURIAM. Judgment affirmed.

Cited: *Underwood v. McLaurin,* 49 N. C., 18.

DEN EX DEM. OF TILSON B. DOUGLASS v. DANIEL SHORT.

Where a sheriff sells land for the taxes of two years, when he had a right to collect only those due for the last year, the sale is void, and his deed vests no title in the purchaser.

EJECTMENT, tried on the fall circuit of 1831, at ANSON, before *Strange, J.*

The only question which it is necessary to present arose upon the validity of a deed executed by the sheriff of Anson, to the lessor of the plaintiff, whereby it was recited that the sheriff had sold the land in dispute to the lessor of the plaintiff at a public sale made in April, 1827, for the taxes due in the years 1824 and 1825.

The jury, under the directions of the judge, found a verdict for (433) the plaintiff, and the defendant appealed.

Mendenhall for defendant.
Gaston contra.

HENDERSON, C. J. There are several questions made in the cause which it is not necessary to consider, as we think the sale is void *in toto,* and gives no title to the purchaser, for want of power in the sheriff to sell for the taxes of the year 1824. The rule in regard to the validity of a sheriff's sale under a *fi. fa.,* where he sells all the land levied on, does not apply; there the surplus of the money, after satisfying the *fi. fa.,* belongs to the defendant in the execution. Therefore, if the sheriff professes to sell under several *fi. fas.,* and all are void but one, the sale is valid by virtue of the good execution, and the surplus of the money, after satisfying it, belongs to the defendant in the execution, and his title is not affected by the misapplication by the sheriff of the purchase money to the void executions. This is matter of adjustment between the sheriff and the defendant in the execution, and the purchaser has nothing to do with it. It is sufficient that the sheriff had an authority to sell, and the valid execution gave him that authority. But a sale for taxes is governed by a different rule; there the whole thing is not sold, but the offer or proposition is, who will pay the tax demanded for the least quantity of the land? Every cent of tax, therefore, demanded takes from the owner a portion of the land, while the sum over-claimed does not go into his pocket, or for his benefit. For, although, as in this case, some of the taxes may be really due, he may not choose to have them paid by this sacrifice, and the rule must be general. The quantity of land sold was, therefore, improperly swelled, and we cannot separate and say how much was sold for the taxes which the sheriff had a right to collect, and how much for those for which he had none. Neither (434) can we settle it by the rule of proportion, for *non constat,* that there was no one present who, had the proper sum been demanded, would not have paid that sum for a much less proportion of the land. A variety of causes might thus operate; a bystander might have money enough to pay the tax which ought rightfully to have been demanded, and not enough to pay what was actually demanded, or he might not choose to purchase as much of the land. Sales for taxes are sufficiently rigorous by the acts of the Legislature without being made more so by construction. I have not gone through the acts to show that the sheriff could not, when he sold, include the taxes for the year 1824, as it is evident from a slight examination of them.

PER CURIAM. Judgment reversed.

THE ROANOKE NAVIGATION COMPANY v. JOHN H. GREEN, EXECUTOR OF SOLOMON GREEN.

1. Where a testator, in the event of the death of his executor, directed the county court to appoint some person to administer his estate, the executor of the first executor is not the executor of the first testator.

2. The case of *Granberry v. Mhoon*, 12 N. C., 456, affirmed.

THIS was a *scire facias,* which recited that the plaintiffs had obtained a judgment against Solomon Green, as the executor of William Green; that Solomon Green was dead, having made a will, whereof he appointed the defendant executor, and praying to have execution upon that judgment against the goods of the defendant's testator.

Plea—in substance, that although the defendant's testator was the executor of William Green, that the defendant had never administered any of the chattels of William, neither was the defendant the executor of William, because that William, by his will, directed the Court of Pleas and Quarter Sessions of the county of Warren, where he (435) resided at the time of his death, in case of the death of Solomon, his executor, before he had fully administered, to appoint some suitable person to take charge of and administer the residue left unadministered by his executor. And further, that William, by his will, gave to the person thus to be appointed by the county court the same powers as to such of his estate as should be so unadministered as he had given his executor, the defendant's testator.

Replication—admitting the plea, but averring that the defendant was executor to William, because the county court had never appointed any person to administer the goods of William, unadministered by Solomon.

Demurrer and joinder. His Honor, *Daniel, J.,* on the last spring circuit, at WARREN, overruled the demurrer and gave judgment for the plaintiffs, from which the defendant appealed.

Badger for plaintiff.
Gaston and W. H. Haywood for defendant.

HENDERSON, C. J. The affirmations of the court of probate cannot be controverted. In this case the Court affirms that John H. Green is the executor of Solomon Green, and that Solomon was the executor of William, but it does not affirm that John is the executor of William. That is an inference drawn by the law in certain cases, as where the executor of the first testator was sole executor, or surviving executor, but not where

the first testator, by his will, declared that the executor of his executor should not execute his will, as I think William did in this case, by appointing some other person to execute it upon the death of Solomon. A testator may appoint that his executors shall act jointly or in succession. If these facts do not appear, they may be introduced by plea, as in the present case, and I adhere to the opinion given in *Granbury v. Mhoon,* that a copy of the will does not necessarily accompany the letters testamentary, and even if they did, in this case it would only be again putting that on the record which already as fully appears as if the probate had been set out at large that William Green (436) directed some other person except the executor of Solomon to execute his will. I think the demurrer should be sustained and the judgment reversed.

PER CURIAM. Judgment reversed.

Cited: London v. R. R., 88 N. C., 588; *Pendleton v. Dalton,* 92 N. C., 191; *Starnes v. Thompson,* 173 N. C., 471.

THE GOVERNOR, UPON THE RELATION OF RICHARD FISHER, v. CHARLES CARRAWAY, EXECUTOR.

1. The sureties of a constable are not liable under the Act of 1818 (Rev., ch. 980) for his omission, without instructions to the contrary, to sue out an execution against an insolvent debtor.

2. In mixed questions of law and fact, a judge is not bound to charge the jury upon a supposed state of the facts, unless moved to do so.

THIS was an action of debt upon a bond executed by the defendant's testator, as surety to one Brinson, upon his being appointed a constable. The breach assigned was that Brinson had not sued out execution for sundry small debts placed in his hands by the relator.

Plea—performance of the condition of the bond.

On the trial, before *Martin, J.,* at CRAVEN, on the last spring circuit, the case was, that Brinson's appointment was made in June, 1819; in July following he received the notes, etc., due the relator for collection; all the debtors but one Hendrick were insolvent; Hendrick owed $375, and was very poor, but had a cow, some sheep and hogs, in the year 1821; and in April or May, 1820, he, upon the death of his father, succeeded to a small tract of land.

For the plaintiff it was contended that the constable had been guilty of neglect in not procuring satisfaction of this debt.

His Honor charged the jury that a constable was not of course bound to take out execution for every debt which might be placed in his hands for collection; that if it was manifest that nothing could be made by an execution, it was no breach of duty in the constable not to take one out, unless specially directed to do so; that an officer was bound to
(437) strict diligence, which was such diligence as prudent men used in the management of their own affairs; that in the application of this rule the constable acted at his peril in not taking out an execution against Hendricks, for if that process would have made the amount due by him, the constable was guilty of negligence, and the condition of the bond was broken.

No special instructions were prayed for by the plaintiff. The jury returned a verdict for the defendant, and a new trial was then moved for, upon the ground, that the judge should have instructed the jury to find for the plaintiff, as diligence was a question for him to decide. The motion was overruled, and his Honor observed that diligence being a mixed question of law and fact, a judge was not bound in his charge to assume all the conclusions which the jury might draw from the evidence; that if this was the case, in complicated questions of fact, and in a protracted investigation, it would be impossible for the judge to assume all the various conclusions which the jury might deduce from the evidence, and then inform them what the law would be if they should find the fact to be as he had assumed; that it was sufficient, in cases of this kind, to give special instructions as to the law arising upon any supposed state of facts, when such instructions were moved by counsel. The plaintiff appealed.

W. C. Stanly for plaintiff.
Gaston and J. H. Bryan contra.

RUFFIN, J. The Act of 1818, Rev., ch. 980, may be said to make certain private agencies official duties of a constable. If he be liable for negligence in the discharge of them, he must be so either as other agents are, or as officers are, when under like circumstances they have process. The act does not create a new set of principles upon which a peculiar responsibility is to be imposed on constables, but only provides that their sureties shall be liable for their acts as agents, when they themselves would be responsible upon their undertakings in that capacity. I take this to be the meaning of the statute, and think the judge carried
(438) the rule of diligence as far as he could in favor of the relator. It

is objected that he did not decide the question himself. I agree with his Honor in the opinion expressed by him, and for his reasons that the plaintiff cannot complain; for if he was bound, yet upon such a mixed question of law and fact, it is sufficient to give general instructions, not in themselves wrong, unless the party prays for others more explicit, and in terms applying to the case on trial, but had such been prayed for in this case, they could not have been more favorable to the relator than those given. As to all the debtors but one there was an absolute insolvency, which continued up to the trial of this suit, and there cannot be a reason why an agent should make the debt his own by not pressing a pauper. That one was indebted in the petty sum of $375, and after the constable's year expired, had in 1821 a cow and a few sheep and hogs. He was very poor, but in 1820, in the fore part of the year, his father died, and a small piece of land descended to him, which he has since sold. The plaintiff asks a verdict for that, because the constable neglected to have execution out at all times, so as to cover whatever might fall in. But no knowledge of the death of the father, of the descent or possession of the land by the debtor, or of any other property is brought home to the constable. In an ordinary private agency would that be the rule? If execution had been sued by the relator, and delivered to the officer, would that be the rule? Certainly notice of property must be proved before he is liable for a false return. I do not perceive that the union of the characters of agent and officer, in the same person, can make a difference. I think the constable cannot be chargeable for neglecting to sue execution unless upon the execution, if sued, he would have also have been liable, for where is the use of an execution at the expense of his principal unless there be some probability of making the debt on it?

I think, therefore, that the relator has no cause to complain of the judge's charge, and that he might properly have told the jury that there was no negligence. And I cannot but express my gratification that such a case as this is not to be sent back to another (439) trial.

PER CURIAM. Judgment affirmed.

Cited: S. v. Halcombe, 24 N. C., 215; *Williams v. Williamson,* 28 N. C., 284; *Morgan v. Horne,* 44 N. C., 26; *Warlick v. Barnett,* 46 N. C., 541.

WILLIE BAYNER v. JOSHUA ROBERTSON.

Goods which were the property of a decedent cannot be seized in the hands of his donee, under a judgment against his executor. If the creditor seeks to subject them, he must charge the donee as executor *de son tort.*

THIS was an action of replevin, tried before *Daniel, J.,* at MARTIN, on the last spring circuit, in which the plaintiff sought to recover several slaves.

The defendant, among other pleas, pleaded that the slaves in question were the property of one Thomas Cox, and upon this plea the only question between the parties arose.

The plaintiff claimed under a deed made by one Stancil Bayner, to secure his creditors; Stancil Bayner died, and the defendants took out letters of administration upon his estate. Cox obtained a judgment against the defendant as administrator, and sued out an execution, under which the slaves in question were sold and bought by Cox. The defendant offered to prove that the deed under which the plaintiff claimed was designed to defraud the creditors of the intestate. But his Honor refused to let the evidence go to the jury, observing that if the deed was fraudulent as to the creditors of the intestate, it was valid against him and his administrator; that Cox's execution was to be satisfied out of the assets of Stancil Bayner in the hands of the defendant; that the slaves not being assets of Stancil Bayner, nor in the hands of his administrator, were not subject to that execution; that if Cox or any other creditor wished to reach those slaves, they should declare against the plaintiff as executor in his own wrong of Stancil Bayner,

(440) when the defendant might show that he had fully administered by paying debts of an equal or higher dignity, to the value of the slaves, of which defense the present action would deprive him.

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

Attorney-General and Badger for defendant.
W. C. Stanly and Hogg contra.

RUFFIN, J. The action against a fraudulent vendee of goods as executor *de son tort,* when there is a rightful executor or administrator, is contrary to the analogy of the law of other cases, and is given only from necessity. It supposes that the creditor cannot obtain satisfaction from the rightful representative, and therefore gives this mode of impeaching the fraudulent conveyance, because there is no other, and with-

out some the creditor would be entirely defeated. I do not mean that the creditor must show that he has first sued the true executor, and has been unable to fix him with assets. He may sue the fraudulent grantee first, but then he runs the risk of losing his suit, because the conveyance was not fraudulent, the donor or vendor not being indebted at the time of his conveyance, or not to an extent that could reasonably impeach his gift as being made with a view of defeating an existing debt, or one that he was about to contract. Where, therefore, there are assets in the hands of the creditor, there is neither a necessity that the creditor should, nor a probability that he will, sue the donee. And where the executor has been sued and fixed with assets, there seems to be no reason for allowing the action against the donee at all, for there is no necessity for it. The creditor obtains satisfaction without, and the deed which is good between the parties injures nobody, for the goods conveyed to the donee could not be chargeable to the executor as assets, and therefore those found are exclusive of those goods. Much more does it seem to be proper that upon such a judgment against the executor the goods of the donee should not be taken in execution. The verdict shows that there are other assets in the proper hands to satisfy the judg- (441) ment. And I cannot conceive a motive for this proceeding, unless it was a contrivance between Cox and Robertson for the latter to confess assets, when he had none, in order to defeat the conveyance to the plaintiff, and deprive him of the property, without first trying the question of title. Besides, as the judge properly said in the Superior Court, there is another reason for trying that question directly in a suit against the donee, which is that he may have paid the value to other creditors and ought to be allowed for it. It seems to me that to sustain the proceeding would be to call forth actual fraud, to counteract one that was only probable, or merely alleged without foundation in fact. It would cause many administrations to be taken out, for no other reason than that of putting one claiming under a conveyance to the disadvantage of being deprived of property without a trial first had—of being a plaintiff instead of a defendant.

PER CURIAM. Judgment affirmed.

Cited: *Grant v. Hughes,* 82 N. C., 220.

EX PARTE CHARLES HAUGHTON.

The Supreme Court has no jurisdiction of an appeal from an order of the court below, allowing commissions as to administrator.

(*Potter v. Stone*, 9 N. C., 30, overruled.)

THIS was an application to the county court of Chowan for an allowance of commissions to the administrator of Thomas B. Haughton, deceased. The case commenced in the county court and came from the Superior Court of CHOWAN upon the appeal of the next of kin. The facts attending the administration of the applicant, together with his accounts, were certified to this Court, but need not be stated.

Iredell, upon opening the case for the next of kin, was asked by the *Chief Justice* if it was not an appeal from the exercise of a discretionary power.

No counsel appeared for other side.

(442) HENDERSON, C. J. This is an appeal from the discretion of the court below to that of this Court—from a court having the means and the power of examining into facts to one having neither. We can only act on facts, established either by the admissions of the parties or the verdict of a jury. Except in equity cases, where we have a *quasi* original jurisdiction, this Court has neither the power nor the means of ascertaining the facts. And certainly the commissions to be allowed an executor, administrator or guardian, depend on a great variety of facts. The nature and intricacy of the estate, the difficulty and labor of managing it, all ought to be inquired into—not the bare amount of the receipts and disbursements. This Court, therefore, has no jurisdiction. It is true if the court below had allowed commissions, when by law none were due, or refused them when legally claimed, those mistakes in the judgment may be corrected upon appeal, but we perceive none such here. When we entertained jurisdiction, and decided the case of *Potter v. Stone,* the jurisdiction of the court had not been settled. It came close upon the heels of the old Supreme Court, a court of multifarious powers, in some cases having and exercising jurisdiction on the facts, in others restricted.

PER CURIAM. Appeal dismissed.

BENJAMIN HOWELL v. ARTHUR BARDEN ET AL.

1. In an issue of *devisavit vel non, it was held* by HENDERSON, C. J., and RUFFIN, J., that declarations of the supposed testator, made after the execution of the will, were admissible to prove that it was obtained by fraud, notwithstanding the Act of 1819 (Rev., ch. 1004), to prevent frauds in the revocation of wills. DANIEL, J., *dissentiente*, but holding declarations made at the execution of the will to be admissible as part of the *res gestæ*.

2. The case of *Reel v. Reel*, 8 N. C., 248, approved.

THIS was an issue of *devisavit vel non* as to a will of Benjamin Howell, Sr., propounded by the plaintiff, which was tried before *Martin, J.*, at GREENE, on the last spring circuit.

The plaintiff having made out a *prima facie* case, the defend- (443) ants offered to prove declarations of the supposed testator, made after the execution of the proposed will, tending to show that it was obtained by fraud and undue influence of the principal legatee. But the presiding judge rejected the testimony. The plaintiff had a verdict, and the defendants appealed.

W. C. Stanly and Mordecai for defendants.
Gaston and J. H. Bryan contra.

RUFFIN, J. The admissibility of the evidence rejected in the Superior Court was, as a general principle at the common law, determined in *Reel v. Reel*. The discussion in that case was full, and the decision is to be regarded by succeeding judges, not only with respect, but in my opinion as authoritative. For this reason I must say I do not consider that question open to dispute.

The stress of the argument for the plaintiff is, however, on the Act of 1819, "to prevent frauds in the revocation of last wills." It must appear to every one who reads the opinions in *Reel v. Reel* that the judges there thought that the statute did not affect the question. It is true, the supposed testator there died in 1818, and therefore the point did not directly arise. But the leading authority against the evidence, *Jackson v. Kniffen*, was not treated by the court as inapplicable, upon the ground that the statute of frauds was in force in New York. (444) On the contrary, although the opinions of the majority of the judges profess to be founded on that statute, this Court rejected the case altogether and expressly adopted the opinions of the dissenting judges, *Spencer* and *Tompkins*, who held that the statute, any more than the common law, was not against hearing the evidence.

But as that was not the point of *Reel v. Reel,* the court have now treated it as yet undecided here, and deliberately considered the question anew. My own opinion is quite clear, that the case is not within the purview of the statute, nor within the mischief.

The act relates exclusively to the revocation of wills. It presupposes in every case a will, good *ab origine,* to exist. It does not profess to touch the validity of the instrument, as depending upon the formality of its execution or the disposing capacity or purpose of the maker. Nor does it prescribe the evidence by which those facts shall be proved. Those requisites are left as they stood at the common law or by other statutes. This act does not say nor mean that a writing having the prescribed forms of a will, but obtained by fraud, duress or undue influence shall, by force of the formal circumstances, be a will, but it says that such an instrument, having not only the forms, but having at its execution been in reality the instrument it purports to be, shall only be *revoked* by another will, or other mode prescribed in the act. The very title shows this, which is "to prevent frauds in the revocation of *wills.*" In fine, the act goes wholly to a change of mind in the testator, and not to the original want of the *animus disponendi.*

Here, perhaps, I might properly leave the case, since it is our province only to ascertain the meaning of the Legislature, and not to carry their enactments beyond their meaning, because we might think they ought to have gone further. Yet I think in this case, notwithstanding the argument and authorities offered for the plaintiff, that there is a plain reason why the statute was not made broader.

(445) It is said the admission of this evidence is an evasion of the statute and will bring in all the evils that it was meant to remedy; that there is little difference between a declaration, "that I revoke my will," and "that paper never was my will; it is a forgery"; or "I was forced to sign it." And it is further insisted that if the statute will not exclude it in all cases, yet the rule should be in analogy to it and exclude it in all cases, when the supposed testator had it in his power, by other means than his declarations, to destroy the operation of the instrument, as where he had possession of it, or lived long after, free of restraint, and could have made another will.

I admit that evidence of such declarations may mislead a jury. So, indeed, may almost all evidence submitted to them, especially if it be competent for one purpose and not so for another. This is incident to our tribunals as constituted, and not peculiar to this species of evidence. If it be competent for any purpose, the court must receive it at the risk of misconception or misapplication by the jury. The law does not anticipate either, but the contrary—not a misconception because the court should explain the purpose for which it is received, and the point it

tends to establish, nor a misapplication, because there is a reliance on the integrity of the jurors. There is no instance in which the legitimate and illegitimate purposes of introducing evidence are more distinct or more obvious to a common understanding than the one before us. The one is to determine whether a will was made, and fairly made; the other, whether the operation of such an instrument, not destroyed, has been recalled. This last, the Legislature has enacted, shall not be proved by parol. Can the court by any analogy say the same of the former? If we are to look to the policy, what is that which governed the Legislature? It is not that a will once made in writing is, from that circumstance, to be taken as necessarily in its nature continuing to be the will of the maker until it be canceled or revoked in writing, nor that it is not right to annul it as soon as it is made to appear in any manner, whether by parol or otherwise, that it did not continue to be the maker's will. But the reason for not hearing the parol proof is (446) that there is not the *ordinary security* that it is true. The declarations sworn to are those of a dead person, and generally will purport to have been made to the witness or witnesses alone. The law-giver may well act on the presumption, which experience proves to be too well founded, that many men are withheld from falsehood, less by the restraint of conscience than by the apprehension of detection and temporal punishment. This is the principle of the statute. It repudiates the testimony, not because it ought not to be acted on, if true, but because, if false, there are no means of showing it to be so, and because that circumstance constitutes an immunity to the witness which tempts him to crime.

But when the evidence is of declarations relating to the creation of the will, there are not only the guarantees for veracity common to other cases, but peculiar ones, arising out of the provisions of the statutes passed to secure to the citizen the establishment of the will he has made, and against the imposition of one he has not made. Such declarations would be manifestly inofficious in the case of a will altogether in the testator's own handwriting. With respect to attested wills, there must in all cases be one, and where land is devised, two witnesses capable of speaking to the fact to which the declarations purport to refer. There is then witness against witness, and the case is not within the policy which dictated the statute, more than within its words. Against this conclusion the case of *Provis v. Reed,* 15 Eng. Com. L. Rep., 490, has been cited. The opinion of *Mr. Justice Parke* is founded on the policy of the statute of frauds, but *Chief Justice Best* and the other judges do not go on the legislative provisions, but on general principles. I do not find that any other English judge but *Mr. Parke* has entertained the opinion expressed by him; that is, for his reasons. The

decision of the whole Court was, it is true, against the evidence. But upon the general question, the respect due to those judges is overborne by the authority of a judgment of our own courts, directly in point, and certainly the cases cited in *Reel v. Reel* prove that the court of
(447) common pleas erred in supposing that the question was made in that case for the first time.

The residue of the objection obviously goes to the weight of the evidence. It is true there are many cases in which it would be entitled to but little weight; nay, but few in which it would be entitled to any. Yet, if there be others in which it would subserve the cause of truth and justice, it must be heard, leaving its effect to those whose province it is to weigh it. I think there is little danger in this, when the court can aid the jury by pointing out its legitimate tendency. When the fact of fair execution is once established by witnesses fully believed, the credit of the witnesses deposing to declarations inconsistent therewith is at once subjected to a severe test. But suppose the declarations to be fully and satisfactorily proved, there are so many other motives for a testator to speak evasively, or even untruly, both of the execution and the provisions of his will, besides that of disavowing it in its actual form to be his will as to prevent much attention being paid by anybody to such evidence. Looking at such evidence judicially, in a case in which it should be addressed to me, I should give it, if any, the least possible effect in the case supposed. For if the testator lived long after executing the instrument, had the possession of it, or could command it, or had it in his power to make another will, or to revoke the first, and did not, the fact of leaving it in existence, supported by the witnesses to it, to be repelled only by the uncertain evidence of his vague declarations, so far outweighs, in a reasonable mind, those declarations as to make them but dust in the balance. The declarations were never made, or have been misunderstood, or were not serious, but intended to deceive. The truth in these respects is not likely to be obscured, because it is to be recollected that the attesting or other witnesses on the other side must speak to the very fact to which the declarations refer. But it is likewise to be remembered that the witnesses offered to support the will may testify untruly. Of their truth, the subsequent declarations are, amongst other things,
(448) the test. Suppose a forgery of a will out and out, and that the supposed testator averred solemnly on his death bed that he never had made a will, and that he meant to die intestate, and this established by indubitable proof. If this evidence could not be heard, a single perjured witness might establish a fabricated writing disposing of the largest personal estate, and two might carry all. On this ground, evidence of this character must be admissible. As was said in *Reel v.*

Reel, a contrary rule would palm upon the world wills never made, or made under duress—a proposition the very stating of which shocks us. Wherefore, I think there must be a new trial.

HENDERSON, C. J. I adhere to the opinion I expressed in the case of *Reel v. Reel,* nor do I think that the Act of 1819, providing that no written will shall be altered or revoked by parol, affects this question. It is very clearly not within the words of the act, for they relate to what was once a will; these declarations are offered to show that the proposed script never was a will. The questions are essentially different in their nature. The act prohibits a will, when actually made, from being altered or revoked by parol evidence. This is an attempt to exclude declarations going to show that it is not and never was a will. Suppose the defendant had made a case going to show a forgery, and the question was nearly balanced, shall not the declarations of the alleged testator be heard to determine the fact? Does the letter or the spirit of the act inhibit it. Yet, if the testimony be excluded under the statute in a case like the present, it must be excluded in all. It is enough for courts to see and ascertain the legislative will; it is not for them to inquire why the Legislature has excluded parol evidence upon questions of alteration or revocation, and permitted it in questions touching the making of a will. But I think I can perceive why they inhibited it in the one case and not in the other; in the first place, if the written will be established, there is clear and certain proof of what was the will of the testator at one time. By admitting mere parol declarations of revocation or alteration, a very uncertain and questionable will may be substi- (449) tuted, by the perjury and misrepresentation of witnesses, for one clearly established, and there are no means of preventing these perjuries, as they point to nothing by which their falsity may be detected. Mere words, such as "I revoke my will," which were admissible before the late statute, cannot be easily disproved, because they may be sworn to have been uttered when no one but the perjured witnesses were present. But it is not so with declarations that the script in question never was the will of the supposed testator; they refer to the time of the alleged making—to the opposing proof which supports the will—and they may be weighed and compared with it. This policy is not confined to the Act of 1817. It is to be found in the book debt law; a person may swear to his account for goods sold and *delivered* (not sold only), or for *work* and *labor* done, but not to a special agreement, or even to money lent, because the latter are incapable of disproof; they point to nothing by which their truth can be tested. It is otherwise as to goods sold and delivered, or work and labor done. There is some chance of opposing false accounts of this description, for the consideration is something

visible, something tangible, the want of which may very probably be shown, and prevent imposition to any great extent. The same policy is visible in this statute. It is not for me to say how much such evidence ought to weigh, having, as I have elsewhere observed, no weights and measures for my own mind. It must, under the circumstances of each case, be left to the judgment and discretion of the jury as rational men; if they believe it, they will give it effect; if they do not believe it, of course they will pay no attention to it. I think a new trial should be granted.

DANIEL, J., *dissentiente:* It is contended by the defendants that the case of *Reel v. Reel* is in point for them, and so it would be were it not for the Act of 1819, which has passed since the year 1815, the date of the supposed will in that case, and since the death of Reel, which took
(450) place in the year 1818. At the time of making the will in that case it was lawful to prove a revocation by parol testimony; but now, by the Act of 1819, no last will and testament can be expressly revoked but by writing, and in the forms pointed out by that statute. It is contended that the statute can have no operation on this case, as it was intended to apply to the revocation of wills indisputably executed, and not to scripts offered as wills and denied by the adverse party to be the wills of supposed testators. The Act of 1819 is a copy of part of the statute of frauds and perjuries (29 Cha., 2), and the same decisions which have taken place in England since the statute on questions similar to the one now under consideration, as well as decisions in those states of the Union which have adopted it, ought to govern us in deciding the present case. In the case of *Provis v. Reed* it was decided that "declarations of the testator in subversion of a will made subsequent to the time of its date are not admissible in evidence, though both parties claim under him, and though they are offered with a view to show the manner in which the will was executed." But the *Chief Justice,* in delivering his opinion, said: "No case had been cited in support of such a position, and we shall not for the first time establish a doctrine which would render useless the precaution of making a will; for if such evidence were admissible, some witnesses would be constantly brought forward to set aside the most solemn instruments." In Massachusetts a similar statute to the Act of 1819 has been enacted, and the same rule has been adopted. *Smith v. Fenner,* 1 Gallison, 170. So in New York there is a like statute and a like adjudication. *Jackson v. Kniffen.* After such a chain of authorities, all establishing the same doctrine, it would be unwise in us to lay down a different rule; if we did, it appears to me the Act of 1819 would be rendered inoperative. Parties would only change their position from parol proof of a revocation of a will to an attack

upon its execution, by introducing parol evidence of the subsequent declarations of the testator; so all of the evils of fraud by (451) the parties, and perjury by the witnesses, would be let in, which the Legislature has so studiously endeavored to shut out. When I lay down the rule in this manner, in the case before the Court, I do not wish to be understood as excluding parol evidence of the declarations of a testator, made at the time of the execution of a will. Such declarations are a part of the *res gestæ,* and are admissible. (1 Thomas' Coke, 761, 763, note.) I think a new trial should be refused.

PER CURIAM. Judgment reversed.

Cited: Simms v. Simms, 27 N. C., 687; *In re Burns' Will,* 121 N. C., 338; *Evans' Will case,* 123 N. C., 117; *In re Shelton's Will,* 143 N. C., 222; *Linebarger v. Linebarger, ibid.,* 233; *In re Fowler,* 159 N. C., 207; *In re Hinton,* 180 N. C., 212.

THE JUDGES, UPON THE RELATION OF TITUS J. OATS ET AL., v. DAVID H. BRYAN ET AL.

1. The Act of 1819 (Rev., ch. 990) requiring clerks to renew their bonds does not make their offices annual appointments, but gives cumulative securities for the performance of their official duties.
2. Nonpayment of money received by a clerk officially may be assigned as a breach on any bond given by him.
3. Is the bond of a clerk and master within the Act of 1810 (Rev., ch. 800)? *Qu.*

THE defendant Bryan, being clerk and master of the court of equity for the county of Johnston, on 26 March, 1823, gave a bond and sureties, with the usual condition for the faithful discharge of the duties of his office. On 24 March, 1824, he gave a similar bond with different sureties, and so, also, on 29 March, 1825 and 1826.

By an order of the court of equity for Johnston County, a large estate held by the relators, as tenants in common with others, was sold by the clerk and master, and the purchase money directed to be paid to the owners as they were respectively entitled. The clerk and master began to receive the purchase money in March, 1823, and continued the receipts until March, 1827.

At the term of the Superior Court of Johnston, held on the fourth Monday of March, 1828, the defendant Bryan failed to renew his bonds, and a successor was appointed. At the same time the guardian of the

relators, they being infants, applied to Bryan for their share of
(452) the purchase money, but he was unable to pay it, and suits were soon after instituted on the two first bonds above mentioned, and afterwards, on the others, and the nonpayment of the money due the relators, assigned as a breach of their conditions. The defendants, after *oyer,* pleaded performance, and the Act of 1810 (Rev., ch. 800), limiting actions on certain office bonds to six years.

The above facts were submitted to *Norwood, J.,* in the shape of a case agreed, at JOHNSTON, on the spring circuit of 1831, when judgment was rendered for the plaintiffs, and the defendants appealed.

In this Court the four cases were considered together; the questions discussed were those which arose between the defendants.

W. H. Haywood for plaintiffs.
Hogg for sureties of 1824.
Gaston for those of 1825.
Badger and Devereux for those of 1826.

HENDERSON, C. J. The Act of 1793 (Rev., ch. 384), and the Act of 1819 (Rev., ch. 990), requiring clerks and masters in equity, and the other officers mentioned in them, to renew their bonds at stated periods, does not make each renewal of the bond a new appointment to office, but the new bonds are made additional securities for the performance of the official duties of the incumbent. The office is vacated by neglecting to renew the bond, not by doing so. The bonds thus given are cumulative; the old sureties continue bound for the performance of all the duties then resting upon the clerk, as well as for those which should thereafter arise, during his continuance in office; the new sureties are also bound in the same manner from the time of their executing the bonds until the office determines. Some official duties are of a continuing character, the obligation to perform them remaining until they are performed. Of duties of this kind, there may be several breaches, or rather, breaches at several different times, and a breach at one time does not put an end to the official obligation, so that another breach of the same duty
(453) cannot occur. Breaches of this kind are most commonly acts of omission, an instance of which is that assigned by the plaintiffs, viz., the nonpayment of the money due the relators. This is a continuing duty, and if not performed when an additional bond is given, it attaches upon the new bond, and also continues obligatory on the old ones. There are other acts which, being once done, cannot in their nature be done again. Acts of this kind, which are breaches of duty in a clerk, being, I presume, acts of malfeasance, can be only assigned as breaches of a bond in existence at the time they happened; they are not

covered by bonds given afterwards. I do not intend to specify any act of this kind, but leave them for discussion when proper cases shall arise; all intended to be decided in this case is that the neglect of the clerk and master in not keeping the money of the relators safely, and paying it over to them, or to some one authorized to receive it for them, is an act constituting a continuing violation of official duty, and may be assigned as a breach of any bond which he has given. Judgment must therefore be rendered for the plaintiffs upon all the bonds, and must include damages, at the rate of 12 per centum per annum upon the money due the relators from the time of the clerk and master's neglect to pay it over. The Act of 1819 (Rev., ch. 1002) being express upon this point, and including the sureties as well as the officer himself.

The Act of 1810, barring actions upon certain official bonds, unless brought within six years, does not in its words include the bond of a clerk and master, the words being "all suits on sheriffs, Superior Court clerks, and clerks of the courts of pleas and quarter sessions bonds shall be commenced," etc. Although a clerk and master in equity is in strictness a clerk of a Superior Court, yet the Legislature has, from the creation of the office in the year 1787 to the present time constantly distinguished that officer from others by the appellation of clerk and master. Courts of justice have adopted the same appellation, and, in fact, it has become general in all classes of society. The question whether a clerk and master's bond is within the act does not arise in any of these cases, as the first money was received in March, 1823, and the last suit was commenced in February, 1829, and no opinion (454) is intended to be intimated upon it.

PER CURIAM. Judgment affirmed.

Cited: *Poole v. Cox,* 31 N. C., 72; *Jones v. Hays,* 38 N. C., 509; *Pickens v. Miller,* 83 N. C., 547; *Commissioners v. Nichols,* 131 N. C., 502; *Fidelity Co. v. Fleming,* 132 N. C., 336; *S. v. Martin,* 188 N. C., 121.

GEORGE E. CABINESS v. THOMAS MARTIN ET AL.

Probable cause is such a suspicion as would induce a reasonable man to commence a prosecution, and where a witness swore that a magistrate, upon the return of a State warrant, said that he "would commit the defendant unless," etc., and the magistrate had in fact said he "would bind the defendant over unless," etc.: *It was held* that the variance did not constitute probable cause for a prosecution for perjury.

CABINESS *v.* MARTIN.

THIS was an action on the case, in which the plaintiff declared against the defendants for maliciously, and without probable cause, prosecuting him for perjury. Upon *not guilty* pleaded, the cause was tried before *Donnell, J.*, at RUTHERFORD, on the last spring circuit. The perjury for which the defendants had the plaintiff arrested was alleged to have taken place on the trial of an indictment against the defendants for a conspiracy to extort money from one Horde, and it appeared that Horde, having been arrested upon a charge of larceny, and brought before the defendant Martin, who was a justice of the peace, had been discharged upon his surrendering a bank-note of three dollars to the person who sued out the warrant against him, and also executing to the prosecutor his own promissory note for $8.75. On the trial of the indictment against the defendants, the plaintiff swore that the defendant Martin had told Horde that unless he gave his note, and surrendered the bank bill as above mentioned, he would send him to jail. In this, it was alleged the plaintiff swore falsely, and it was contended that the defendant had said that unless he, Horde, gave his note, etc., that he
(455) should bind him to appear at court. Much testimony was offered on both sides, on the trial, which it is not necessary to state.

The presiding judge charged the jury that if the plaintiff had sworn on the trial of the indictment against the defendants that Martin had said he would send Horde to jail, by a mistake, yet if it was false, it amounted to probable cause, and justified the defendants in suing out the warrant against him for perjury.

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

Gaston for plaintiff.
Badger contra.

DANIEL, J., after stating the facts, proceeded as follows: We are of opinion that if the facts were such as are contended for by the defendants, they would not make out a probable cause to authorize their issuing a State's warrant and prosecuting the plaintiff for perjury. In the case of *Munns v. Dupont,* 2 Brown Rep. Ap., 65, *Judge Washington,* in delivering the opinion of the Court, asks, "What is the meaning of probable cause? I understand it to be the existence of circumstances and facts sufficiently strong to excite in a reasonable mind suspicion that the person charged with having been guilty was guilty; it is a case of apparent guilt, as contradistinguished from real guilt. It is not essential that there should be positive evidence at the time the action is commenced; but the guilt should be so apparent at that time as would be sufficient ground to induce a rational and prudent man, who duly regards the rights of others as well as his own, to institute a prosecution; not

that he knows the facts necessary to insure conviction, but that there are known to him sufficient grounds to suspect that the person he charges was guilty of the offense." The material question in the cause, on the trial of which the plaintiff was alleged to have committed perjury, was whether the defendants had fraudulently conspired to obtain by illegal means the money and property of Horde. In the ascertainment of the guilt or innocence of the defendants, on the indictment for (456) the conspiracy, it was quite immaterial whether the plaintiff swore that the words used by Martin were that he would send Horde to jail if he did not give up the three-dollar bill, and give his note for the balance, or whether he swore that Martin said he would bind him over to court if he did not give up the property. Horde had been arrested for larceny, and it was the duty of the justice before whom the warrant was returned to have bound him over to court, whether he was willing or unwilling to give up the money, if in the opinion of the justice the evidence proved him guilty of the charge. But upon the question whether the defendants wished, by their oppressive conduct, to extort money from Horde, which, in truth, was the fact that the plaintiff's evidence was offered to establish, the words used by the magistrate in either way, viz., that he would send him to jail, or bind him to court, if he did not deliver the money, would have the same effect. The jury could not have been misled by the variance in the words sworn to by the plaintiff from those that in fact were spoken by the magistrate. The difference between the words spoken by the magistrate and the words which the plaintiff swore he made use of was not sufficient to excite in the minds of the defendants a reasonable suspicion that he had committed perjury. If the justice had said he would bind Horde to court if he did not give up the money, then the money must have been surrendered, or Horde must have gone to jail, if he had been unable to procure bail. We think the court and jury could not have been misled by the variance in the expressions used; and it appears to us that no reasonable mind could suspect that the witness was guilty of perjury. We therefore think that the facts disclosed did not amount to probable cause, and a new trial should be granted, which is done accordingly.

PER CURIAM. Judgment reversed.

Cited: Beale v. Roberson, 29 N. C., 283; *Smith v. Deaver,* 49 N. C., 515; *Moore v. Bank,* 140 N. C., 302; *Morgan v. Stewart,* 144 N. C., 430; *Humphries v. Edwards,* 164 N. C., 157.

(457)

URIAS COLLINS v. MARTIN NALL.

1. Sheriffs, although elected for one year, by the Act of 1777 (Rev., ch. 118), hold their office until the qualification of their successor.

2. Although sheriffs are elected at stated terms of the county court, they hold their offices, not from the court at which they were elected to the next court when an election takes place, but for one year.

THIS was a petition under the Act of 1809 (Rev., ch. 773) for damages done to the plaintiff's land by its being overflown by the defendant's millpond. On the trial before *Swain, J.*, on the spring circuit of 1831, at WAKE, the only question arose upon the validity of a deed by the sheriff of Wake for the land overflown. If the deed was valid, the plaintiff had no title, and upon this point judgment was entered for the plaintiff, subject to the opinion of the court upon the following facts:

Isaac Lane was elected sheriff of Wake at the term of the county court held on the third Monday of May, A.D. 1815, being the 15th day of the month. At the ensuing sessions, commencing on the third Monday of August, 1815, being the 21st day of the month, Lane qualified as sheriff according to the appointment made the preceding term. At May session, 1816, being the 20th day of the month, William Hinton was elected sheriff, who, at August sessions following, being the 19th day of the month, qualified in pursuance of the appointment made the preceding term. From May Term, 1816, an execution, returnable to the ensuing August term, issued, which came to the hands of Lane, who levied it upon the land in question, and on 20 August following, the Tuesday of the county court, he sold it, and executed the deed.

His Honor, being of opinion with the defendant upon these facts, dismissed the petition, and the plaintiff appealed.

Attorney-General for plaintiff.
W. H. Haywood for defendant.

(458) RUFFIN, J. An important question was supposed to arise in this case, which, upon a closer inspection of the record, is found not to do so. It has been treated as a case in which a person whose term of office as sheriff expired on the first day of the term of the court, upon the qualification of his successor, made a sale of land on the second day of the term, on a *fieri facias*, returnable to the same court. Two defects were alleged to exist in the sale. The first, that it was made too late, even if the sheriff's office had continued. This has been decided otherwise, in *Mordecai v. Speight, ante,* 428, and before in *Lanier v. Stone.* The second, that the authority of the sheriff closed with his office. This

last is a nice point, and it is one which could not be ruled against the applicant, to say the least, without further consideration and research.

But it turns out that the objection is not founded in fact. Mr. Lane was still in office when he made the sale. By the record of the county court, appended to the transcript filed here, it appears he entered upon his office on 21 August, 1815, and the case states the sale to have been on 20 August, 1816. It is true that the third Monday of August of the former year was the 21st day of the month, and that the corresponding Monday of the latter year was the 19th day of the month, and that the new sheriff qualified on this last day. But we do not count the year from one Monday in the one to a corresponding Monday in the next, but from one day to another day. The year is made up of so many days; and particularly is this mode of computing required in this case, since the statute has plainly a reference to the chasm which might occur in the office by the computation from week to week, and has provided for that case. The Act of 1777 (Rev., ch. 118) assumes that a sheriff, once appointed, is bound to continue at common law until discharged, and enacts that he shall not be compellable to serve "more than one year, and until the next succeeding county court after the expiration thereof." If the year expire before court, he must serve until court. But if the court shall sit before the expiration of the year, the office is (459) not then determined; he is to serve one whole year, at all events. And it must mean the year reckoned by days, because in any other view there was no necessity for extending the term of office to the court, as the terms are in fixed and corresponding weeks, and it cannot be supposed the provision was designed to meet only a change of the time of holding the court. The qualification of the successor does not affect the question. It may be that there cannot be two sheriffs at once, but the question remains, Which of these two was the sheriff? If Lane was compellable to serve a year, if he could not compel Hinton to serve before his own time expired, it seems a reasonable, indeed, a necessary consequence that he should have the whole time to complete the execution of process begun by him, and his successor and the court could not prematurely oust him, and thereby subject him to amercements and civil suits. His rights and powers correspond with his obligations. But if he could, upon the qualification of the new sheriff, have relinquished the office, he did not. He continued to act, in making this sale, and he made it within the period limited by law for his office, for in such a case certainly both the days, that of the commencement and that of the ending of the year, are not to be excluded. It is therefore valid, and the judgment below must be affirmed.

PER CURIAM. Judgment affirmed.

(460)

ALLEN S. BALLENGER v. ELIZABETH BARNES, EXECUTRIX.

1. When the plaintiff to rebut the plea of the statute of limitations, proved that the defendant's testator in his last sickness sent for him, and expressed great anxiety to adjust an unsettled account between them, and upon being disappointed, made entries of credits to which he was entitled, but no admission by him of a balance due the plaintiff was proved: *It was held*, DANIEL, J., *dissentiente*, and HENDERSON, C. J., *dubitante*, that the evidence was not sufficient to authorize a verdict for the plaintiff, but that it should be left to the jury, with instructions to find for the defendant, unless the testimony proved the testator to have been willing that the account should be settled after his death.

2. A witness who is offered to prove what was deposed to on a former trial between the same parties, by a person who is dead, must give the substance of the testimony, not its effect.

3. The allowance of four per cent additional interest, under the Act of 1807 (Rev., ch. 713), is a matter of discretion, and cannot be revised upon appeal.

ASSUMPSIT, in which the plaintiff, the sheriff of JOHNSTON, declared against the defendant for money had and received by her testator, Henry Barnes, to his use, and specially, that her testator, being a deputy of the plaintiff, collected the taxes in certain districts of the county and had not accounted for them to the plaintiff. There were several other counts, which it is unnecessary to state.

Pleas: (1) That the defendant's testator did not assume, and (2) that he did not assume within three years.

The cause was tried before *Norwood, J.*, at NASH, on the last circuit.

Upon the issue on the first plea, the plaintiff offered a witness who had been of counsel for him on a former trial in the county court, to prove what a witness, since dead, had there deposed; the counsel stated that he had examined the witness; that he paid particular attention to his evidence, and had taken notes of it, which were then produced; that he did not pretend to have taken down the exact words of the witness, but that he believed that he was able to give the jury the whole of the testimony of the witness on the former trial, though not in the very words then used by him. Upon this statement, his Honor admitted the evidence of the testimony of the deceased witness, and that testimony was material for the plaintiff. The defendant's counsel then pro-

(461) posed to prove that the deceased witness had deposed to other facts besides those in evidence, but his Honor refused to stop the plaintiff's case to receive the proposed testimony, observing that the competency of the plaintiff's witness could not be tested by the opposing recollection of another witness, but depended on the statement upon

which it had been received; that the defendant would be at liberty, when called on for his evidence, to offer to the jury such proof on that point as he might think proper. Afterwards the defendant proved other facts deposed to by the deceased witness on his cross-examination, which had not been stated by the plaintiff's witness, which were material to the defendant, and then requested his Honor to direct the jury to disregard all the evidence of the deceased witness, which the judge refused to do.

All the transactions between the plaintiff and the defendant's testator having happened more than three years before the commencement of the action, the plaintiff, to repel the plea of the statute of limitations, introduced a Mr. McLeod, who deposed that he was sent for by the defendant's testator a few months before his death, but within three years of the issuing of the writ, and requested to draft his, the testator's, will; that all his property was left to the defendant, his wife; that during the time the witness was writing the will, the testator requested the defendant to do something for his sister; that the defendant answered he had better leave her a legacy, to which he replied he was not able to do so, as he feared, when his affairs were settled and his debts paid, there would be but little left, too little to allow him to make a separate provision for his sister. The testator requested Mr. McLeod to be his executor, which was declined, but Mr. McLeod promised to render any assistance in his power to the defendant, who was appointed. The testator then entered into conversation as to his business, stated that he never had settled with the plaintiff, and seemed much distressed at the thought of not doing so. At his request, Mr. McLeod made a memorandum of sundry credits to which he was entitled, in a settlement with the plaintiff, several of which were similar to the following: "I paid Mr. Ballenger (462) 142 dolls. at February court, 1822, I think, for which I have no receipt, and this payment was made him towards a settlement for tax money."

Another witness deposed to a conversation between the plaintiff and the defendant's testator, during his last illness, within three years of issuing of the writ, in which the former said there never had been a settlement between them, which was admitted by the latter, who said he wished they could come to a settlement.

A witness introduced by the defendant deposed that a few days after the will was drawn by Mr. McLeod, he was sent by the defendant's testator to the plaintiff to request the latter to come and see him, that they might arrange their business and have a settlement, to which the plaintiff returned no answer. That afterwards, in consequence of a similar request, he again went to see the plaintiff during the sitting of the county court, and was informed by the plaintiff that he could not then go, as he was attending upon the court; that the witness asked him

to come directly after court, to which the plaintiff made no reply. It did not appear that the plaintiff had any other claim against the defendant's testator, except that for which this action was brought.

His Honor informed the jury that when a man admitted the existence of an unsettled account, and declared a willingness to settle it, a promise to pay what should be ascertained to be due was implied, and the defense of limitations would be thereby waived. For to what purpose, it might be asked, was a settlement to be made, unless the balance, when ascertained, was to be paid? And therefore he instructed the jury that if they were satisfied from the evidence that the defendant's testator did admit the existence of an unsettled account between him and the plaintiff, and declare his willingness to come to a settlement with the plaintiff, they would be warranted in finding against the defendant upon the plea of the statute. No modification of these instructions was asked, nor was any exception thereto taken, the counsel for the defendant only (463) insisting that there was no evidence to rebut the plea of the statute. A verdict was returned for the plaintiff, and a motion for a new trial being overruled, judgment was entered accordingly. The cause having been tried in the county court, and the defendant having failed to reduce the amount recovered in that court, his Honor gave judgment for the additional four per cent imposed by the Act of 1807 (Rev., ch. 713). The defendant appealed.

Badger and Devereux for plaintiff.
Attorney-General and Gaston for defendant.

(464) HENDERSON, C. J. This is a most perplexing question. It is clear from the frequent acknowledgments made by the testator, not long before his death, that there were many unsettled accounts between him and the plaintiff, and that he desired to settle them in his life time. The credits which he directed McLeod to write down plainly point to the nature of those accounts, and show that they were for the tax money received by him as the collector and deputy of the plaintiff. But the amount due, if anything, does not appear from his admissions otherwise than it can be collected from an observation made to his wife, that he was largely indebted, but to whom he did not even allude, further than can be inferred from the accounts between him and the plaintiff, being the principal subject of their conversation. It is very unlike an acknowledgment made by a person by agreeing to enter into a settlement, or that another should settle for him. In a case of that kind why settle, unless the balance due was to be paid? An admission of that kind would be a waiver of the statute, for the defendant says, "I can and agree to stand upon my rights. I can do myself justice in the settlement." In this

case there was a great anxiety on the part of the testator to (465) settle himself in his lifetime that he might do himself justice, and a regret expressed that it could not be done upon the plaintiff's last visit. His sending twice for the plaintiff, just before his death, evinced his great desire that the settlement should take place in his lifetime and under his inspection. This was the settlement he was anxious and willing to have made—not one after his death, to which his estate is now called, and which the argument must affirm, to derive anything from his admissions, to be the one he was willing to have made. The statute was passed to avoid litigation upon doubtful claims, and therefore when the doubt is done away by the admission of the party, or the benefit waived by him, it was thought to be in accordance with the spirit of the act to declare it formed no bar to a suit. But here we are left entirely in the dark; the statute has not been waived by an agreement of the defendant's testator to settle, except in his lifetime; and the proof is rather of an anxiety to settle than a formal agreement that the accounts might be settled at another time, or otherwise than by himself in prospect of death. All the mischiefs of the statute will be let in, as the admission does not aid in settling the amount due, nor can we be satisfied that these are the accounts referred to—there may be others—and the credits entered by McLeod might not be all his payments, but only those for which he had no receipt, and his having them put down does not prove that he was willing that a settlement should take place after his death, but a wish to prepare for the worst. Upon the whole I am inclined to think from policy, as well as justice, a new trial should be awarded. There cannot be a nonsuit, as that is entered where the plaintiff does not support his action by proof, not where the defendant supports his plea.

There is nothing in the objection that the witness who was examined by the plaintiff, as to the testimony of one who had been sworn on a former trial, did not profess to give the very words of the deceased witness, but the substance only. No man can give the words where the testimony exceeds a single sentence. The witness himself, (466) if desired, after closing his testimony to commence and go through with it again, could only give the substance in many parts. The difficulty has arisen from the English reporters confounding substance with effect; the latter usually will not do; it must be the words or the substance. If the witness professed to be able to give the whole, it was proper to hear him, and when it appeared afterwards that he was mistaken and omitted some material parts, according to the testimony of another witness, the court could not decide between them, and if it could, and the addition placed the whole of what the dead witness said before the jury, they would then receive it as evidence. They must

be satisfied that they have the whole of what the witness deposed to before them; they must have all or none, as the whole is to be explained by the whole and by every part. I do not know in such a case how the court could do otherwise.

I feel better satisfied in sending this case to a second jury, as the verdict is large, upon a very stale demand and against the estate of a dead man, although I am not entirely satisfied on the point of the statute of limitations. But there was no acknowledgment of a debt, or balance due, or an agreement to settle then or at any other time, but a great anxiety to have a settlement in his lifetime. It evinced great unwillingness for what is the object of this suit, viz., a settlement after his death, and that by an action.

RUFFIN, J., concurred.

DANIEL, J., *dissentiente,* after stating the case, proceeded: All these facts were sufficient to authorize the jury to find that the defendant's testator had acknowledged a subsisting debt due by him to the plaintiff. Upon a plea of the statute of limitations, the burden is thrown upon the plaintiff, either of proving an express promise made by the defendant within three years, or an acknowledgment that the debt still subsists, and that acknowledgment is evidence, from which a new promise can be inferred, *Heyling v. Hastings,* Ld. Ray, 421, or a new promise (467) is implied by law, or a new debt created. *Bryan v. Horseman,* 4 East, 599. It is sufficient if the jury find the fact of an acknowledgment, without finding a new promise by the defendant, for the law infers the promise. Neither is it necessary that the promise should be made to the plaintiff; it is sufficient if made to a third person to take the case out of the statute. *Halliday v. Ward,* 3 Camp., 32; *Mountstephen v. Brooke,* 5 Eng. C. L. Rep., 245. If evidence be given by plaintiff to prove the existence of the debt *aliunde,* then it seems that any expressions of the defendant which tend to show that it has not been paid may be left to the jury, but if such evidence be not given by the plaintiff, a mere admission by the defendant that a debt claimed has not been paid, will not be sufficient, unless accompanied with the further admission that the debt once existed. *Rowcroft v. Lomas,* 4 M. & S., 457. The request of the defendant's testator to Mr. McLeod to make out the list of credits, for which he had no receipts, preparatory to a settlement with the plaintiff, necessarily amounts to an admission that the latter had a debt against him, to which these credits were to be applied; and if any other debt existed, to which those credits were to be applied, except the one now claimed by the plaintiff, the proof of that

fact lays upon the defendant. *Baillie v. Inchiquin,* 1 Esp. Rep., 435; *Frost v. Bengough,* 8 Eng. C. L. Rep., 318. I think that the declarations of the defendant's testator amounted to an admission that he owed the plaintiff a subsisting debt, and that the law raises upon this admission a promise to pay it, and as this took place within three years of the commencement of the action, that it is not barred by the statute.

The next objection is that the judge refused to strike out all the evidence given by the plaintiff respecting the testimony of the deceased witness, because it was proved on the part of the defendant that material parts of the testimony had been forgotten by the plaintiff's witness. If a witness who has been examined in a cause dies, and upon a subsequent trial between the same parties his testimony becomes material, his evidence may be proved by any one who heard it. *Mayor of Doncuster v. Day,* 3 Taun., 262. The witness who offered to prove the testimony of the deceased should have been present during the whole (468) examination and be able to state substantially the testimony then given. No one can be expected to narrate *in hæc verba* what a witness deposed to on a former occasion, and the law does not require impossibilities. But the witness must be able to give the substance of the testimony, not its effect, or the impression which it made upon his mind. He should be able to narrate substantially the facts and circumstances which were then deposed to, as the witness would have repeated them had he been alive and been examined again. The witness offered by the plaintiff thought he could relate all that the deceased swore to on the former trial, that made him admissible, and the testimony of another person, who swore that there were facts which the first witness omitted, was to be left to the jury to weaken the effect of the evidence given by the latter. In other words, it went to his credit not to his competency, and the judge was right in refusing to strike the testimony out of the cause. The judge in the court below allowed the plaintiff to enter the judgment for four per cent additional interest from the time the judgment was rendered in the county court. He did this because he thought the appeal was for delay. This was a question solely for his discretion, and although I think he erred, yet we have no power to revise his judgment. I think the judgment should be affirmed.

PER CURIAM. Judgment reversed.

Cited: Bright v. Sugg, 15 N. C., 494; *McLin v. McNamara,* 22 N. C., 84; *Jones v. Ward,* 48 N. C., 25; *Wright v. Stowe,* 49 N. C., 519; *S. v. Pierce,* 91 N. C., 611.

THE STATE v. RANDAL McDONALD ET AL.

1. A search warrant can be granted only to seize stolen goods, and when one recited that A. had enticed the negroes of B. to leave him, and that he was harboring them, and commanded the officer to seize them: *It was held* that the justice had no authority to issue it, and that it did not justify the officer.

2. An officer cannot decide whether a warrant is issued properly, but he must, at his peril, determine whether he who issued it had jurisdiction of the matter.

THE defendants were indicted for a forcible trespass in entering the dwelling-house of one Philip Brooks and carrying away several (469) slaves. On the last circuit at MOORE, before his Honor, *Daniel, J.*, the jury returned the following special verdict:

"That Randal McDonald, one of the defendants, was a constable of Moore County on 29 August, 1831; that on that day D. M., another of the defendants, gave information upon oath of the facts stated in the warrant hereinafter set forth, to W. D., a justice of the peace for the county aforesaid, who thereupon issued the same in the words and figures following: To any lawful officer, etc., whereas complaint has been made on oath before me, etc., by D. M., that a certain Philip Brooks, of, etc., has tempted and persuaded his negroes, etc., to leave him, the said D. M., and now has the same concealed in his possession for the purpose of harboring the same, or conveying them out of the State. These are therefore to command you, etc., to search the possessions of the said P. B. and take the said negroes, if they are found, together with the said Brooks, before me or some other, etc.; that the said warrant was delivered to the said Randal McDonald to be executed, who thereupon, accompanied by the other defendants, who were summoned by the constable to aid in the execution of it, proceeded to the farm of the said P. B., and the defendants then, in execution of the warrant, took into their possession some of the negroes above mentioned, who were laboring upon the farm of the said P. B. and in his service; that the defendants afterwards proceeded to the dwelling-house of the said P. B., and after the constable had demanded admittance into the house, and had been refused, with force and violence broke open the door thereof, and took into their possession others of the negroes above-mentioned, who were then in the house, and carried them away. The jury further find that the said D. M. was entitled to the services of the above-mentioned negroes, and that they were enticed and persuaded by the said P. B. to leave his possessions, but that the said P. B. in good faith claimed to be the lawful owner of them, and that he acquired possession in asser-

tion of his supposed title, and that the said negroes came to his house before daylight on the morning of the said 29 April, 1831. The jury being ignorant, etc. Upon this verdict his Honor gave judgment for the defendants, and Mr. Solicitor Troy appealed. (470)

Attorney-General for State.
No counsel on other side.

DANIEL, J., after stating the verdict as above, proceeded: Since hearing the arguments here, and examining the authorities cited, I am satisfied that the judgment I gave in the court below was erroneous.

The question now to be determined is, whether the defendant McDonald, who was a constable, and the other defendants who were summoned by him to aid him, can justify under the warrant mentioned in the case.

At common law a lawful warrant from a justice who has jurisdiction of the cause, justifies the officer who executes it, though it be irregularly issued, but it is otherwise when the justice who issues the warrant has not jurisdiction of the cause. 1 Chitty C. L., 69, Hawk P. C. Bk., 2, ch. 13, sec. 10; Com. Dig. Imprisonment, 8, 9. Warrants to search for stolen goods are authorized by the principles of the common law. Without them, says Lord Hale, felons would frequently escape detection. 2 Hale, 113. A search warrant in this State is to be granted only where a larceny is charged to have been committed. It is not to be granted without oath made before the justice that a felony has been committed, and that the party complaining has probable cause to suspect that the stolen goods are in such a place, and he should show his reasons for the suspicion. 2 Hale, 113, 150 Chitty Crim. Law, 65. The warrant then should be directed to a constable or public officer, and not to a private person. It is fit that the party complaining should be present, and assisting, because he will be able to identify the property which he has lost. 1 Hale, 150.

The justice who issued the warrant in this case had jurisdiction to issue a warrant to search for stolen goods, and whether the facts set forth in the affidavit of the applicant for the warrant con- (471) stituted a larceny of the goods was for his determination. If he had issued a warrant, which professed to be an authority for the officer to search some particular place for stolen property, then the officer would have been justified in acting under such a warrant, although in truth and fact no larceny had been committed. The justice is to judge and determine upon the questions of law, arising from the facts disclosed in the affidavit of the person making the application. The con-

stable being a ministerial officer, must execute the warrant, and cannot decide whether it should have been issued on such an affidavit or not. I mean that the officer must execute, if the case was one which appeared by the warrant to be professedly within the jurisdiction of the justice. But it seems clear that a constable cannot justify an arrest, by force of a warrant from a justice, which expressly appears on the face of it, to be for an offense of which he has no jurisdiction. 2 Hawk P. C., 130; *Shergold v. Holloway,* Strange, 1002. The offense set forth on the face of this warrant expressly appears to be of a description which a justice could not issue a search warrant to remedy. The offense charged against the defendant in the warrant is that he "tempted and persuaded his negroes, Tempy, etc., to leave him, the said Daniel McNeill." The offense was not a larceny; it was only made a misdemeanor by the Act of 1821. Tay. Rev., ch. 1120. The justice did not intend, neither did his warrant profess, to have been issued to search for stolen property. In issuing such a warrant he exceeded his jurisdiction, therefore it was void, and the officer was bound to know that it was void, and would be no justification to him if he executed it. The officer is not bound to know whether a warrant which, upon its face, was professedly within the jurisdiction of a justice, had been issued regularly or not. But if from what is stated on the face of the warrant it appear that the justice has exceeded his jurisdiction, the officer is bound to know that such a warrant is void, and will be no justification for his acting under it; and if he executes it, he does so at his peril. The judgment in the Superior Court must be reversed.

(472) PER CURIAM. Judgment reversed.

Cited: S. v. Mann, 27 N. C., 47; *Welch v. Scott, ibid.,* 76; *Cohoon v. Speed,* 47 N. C., 135; *S. v. Ferguson,* 67 N. C., 221.

THE STATE v. WILLIE CLEMONS.

The Act of 1794 (Rev., ch. 406), to prevent owners of slaves from hiring to them their time, does not subject the master to an indictment, the remedy being against the slave alone.

THE defendant was convicted on the following indictment:

"The jurors for the State, upon their oath, present that Willie Clemons, late of, etc., on, etc., with force and arms at, etc., unlawfully did permit his slave by the name of March to hire his own time to

divers persons, to the jurors aforesaid unknown, contrary to the act of the General Assembly, in such case made and provided, and against, etc."

The defendant was convicted, and judgment for the State being rendered by *Daniel, J.*, on the last circuit at BEAUFORT, he appealed.

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

RUFFIN, J. This is an indictment against the master, and it is founded on a misconception of the Act of 1794. The statute directs the grand jury to make "presentment of any slave." The great purpose of the act is to prevent and abate the nuisance, as was said in *Woodman's case*. The proceeding is therefore primarily against that, and the notice to the master is to give him an opportunity, as in other cases, of defending his slave and not defending himself personally. It is true the owner is indirectly punished by having his slave hired out for one year. But that is only the incidental consequence of the judgment. The personal liability of the master is for the penalty of twenty pounds. The act does not make him guilty of a misdemeanor nor subject him to indictment.

The judgment of the Superior Court is therefore reversed, and the judgment arrested.

PER CURIAM. Judgment reversed.

Cited: S. v. Clarissa, 27 N. C., 223.

(473)

THE STATE v. SOLOMON ROPER.

1. Where a shawl was dropped in an exhibition room, and picked up by the defendant, placed in a conspicuous situation, and afterwards appropriated to his own use: *It was held* that he was not guilty of larceny.
2. Can larceny be committed of goods that are lost? *Qu.*

THE defendant was indicted for petit larceny in stealing a shawl. Upon the trial before *Swain, J.*, at IREDELL, on the last circuit, many witnesses were examined, and the result of all the testimony was as follows: An exhibition of wild animals took place, in which the animals were placed on the inside of a circular tent, a chain was stretched so as to form a ring within the tent, the animals were between the chain and the sides of the tent, and the spectators admitted into the ring formed

by the chain; that upon one occasion, when the ring was full of spectators, the defendant was leaning upon the chain looking at the animals; that some person exclaimed, *"There is a shawl";* that the defendant picked it up from the ground near his feet, shook some rubbish from it, threw it across the chain, and leaned his body over it; that in a few minutes he took the shawl and secreted it under his coat, left the ring, went to his horse and put the shawl under a sheepskin, which served as a cover for his saddle. The owner of the shawl deposed that she did not know when she lost it; that she continued in the ring until she was told that the defendant had it, and that then, for the first time, she ascertained that it was lost.

For the defendant it was insisted, (1) that the shawl being lost, and the owner unknown, it was not the subject of larceny; (2) that unless the first taking was with a felonious intent, the defendant was not guilty of larceny, and of course must be acquitted, unless the jury believed that he intended to steal the shawl at the instant he picked it up and hung it on the chain.

His Honor charged the jury that the guilt of the defendant did not depend upon the felonious intent having entered his mind at the
(474) instant he discovered the shawl. That if at the time he took the shawl from the chain he knew to whom it belonged, but took it with the intention of stealing it, he was guilty, although he might have picked it up with an intention of preventing it from being injured. And further, that if at the time the defendant took the shawl from the chain the owner was within the ring, and within the sound of his, the defendant's voice, although she was unknown to him, if he took it with an intent to appropriate it to his own use, he was guilty of larceny. The defendant was convicted and appealed.

Gaston for defendant.
Attorney-General contra.

DANIEL, J. In a late work of great learning and research, larceny is defined to be "the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property without the consent of the owner." (2 East P. C., ch. 16, sec. 2, p. 553.) But there must be an actual taking or severance of the goods from the possession of the owner, on the ground that larceny includes a trespass; if, therefore, there be no trespass in taking the goods, there can be no felony in carrying them away. (2 East P. C., 554; 1 Hawk P. C., ch. 33, sec. 1; 1 Russell, 95.) It is a general maxim that the ownership of goods draws after it the possession.

But if the owner or person whose property is alleged to be stolen be not actually or constructively in possession of it, the taking cannot amount to larceny. Therefore, if goods were lost by the owner and found by another, and the taking was *bona fide,* and not under a mere pretense of finding, and the finder afterwards feloniously determines to appropriate them to his own use, it will not be larceny. But if the finder, at the time of taking the goods, knew who was the owner, the subsequent appropriation in a secret manner, or his denial of any knowledge of the goods, or any other acts showing a felonious intent, would be evidence to be left to the jury, from which they might infer that the original (475) taking was with a felonious intent. (East P. C., 664; *Lear's case,* 215, n.; 1 Hale, 506; 2 *ibid.,* 507; *Rex v. Walters,* 3 Burns Justice, 180.) If money, by mistake, is sent with a bureau to be repaired, and it is taken with a felonious intent, it will be a larceny, because the money was not lost. (*Cartwright v. Green,* 8 Ves., 405.) In the case before the Court, it appears that the shawl was lost, and that the defendant took it up, after a bystander had said, *"There is a shawl";* that he shook the dirt off it, and then laid it on the chain, and leaned over it for a few moments, and then secreted it in his bosom, and left the ring. The shawl had not been placed by the owner where the defendant took it from, but it had accidentally fallen there, and was lost. The defendant, when he took it up in a public manner, was ignorant of the owner; he continued thus ignorant until some time after he left the ring. The circumstances of his not calling out and proclaiming to the crowd that he had found a shawl does not alter the case; neither does the circumstance of his laying the shawl on the chain, and leaving it for a short space of time, and returning and then taking it from the chain and carrying it away with a felonious intent. The owner had lost it; she had not regained possession of it, nor did the defendant know the owner. The taking from that place (I mean the chain) was not a taking from the possession of the owner. I think, from the time the defendant took the shawl from the ground until he delivered it to the owner, it was in his possession. As the original taking of the lost goods was without a felonious intent, the subsequent felonious asportation will not make the defendant guilty of larceny. I think a new trial should be granted.

HENDERSON, C. J. This case does not present the question whether lost property is the object of larceny, for the original taking of the shawl from the ground was not attended by any circumstance from which a felonious intent could be inferred; it was not done *clam et secrete,* but *openly* and *publicly.* The fraudulent and secret conversion (476) of it afterwards to the defendant's use could not impress a larcenous character on the original taking; at most, it would only be evi-

dence of the original intent, and the open and public manner in which the act was done precludes all idea of a larcenous intent, and shows, too plainly to be controverted, that such intent, if it ever existed, was an afterthought. So far, therefore, as the secret and fraudulent withdrawal of the shawl from the chain gave a larcenous character to the first taking, it is to be entirely discarded from the case, as even those that think that lost goods are the object of larceny admit that the original taking must be with a larcenous intent; that no *after-thought,* or after-act, can convert it into a felony. For my own part, thinking that there must be an *unlawful* taking from the possession of the owner to constitute a larceny, I am of opinion that lost goods are not the object of larceny. Some of my reasons, given in a much more forcible manner than I can give them, are to be found in *Judge Spencer's* opinion in the case of the *People v. Anderson,* 14 John., 294. Runaway slaves do not fall within the description of lost property, for from their nature, being intelligent beings, they are incapable of becoming estrays in the legal or technical meaning of the word, which class of lost property they, in their runaway state, more closely resemble than any other. Possibly this exception to the general rule may be founded in policy, as no vigilance of the owner can prevent their abseonding, and the law attaches some degree of negligence to the owner in *losing* his property, and therefore does not protect it, when lost, by *high* penal sanctions. If the removal of the shawl from the chain was a continuous act of the possession acquired by the defendant when he took it from the ground, and not a distinct and independent acquisition, it was entirely immaterial whether he then knew who was the owner, or whether she was then within the ring, or within the sound of his voice; in neither case could it be a larceny. To constitute it a larceny, there must have been (477) an *abandonment* of the possession by the finder before it was taken from the chain. Whether there had been such an abandonment should have been submitted to the jury. It is true it is a question of law, to be decided by the court, but the facts upon which it arises are to be ascertained, either by the admission of the party upon record or by the verdict of the jury. The facts, then, are in no way ascertained, for abandonment is an intent of the mind, evidenced, it is true, by an overt act, from which, as in the present case, the jury alone is competent to make the inference. There is no fact stated upon the record from which the law can draw the inference. The *quo animo* with which the defendant placed the shawl on the chain, standing by or near to it, is for the jury and not for the court, and I would not add a single instance of an inference of fact to be drawn by the law, and very clearly this is not a case where any judge would do so. The act is too equivocal and subject to too many shades of difference to infer from it any rule of

intent applicable to all cases, and each case must be left to be decided according to its own particular and minute circumstances; that is, according to the *actual* intent in each particular case. I am of opinion, therefore, that the defendant is entitled to a new trial, because the intention with which he placed the shawl on the chain was not submitted to the jury, and without an abandonment of possession by him, no matter under what circumstances he afterwards withdrew it from the chain; no matter whether he knew who was the owner or not, or whether she was or was not within the sound of his voice, such withdrawal was not a larceny. Should the jury be of opinion that there had been an *abandonment* of the possession, I am not prepared to say that the article was then placed in a situation to be the object of larceny. Did such abandonment by hanging it on the chain, if it was an abandonment, restore the possession to the owner, *without her knowledge?* And did it merely cease to be lost property? Or did it only restore it to its *situation* when it was first discovered on the ground?

These are questions I leave to future discussion, if the occasion should require it, for, as I said before, I am not prepared to (478) decide them.

PER CURIAM. Judgment reversed.

Cited: *S. v. Williams,* 31 N. C., 146; *S. v. Farrow,* 61 N. C., 163; *S. v. Deal,* 64 N. C., 275.

THE STATE v. JOHN PATRICK ET AL.

1. A remedial statute is to be construed so as to advance the intention of the Legislature, as where by the Act of 1815 (Rev., ch. 197), incorporating the Cape Fear Navigation Company, no power to collect tolls is expressly given, unless by that section which confers on the company all the powers which the eighth section of the Act of 1812 (Rev., ch. 848) gives to the Roanoke Navigation Company, and that section authorizes the latter company to demand their tolls at the falls of Roanoke: *It was held* that the Cape Fear Navigation Company might demand theirs at any place on that river.

2. A power of distress given a navigation company upon a refusal to pay their tolls is constitutional, the action of *replevin* being a remedy for its abuse.

THIS was an indictment for an assault upon one Connor, tried before *Norwood, J.,* at CUMBERLAND, on the last spring circuit.

On the trial the defendants justified the assault upon the ground that Connor had illegally attempted to take from their possession a steamboat. The prosecutor, on the other hand, justified the seizure as the

collector of tolls due the Cape Fear Navigation Company. The jury found a special verdict to the substance following:

That the Cape Fear Navigation Company had appointed a place on the Cape Fear River where tolls were to be paid, and had authorized the prosecutor to collect them; that on the day before the assault was committed the steamboat *John Walker* arrived in the river opposite to the place where the tolls were to be paid, when she was hailed by the prosecutor, who demanded of the defendants, who were on board, the tolls due on her cargo, which was refused, and the boat kept under way against the orders of the prosecutor, up the river to a wharf, about three hundred yards above the place where the tolls were demanded, where her cargo was usually discharged; that on the next day, before the
(479) cargo was discharged, the prosecutor having again demanded the tolls, which were refused, attempted to go on board and seize the boat, which was resisted by the defendants, when the assault was committed. Four points were presented by the verdict, and in case either of them were decided negatively, then the jury found the defendants not guilty. The points were:

1. Whether that part of the act of incorporation which authorized a seizure of the boat was constitutional.

2. Whether the demands for the toll could be made on the Cape Fear River.

3. Could the seizure be made on the day after the demand was made?

4. When the boat had arrived at her place of discharge?

His Honor, being of opinion that the section of the act of incorporation which authorized the seizure was unconstitutional, discharged the defendants, and *Mr. Solicitor Troy* appealed.

Attorney-General and Gaston for the State.
Badger and W. H. Haywood for defendants.

DANIEL, J. The first question arising out of the special verdict is whether the power granted by the charter incorporating the com-
(480) pany, and giving the right to seize the boat is constitutional. We think it is constitutional. The Act of 1815, entitled "An act concerning the navigation of Cape Fear River," changed the name of the "Deep and Haw River Navigation Company" to that of the "Cape Fear Navigation Company," and gave it all the rights, privileges, and franchises granted to the "Roanoke Navigation Company," by certain sections of the Act of 1812, entitled "An act for improving the navigation of Roanoke River, from the town of Halifax to the place where the Virginia line intersects the same." The Act of 1815 adopts those sections, and among them is the eighth, and declares that they shall con-

stitute and form a part of the charter of the "Deep and Haw River Navigation Company." By the eighth section of the Act of 1812, the Roanoke Company are authorized to demand and receive at some convenient place or places, at or near the Falls of Roanoke, for all commodities transported through any canal, lock, or sluice, made by the said company, tolls according to the following table and rates, etc." After setting out the table of rates, the section proceeds, "That if any person or persons shall refuse to pay the tolls at the time of offering to pass the places appointed for their collection, and previous to passing the same, the collectors, respectively, may lawfully refuse passage to the person or persons so refusing; and if any vessel shall pass without paying the toll, then the said collectors, respectively, may lawfully seize such boat or vessel and sell the same at auction for ready money, after advertising the sale at least ten days," the money to be first applied to the payment of the tolls and expenses of seizure and sale, and the balance to the owner of the boat. This remedy is given in addition to the personal liability of the owner of the boat, to secure the tolls to the company.

The prosecutor, who was collector of the tolls due the Cape Fear Navigation Company, went, in the manner stated in the case, on board of the boat to seize and sell her, according to the directions of the eighth section of the Act of 1812, when he was assaulted by the defendants and driven from the boat, on the ground, as they say, that he (481) had no legal or constitutional authority to seize and sell the same to pay the tolls, and therefore they made the assault in a necessary defense of their own property, which was about to be forcibly and illegally taken from them, and that they had no opportunity or right, by the Act of 1812, to contest the demands of the prosecutor in any court of justice. We think the law gave the defendants a right to have the claims of the prosecutor judicially investigated; they might, on the distress being made, have replevied the property, and had the proceedings returned into a court of record, and had its judgment on the rights of the parties. The writ of replevin is a common-law proceeding, and may be used in this State, and is a remedy incident to every species of distress without process. It has frequently been used in this as well as in all the states of the Confederacy, which have adopted the common law. The objection, therefore, that the property of the defendants might have been taken from them, under the eighth section of the Act of 1812, without giving them an opportunity to defend themselves against any unjust claims for tolls, is not tenable, and will not avail in this case.

The second ground of defense is that the demand of tolls could not be made on the Cape Fear River. By the second section of the Act of 1815, the rights, "privileges, and franchises of the Deep and Haw River Navigation Company shall extend from the sources of the several rivers and

creeks running into the Cape Fear River, to the mouth of said river." By the seventh section of the same act it is declared thus: "And whereas, by improving the navigation of the Cape Fear River, and the various streams that run into the said river, the company will become entitled to tolls at *different places,* but of unequal amount: *Be it enacted,* that the stockholders, or a majority of them, in a general meeting, shall have power to regulate and determine the tolls which shall be paid, and from time to time alter the said tolls."

It appears from this section that the company are to be paid tolls; we perceive that there is a navigation company formed; it has (482) rights, privileges, and franchises from the sources of the Cape Fear River to its mouth; the company have a right to regulate and determine by their by-laws what tolls shall be paid, so as not to exceed fifteen per cent on their capital stock. This toll is directed by law to be paid. But where are they to be paid? ask the defendants. They call our attention to the eighth section of the Act of 1812, adopted by the Act of 1815, and say if the collector, under this section, sets up a right to seize our vessel, we have a right to say that his demand of toll must be made according to the very same section, "at some convenient place or places, at or near the Falls of Roanoke," and if a seizure is made before a demand of the tolls shall have been made, at some convenient place near the Falls of Roanoke, it will be illegal, and we have a right to resist it. If by adhering to the letter of the Act of 1815, with its adopted sections of the Act of 1812, we disappoint the intention of the Legislature, and defeat the object comtemplated, we may be sure that our construction is improper, but if we place a construction on the act which will carry the intention of the makers into execution, and effectuate the object contemplated, we may be equally sure our construction is right. What was the intention of the Legislature? This is gathered from reading the whole act, as we gather the intention of parties to a deed or other written contract by reading the whole of it. I presume the Legislature intended by the act of incorporation to enable the company to raise a capital by means of which the river Cape Fear should be made navigable, and that the owners of the capital should be rewarded for the use of it by taking at different "convenient places" tolls on vessels and commodities passing along the river, so that the tolls should not exceed fifteen per cent. If the tolls for passing up and down the Cape Fear River were to be demanded at a place near the Falls of Roanoke River (a distance of nearly one hundred and fifty miles from the Cape Fear River), before they could be legally collected, the object and intention of the Legislature in passing the Act of 1815 would (483) be frustrated. If we were to hold that the demand was to be made at or near the Falls of Roanoke, and upon a refusal to pay

there, that the vessel and goods should be distrained on the Cape Fear River, such a construction would at once be tantamount to a repeal of the law. This act of Assembly, not being a penal act, but passed for a purpose highly beneficial to the country, must receive a fair and liberal interpretation. The tolls by the act are to be paid, and I think they may be demanded at some reasonable and convenient place near to the place for the use of which they became due. Would it not be monstrous to tell the debtors for tolls on the Cape Fear River that they must go to the collector's office at or near the Falls of Roanoke to pay them? I think it equally absurd to require the company to demand its debts due as tolls from the captains of boats for using the Cape Fear River at the Falls of the Roanoke before a distress for them could be resorted to.

Where there is a saving clause in a statute, which is repugnant to the purview or enacting part of it, it is void. (1 Co., 47; Plowd., 564; 14 Petersdorffs Ab., 719, 720.)

The intention is to be collected from the express words of the particular clauses in each statute, and where the object and intention is clear, it is not to be defeated by the letter or wording of any particular clause, for every statute is to be expounded, not according to the letter, but the intention of the makers of it. (*Curlew v. Chanklin,* 3 M. and S., 510; 14 Petersdorffs Ab., 716.)

It does not appear from the case that there is any such place as the Falls of Cape Fear River; the place of collection of the tolls due must be at some reasonable and convenient place, and it does not appear that the place mentioned in the case is an improper one.

If the demand of toll could be made at the place mentioned in the case, which I think it might, the next question made by the verdict is, "Could the seizure be made on the day succeeding the day of the demand?" The answer to the question, appears to me, ought to be in the affirmative. I see no reason why the boat should not be distrained the next day for a debt which she owed for tolls the day before, which had been then demanded and refused to be paid. (484)

The next question is, "Could the seizure be made after the boat had arrived at the wharf?" By the eighth section of the Act of 1812, the collector may refuse the passage of a boat upon an omission to pay the tolls demanded, but the section proceeds, that "if any vessel *shall pass* without paying the tolls, then the said collectors, respectively, may lawfully seize such boat or vessel." I think it a very convenient time and place for the collector to distrain when the boat came to the wharf; certainly it would be as legal to arrest the boat there as in the stream. After reviewing the whole case, I think the judgment of the Superior Court should be reversed, and judgment entered for the State.

PER CURIAM. Judgment reversed.

(485)

THE STATE v. ISAAC D. LIPSEY.

1. Where a judge in his charge did not repeat all the testimony, but only such parts of it as he thought would aid the jury in finding their verdict: *It was held* (DANIEL, J., *dissentiente*), to be correct. And per RUFFIN, J., and HENDERSON, C. J., that part of the Act of 1796 (Rev., ch. 452) directing the conduct of judges in charging juries, which forbids a judge to express his opinion as to the weight of evidence, introduces a new rule. The other part directing him to state to the jury the facts given in evidence is declaratory that his discretion in that respect was not affected by the prohibitory clause.

2. Where, in the court below, a new trial was moved for because the judge expressed an opinion to the jury on the weight of evidence, and the case certified with the record stated no instance in which this had been done, but that the judge was unconscious of having done so: *It was held* that this Court, having no power to ascertain the fact, could not reverse the judgment.

3. Where, on a trial for murder, the prisoner proved his general peaceable demeanor, and the judge informed the jury that evidence of character was entitled to but little weight where facts were positively sworn to, and it is doubtful from the case whether this instruction referred to the fact of killing or the amount of provocation, a new trial was granted. RUFFIN, J., *dissentiente.*

(*State v. Morris*, 10 N. C., 388, approved and extended by HENDERSON, C. J., and RUFFIN, J., and disapproved by DANIEL, J.)

(*State v. Merrill*, 13 N. C., 268, approved by HENDERSON, C. J.)

THIS was an indictment for murder, tried before *Strange, J.,* at DUPLIN, on the last circuit. The prisoner was convicted, and a motion for a new trial being overruled, and judgment of death pronounced, he appealed. The case certified with the record stated "the following to be the grounds upon which the motion was made:

"1. That the jury had found against the weight of testimony, only two witnesses testifying on the part of the State to a case of murder, and those two being contradicted in material parts of their testimony by three witnesses on the part of the State, and by all of the defendant's witnesses who deposed to the same part of the transaction.

"2. That the jury returned their verdict without due reflection and proper deliberation, in a case where there was confessedly a mass of conflicting testimony.

(486) "3. That the judge expressed his opinion to the jury on the facts of the case, or gave them so strong an intimation of it that it was impossible for them to mistake it.

"4. That the judge, in reciting and commenting on the testimony, dwelt at length and directed the attention of the jury particularly to the

parts of it which operated against the prisoner, and omitted to recapitulate or comment on those operating in his favor.

"5. That the judge erred in instructing the jury that the character of the prisoner was only to be considered by them, where there was a doubt as to the fact of killing, and was entitled to but little weight where that fact was positively sworn to.

"6. That in a case of conflicting and contradictory testimony, the jury should have been instructed that if, upon weighing the whole testimony, they had a rational doubt of the guilt of the prisoner, they ought to acquit him.

"7. That the judge misapprehended and misrecited to the jury a part of the testimony of Hardy Newton, a most material witness for the prisoner.

"The two first grounds were overruled, the judge approved the verdict, which was held to be sustained by the evidence. The third ground was overruled because the presiding judge was unconscious of having said anything in his charge to the jury which invaded their exclusive right, as judges of fact. As to the fourth objection, the presiding judge did not recapitulate all, or nearly all, that was said by the witnesses on either side, but selected from the mass of testimony such facts as occurred to him to be important to a just determination of the cause; and did not refuse to mention anything which was suggested by the prisoner's counsel, but, on the contrary, did mention several facts, and commented upon them, at the suggestion of the prisoner's counsel, which he would not otherwise have deemed necessary to call to the attention of the jury. On the fifth point, the jury were instructed that the character of the prisoner was only to be considered by them where his guilt was doubtful, and was entitled to but little weight where facts were (487) positively sworn to. On the sixth point, the jury were instructed that, unless the prisoner's guilt was so fully proven as to leave no doubt in their minds, they ought to acquit. On the seventh, the presiding judge is not aware of having misapprehended or mistaken the testimony of Hardy Newton, or any other witness in the cause, except one, which, upon the intimation of the counsel for the prisoner, was corrected at the time, and if any others had been pointed out, they would have been corrected. It is further stated, at the request of the counsel for the prisoner, that the testimony of the first and most material witness for the State was fully recapitulated by the judge, and that of the other witness was not recapitulated fully, but such parts thereof presented as in the opinion of the judge tended to support or contradict the principal witness for the State; that if the principal witness for the State and others were believed, it was a case of murder, and if the statement of some other witnesses was believed, it was a case of manslaughter. And

the jury were distinctly informed that in this conflict of testimony they must determine what they believed to be the real facts of the case. Many witnesses were offered on both sides, none of whom were implicated as unworthy, from their characters, of credit. And the judge went fully into the rules by which the credit of witnesses was to be tested by the jury. It was in proof by all the witnesses who testified to the fact, and they were many, that the prisoner's demeanor had hitherto through life been perfectly pacific."

Mordecai for the prisoner.
(488) *Attorney-General contra.*

DANIEL, J. The third reason for a new trial is, that the judge expressed his opinion to the jury on the facts of the case, or gave them so strong an intimation of it that it was impossible for them to mistake it. On this point, the judge states in the case that he was unconscious of having said anything in his charge which invaded the exclusive right of the jury to determine the facts. No particular expressions of this opinion by the judge were pointed out by the counsel in the court below, and inserted in the draft of the reasons for a new trial, and thereby to get them incorporated in the case, or have a statement by the judge of what he did say to the jury. I cannot, therefore, discover that
(489) he did express his opinion to the jury on the facts of the case, and, on this ground, the motion must be overruled.

The fourth reason is that the judge, in reciting and commenting on the testimony, dwelt at length and directed the attention of the jury particularly to those parts of it which operated against the prisoner, and omitted to recapitulate or comment on those operating in his favor. The case states that "the presiding judge did not recapitulate all, or near all, that was said by the witnesses on either side, but selected from the mass of testimony such parts as occurred to him to be important to a just determination of the cause, and did not refuse to mention anything which was suggested by the prisoner's counsel as important, but did mention several facts, and comment on them, at the suggestion of the prisoner's counsel." The Act of 1796 (Rev., ch. 452), forbids a judge giving in his charge to a petit jury an opinion whether a fact is fully or sufficiently proved. But it declares it to be his duty to state in a full and correct manner the facts given in evidence, and to declare and explain the law arising thereon. In the case of *The State v. Morris* it was determined that a judge is not bound to notice the facts at all, but if he states any part of them, it becomes his duty to state the whole evidence; not in *hæc verba,* but as substantially as his recollection of them, aided by his notes, will enable him. The judge, in the present

case, says, "he selected from the mass of testimony such parts as appeared to him important to a just determination of the cause." If the residue of the evidence was material to the issue (if not material, it should not have been admitted), he was bound by the enactment of the Legislature to state in a full and correct manner the whole of it; otherwise, what he did state might have a tendency to obliterate from the minds of the jury what was omitted, or leave an impression upon them that in his opinion the evidence not recapitulated was worth nothing, and did not deserve consideration. I think the judge erred in not stating the evidence fully, and therefore, for this reason, a new trial should be granted.

The fifth reason for a new trial is that the judge erred in in- (490) structing the jury that the character of the accused was only to be considered by them where there was a doubt of the fact of killing, and was entitled to but little weight where the fact was positively sworn to. The case states "the jury were instructed that the character of the accused was only to be considered by them where his guilt was doubtful, and was entitled to but little weight where facts were positively sworn to"; again the case states "that if the principal witness for the State, together with others, was believed, it was a case of murder; and if the statement of some other witnesses was believed, it was a case of manslaughter; and the jury were distinctly informed that in this conflict of testimony they must determine what they believed to be the real facts of the case; many witnesses were offered on both sides, none of whom were impeached as witnesses unworthy, from their characters, of credit." "It was in proof by all the witnesses who spoke of the fact, and they were many, that the prisoner's demeanor had hitherto through life been perfectly pacific." In criminal prosecutions the prisoner is always permitted to call witnesses to speak of his general character, for it is general character alone that can afford any test of good conduct, or raise a presumption that one who had maintained a fair reputation down to a certain period would not then begin to act an unworthy part (2 Russell, 703; 1 McNally, 322). If the judge, in his remarks relative to character, meant to apply them to a hypothetical case, or to state an abstract proposition, then he was right, for when the charge in the indictment is positively proven by credible witnesses, the general good character of the prisoner will have no weight in his favor; he must be convicted. But it appears there were a class of witnesses in this case who deposed to facts which, if found by a special verdict, would have authorized the court to pronounce the homicide to be a case of murder, and another class who deposed to facts which, if thus found, would only have authorized the court to adjudge the prisoner guilty of manslaughter. In this conflict of testimony, the general good or peaceable character of the pris-

(491) oner would be a powerful auxiliary to support the latter class, by making out the proof of a provocation, to reduce the case to manslaughter. If, in a case of this kind, the judge was to tell the jury that the general good character of the prisoner was entitled to but little weight where the facts were positively sworn to by the witnesses for the State, such a charge would not only be erroneous in point of law, but would be expressing an opinion as to the force and effect such a circumstance should have on the minds of those who were solely entrusted with the power of weighing the evidence, and judging whether it proved the fact of provocation, so as to reduce the homicide to a case of manslaughter. If I was to take the case from the reasons assigned by the counsel of the prisoner, it would be clear the judge erred; but I am to look at the case made up by the court, and in that I am not so well enabled to learn how and to what the expressions excepted to by the prisoner were applied. They were words of supererogation, or they must be a part of the charge, relating to the evidence which bore upon the question of provocation, for that the deadly blow was given by the prisoner was not disputed. The general good or pacific character of the prisoner was proper evidence to be left to the jury, and connected with the other evidence, was proper to enable them to ascertain the *quo animo* with which the act was perpetrated. I am left so much in doubt by the case sent here, whether this portion of the charge related to the fact of killing or to the question whether there was such a provocation given by the deceased as reduced the homicide to manslaughter, that I think it best a new trial should be granted.

HENDERSON, C. J. I shall confine myself to what is called the fifth point on the motion for a new trial, which I shall take from the judge's response to the motion, and not from the allegation of the counsel. The judge asserts that the jury were instructed "that the character of the accused was only to be considered where his guilt was doubtful, and was *entitled to but little weight where the facts were positively* (492) *sworn to.*" Although I am opposed to prescribing rules of faith for the opinions of others, as we know so little of the ground on which our own are formed, that had this been a civil case, I do not know that I should disturb the verdict, as, without a very strained construction, the judge may be understood to have added the latter words as illustrative of the former part of his charge, and it was so understood by the jury. Yet, in a capital case, I cannot act upon bare probabilities, but must give to the words their *most* natural import, and view the latter part, to wit, the following words: "and was entitled to but little weight where the facts were positively sworn to," as a distinct substantive instruction, which from its phraseology it purports to be. If the

judge means by the words *positively sworn to,* clearly and satisfactorily established, he may be right, for character is thrown into the scale as presumptive evidence only, and if the opposing proofs are strong and clear, carrying conviction with them, in such case it is quite evident that presumptions can make but little impression. But if he meant, as the words import, that the presumption arising from the character can have but little weight where the facts are positively sworn to *only;* or *because* the facts are positively sworn to, I think he erred, for the facts may be positively sworn and yet not afford such clear and satisfactory evidence of their existence as not to be shaken by presumptive evidence. This may arise from a variety of causes. The character of the deposing witnesses, their means of knowledge, the manner in which they gave in their evidence, the very nature of the fact deposed to, the negative or positive evidence of opposing witnesses to the same or some other transaction referred to, conflicting with it. And, indeed, a great variety of causes may concur to shake the belief of juries in a fact positively sworn to by one or many witnesses. Yet these of themselves may not be sufficient to overthrow the proofs. The weight of positive testimony yet inclines the scale against the prisoner, or to speak more properly, as character is admissible in criminal cases only, the weights in the opposite scale are not sufficient to raise it from the ground, the character is then thrown into that scale, (493) a rational doubt is raised, and the prisoner therefrom claims an acquittal. Let it not be said that this is an unnatural or an overdrawn picture. The original is of frequent occurrence, and I think I can perceive this case to be of that description. The judge, in his statement, says there was conflicting testimony: on the one side, the testimony of what he calls the main witness, and others, made the homicide to be a case of murder, and some witnesses for the defendant rendered it manslaughter. The peaceable and orderly character, which it was shown the prisoner had ever borne, had, I think, more *"than but little weight,"* particularly as to the provocation, and the circumstances under which the mortal blow was given, for I presume that was the point on which the witnesses differed. Such a character must have considerable influence where there was a doubt whether the blow was given upon little or no provocation, or whether the provocation was great.

These were my views in the case of *S. v. Merril,* 13 N. C., 269, in which I delivered no opinion, but concurred with *Judge Hall* in reversing the judgment. In that case the prisoner's bad character ought not to have prejudiced him, as *he* did not offer his character in evidence, and it was *his* right to offer it or not. Who can say that it did not affect the verdict, that it did not make out a case otherwise defective on the part of the State, or that the State offered it at least as a make-weight.

Could we, who are not permitted to weigh the evidence, say there was sufficient without it? The evidence which convinces the understanding is composed of particles too minute, too subtle, and too fluid to be either counted, weighed, or measured. We have no weights or measures of it even for ourselves, much less have we weights and measures to mete it out to others. The only rule is the *quantum sufficit* to the understanding of him who is to decide. I then thought, and still think, it was the prisoner's right (unless he waived it) *to stand before his jury as* (494) *an ordinary man,* neither *above* nor *below* the common level, and he should not, but by his own consent, be placed otherwise, and that the jury only (and perhaps not even they) could say how much each particle of evidence operated, and affirm that the verdict was unaffected by the bad character of the defendant, improperly given in evidence by the State.

On the other parts of the charge I concur with *Judge Ruffin,* and for the very satisfactory reasons given by him. I think that the judgment should be reversed, and a new trial granted.

RUFFIN, J., *dissentiente:* Although this case goes back to a new trial upon one of the exceptions, yet, as some of the other points are of general consequence, and have received the deliberate consideration of the Court, we feel it a duty to pronounce the opinions formed on the whole case.

The conduct of the judge is impeached upon both branches of the Act of 1796 (Rev., ch. 452).

It is alleged, first, that he violated that statute by not stating in a full and correct manner to the jury all the facts given in evidence.

The case stated in the record contains an admission by the judge that he did not recapitulate all, nor near all, the testimony; that his method of summing up was by reciting fully the testimony of the principal witness for the State, and selecting such parts of the residue of the testimony, both on the part of the State and the prisoner, as he deemed important, and, particularly, such portions of it as in his opinion tended to support or contradict that witness. The case further states that, at the request of the prisoner's counsel, the judge supplied some of the omissions in his charge, as first delivered, by mentioning and commenting on several facts which he had not before thought it material to call to the attention of the jury, and that, although he did not then mention all the testimony, he did not refuse to do as to any part thus requested.

It is contended that the Act of 1796 is susceptible of a construc- (495) tion literal only, and thus construed, that it lays down an imperative and exact rule of duty to be observed in every case.

That this argument is not correct to its whole extent is established by the case referred to at the bar (*The State v. Morris*). That is an

authority that a judge is not bound to charge on the facts, that being a matter left to his discretion. The opinion adds, indeed, that if the judge does charge the jury, he must do it according to the rule laid down in the act. That was not the point of the decision. If it were, it would be conclusive upon us now. And even as an incidental remark falling from *Chief Justice Taylor,* it is entitled to and receives great respect. We do not, however, concur in it, and I am persuaded that had the point come directly into judgment, and thus called for those deliberate reflections of his mature mind, which he always bestowed on those questions upon which the rights of parties were determined, we should now have the advantage of his authority for the conclusion at which we have arrived.

The powers and duties of a judge in giving a charge at the common law, and the aid derived from it by the jury, were fully understood and clearly expressed by the *Chief Justice.* And this duty, both in its performance at all and in the manner of its performance, was felt by him to be discretionary. It depends of necessity, he says, on the circumstances of each case, whether the judge's aid would be of any efficacy. The evidence may be so equally balanced that it would be unsafe for him to interfere, or the case may be so plain and intelligible as to render his interference unnecessary. This necessity appears to us to be an equally good rule for the construction of the act as for the principle adopted at common law. The rule, being founded in necessity, has no limit or restriction, and in its nature can have none. The great reliance, indeed, for truth in the verdict of a jury is on the intelligence, integrity, and independence of the jurors. But while they are deemed competent to that end, experience and the knowledge of mankind produce the conviction that, unused as they are to judicial inquiries, often (496) depending upon artificial reasoning, they are more competent when aided by the more extensive knowledge and more perfect experience of a judge, versed in human affairs, accustomed to consider, discuss, and digest masses of complicated evidence, to separate the material from the immaterial parts, and to combine the former so as to display the full force of each and all its parts. There is but little danger that the complaint now made can be justly urged against a judge—that he did not go fully into the evidence. Not only his usefulness, but his character much depends on it; and it is believed that no judge ever refused, upon the request of the jury, or even that of the party, where the purposes of justice could be in the least promoted by it. But the real point of controversy often and generally depends on a very small portion of the testimony introduced. In the course of a trial, points made upon prolix and complicated documents, or after the most weari-

some examination of witnesses, are abandoned, sometimes expressly, but oftener tacitly, because not sufficiently raised by the proof adduced, or answered by fuller proof on the other side. Counsel themselves, who have industry enough to discover and sagacity to perceive the point really in dispute, do not feel their way through the cause in the dark, laying hold of every intervening object, material and immaterial, but bring that point to the light, establish its character, and press the evidence relevant to it; and in so doing, best serve the interests of the party and the purposes of justice. A burden which the counsel thus takes away from the court and jury, the judge cannot be bound to reassume. To advert to everything that has thus occurred during the trial, though not pressed by the party, though yielded by him, immaterial or absurd, would be a harmful consumption of time, obscure the truth, and confound the minds of the jurors. And it is not possible to lay down any rule, but one of two: either that it must be left to the sound discretion of the judge himself to determine where and on what circumstances he will animadvert, or that he must notice and comment upon *all;* (497) for who else can determine which was material or immaterial?

Everybody who knows anything of trials knows that there are in every trial many details of testimony upon immaterial matters, and much impertinence of interrogatory and answer, which it can serve no purpose to sum up, and which in practice are always disregarded. It is of necessity so.

The act of Assembly was not meant to alter the rule. It professes to be declaratory. It could not mean to declare that to be existing law which all the world knew to be the contrary. The first clause does abridge an ancient duty of the judge to advise the jury upon the weight of evidence, and to restrain him from expressing an opinion that a fact is sufficiently proved. But the charge was not confined to the weight of evidence, nor was that its most material part. In custom and utility it extended to all the other important aids before mentioned, which the jury could receive from the judge. This the Legislature knew and properly appreciated. The second clause was then added, not to create a new and substantive duty on the part of the judge, but solely to prevent such a construction of the first as should in any wise interfere, either in the way of enlarging or curtailing any of those functions usually exercised, or those duties usually performed, other than saying whether the proof of a fact was full or sufficient. Hence, this clause begins with "but," that is, notwithstanding the previous enactment, and continues, "it is hereby *declared to be,*" that is, declared that it is and shall continue to be "the duty of the judge to state in a full and correct manner the facts given in evidence." If taken to be an enacting statute, enjoining posi-

tively a duty in the terms used, it is absurd, for it requires an impossibility. In giving a full and correct statement of the facts in evidence, there can, in this sense, be neither a more nor a less. In the whole circle of duties to the performance of which a judge is called there is not perhaps one to the due performance of which greater abilities and a happy temperament and elocution are more necessary than this of summing up to a jury. It often calls for the highest efforts of the most vigorous natural faculties, improved by education, informed (498) in professional and general learning, practiced in forensic debate and judicial investigation. It cannot be meant that the least man should fully and correctly perform that to which only the greatest is equal. Coupling in the same sentence this duty with that of declaring the law arising upon the facts does not put them both on the same footing in this respect. The subjects are distinct and of different natures. This last provision is strong to show that it was not intended to introduce a new rule in either respect, but to leave the obligations to sift and collate the evidence, and to decide the law, as they were before. It was before, and always, the duty of the court to declare the law, and it needed no legislative authority to make it so. That in its nature is a definite thing. It may be done in direct terms by anybody, and an error is subject to easy detection and ready correction by a superior tribunal. The act continues the duty as it then was. So with the other. It might be held otherwise if it were possible to lay down any certain rule upon the subject. But the ground of the discretion at common law being indefinite, is that the duty is undefinable. The same reason controls the construction of the statute, even if it be considered as being an enacting one. The charge to the jury, therefore, must be left, as it always has been, to the discretion of the judge—the occasion, to his conscience; the manner, to his ability. The only exception is such a plain departure from impartiality in collating the evidence as of itself to convey to the jury an impression of the judge's opinion as clearly as an explicit declaration would. If it were possible to make such a case appear in its true light in the record brought here, this Court would be bound to set aside the verdict.

This the majority of the Court thinks to be the plain sense of the act, and should not have deemed this reading of it necessary, but for the *dictum* in *S. v. Morris,* and the zeal manifested at the bar in the argument of this case, and a difference of opinion amongst ourselves, which led us to suppose that possibly we might before have misapprehended it. We are now satisfied that there is no medium between (499) the rule of the common law and one which shall seal the mouth of the judge altogether; a measure which will probably be thought of when an appeal shall be allowed from the Superior to the county court, and

which would imply a reproach, unmerited, I believe, as it is derogatory, to the intelligence and the virtue of our fellow-citizens who sit as jurors in the Superior Courts.

It is alleged next that the judge violated the same statute by expressing his opinion upon the facts. If this be true, the verdict must be set aside.

The case stated in the record does not set forth the words of the judge which are complained of as being an expression of opinion, nor does it set forth that in fact the judge did express an opinion. On the contrary, the presiding judge overruled the motion for a new trial because he was unconscious of having thus invaded the exclusive right of the jury. It does not then appear affirmatively that the judge did err, as is alleged.

But it is insisted that the case is so stated in this respect as to preclude this Court from examining into it, and therefore there must be a new trial. The argument is, that the judge cannot say in general terms that he did not express an opinion upon the facts, but must set forth the evidence and his comments on it; much less can he say he is not conscious of having done so, for the rights of the party depend upon the fact, and not upon the motives of the judge, or his inadequate perception of his duties or his errors.

It will be perceived that this argument is not directed against the error which was alleged in the Superior Court to have been there committed by the judge, and from which this appeal is taken. It is not an error committed in deciding the cause, but in the method of stating that decision. Errors of the former kind are those which must be supposed an appellate tribunal is constituted primarily to correct. And it seems to the Court that our jurisdiction is necessarily confined to them. For we have no means but the statement of the record of ascertaining (500) whether the case is truly or untruly, perfectly or imperfectly, set out, and what we find there, we must say happened, and cannot say that anything else did. It is argued that as the judge states the case, or, at all events, admits it, if drawn up by counsel, or such parts of it, to be inserted in the record as he chooses, that the case stated must purport to be a full statement, else the judge will have it in his power to keep all his errors from the revision of this Court. This consequence is true, but the question is not what the judge of the Superior Court ought of his own motion to do, nor what provisions it would be wise in the Legislature to adopt to compel him to do the party right, but what jurisdiction is by law conferred on this Court—whether we can go out of the record for any purpose? Suppose a judge of the Superior Court, instead of stating the case partially, should refuse to state any, and refuse to allow an appeal, or the prayer for one, to be entered of record,

could this Court ascertain those facts and give a remedy by reversing the judgment? Certainly not.

The objection assumes that it is the province of the judge to put the exceptions down in writing, and set forth the facts on which it is founded, and not of the party who alleges the exception. I say this is assumed, because certainly he whose duty it is to draw up the case cannot complain that it is imperfect. The duty of the judge to admit the truth to be stated, as far as the party thinks the same to be material to him, is doubtless both an official and moral one. But that the labor of preparing it does by law or in reason devolve on him is more than doubted. The only statute upon the subject is that of 1799 (Rev., ch. 520). That authorizes the judge to make up a *case,* or to cause one to be made by the counsel in court, under the direction of the judge. No appeal is given by the act. The only questions brought up were those on which the judge or judges doubted, and they were sent to a conference for the satisfaction of the judge himself. He, therefore, as best knowing his own mind, might well be expected to put down the question which he wished resolved, and that required neither much time nor labor, and consequently could not interrupt his other duties. (501) But even then he might impose the task on the counsel of the parties. In practice, a difficulty has seldom, if ever, arisen. The judge or the counsel has drawn out the case according to their mutual convenience. Finding the system, as thus in use, to operate beneficially, the necessity did not occur to the Legislature, when passing the Acts of 1810 and 1818, allowing appeals, for providing by whom the party's exception should be written, or giving any means for compelling the judge to put the matter thus written, if true, upon the record. In the absence of legislative provisions, this Court is obliged to decide upon reasons of propriety and general convenience, and place the duty on those to whom those reasons point. As a matter of personal labor, the party, and not the judge, ought to perform it. But the public interests constitute a preponderating argument, which can leave no doubt. Appeals are now, as they ought to be, matters of right. Imposing it on the judge as his business to prepare the cases will put it in the power of one perverse suitor or capricious counsel to arrest all other business and engross the judge during the term in drawing up reports in perhaps the first or second cause called for trial. If it then be also true that the record, as drawn up by the judge, must set out the whole case, the evils would be intolerable, for although every exception might not make that necessary, yet in every case it would be in the power of the party to make the exception now under consideration, that the judge had expressed an opinion, and then the judge must write out all the evidence, and all his charge, or state falsely that he had set them down when he had not. The judge

would be harassed at the will of the person against whom he had decided, and this only at the poor risk of paying costs in this Court, other suitors would be indefinitely delayed, and the records would be unnecessarily but unavoidably prolix. It is enough to require the judge to admit the party's statement to record, if true, and to reject it if not true. And the party cannot object to the statement, because it must be taken in
(502) this Court to be his own—prepared by him, or for him. Even if it appear to be the personal act of the judge, it must be presumed to have been satisfactory to the party (under the provisions of our law), or that he would have framed another, which, if true, the judge would have adopted. And in this case that presumption seems to be consistent with the fact, for the objection in the Superior Court was made in terms as general as possible, without any specification, and has been sufficiently met by a denial in terms as general.

There are perhaps considerations applicable more directly to the question as to the responsibility of the judge. For, admitting that the duty be on the judge, and that he perform it imperfectly, the question remains, Can this Court reverse the judgment when no error appears, and this much only is seen, namely, that for all that does appear, there may have been an error in the decision? The appeals first known in this State at common law were those on which a trial *de novo* was to be had. The first verdict was abrogated, the merits stood indifferent; the appellate Court was to try and determine the cause upon the whole case as there made, without reference to what it was in the court below. Appeals had so long and familiarly been regarded in this light that it is not surprising that upon appeals being first allowed to the Supreme Court, the difference was not attentively considered. Early after this Court was organized new trials were ordered because the case was not stated, or not sufficiently stated. But in others, as in *Frazier v. Felton,* 3 Hawks, 231, the contrary was held. And more recently, in several cases, an appeal has been treated as being in the nature of a writ of error, operating as a *supersedeas* to the judgment below, and the case in the nature of a bill of exceptions. The verdict and, in some respects, the judgment are not annulled. If erroneous, the latter has to be reversed here, and the former set aside. The merits do not stand indifferent. It is a fair presumption that the instructions in matter of law were right. And every presumption is made in favor at least of a verdict, as determining the merits. These presumptions must stand until over-
(503) thrown by facts distinctly appearing. In no country, I believe, in the world is it otherwise, where causes are not reheard, but barely reviewed; certainly not in any proceeding with the assistance of a jury to determine facts. It is no answer to this reasoning to say that the party will be without remedy. This, by appeal, must be also proved

to be the proper remedy. It may be that there is redress for the party against the judge. That is not for us to determine at present. Certainly, too, the judge is responsible in his character, and obnoxious to punishment as a public offender, who refuses to insert the facts on the record, or does it untruly, to the prejuduice of the party. The Legislature seems to have thought these responsibilities a sufficient guarantee of fidelity, and as far as our experience has extended, the confidence was not misplaced. If they prove insufficient, the Legislature alone can supply others. If, indeed, our present statutes had given to this Court other means of getting the facts placed before it than by a statement *in the record,* the Court could and would have founded a remedy on the statute, as has been done under that of 13 Ed. I., ch. 31, by a rule and a *mandamus* to the judge to certify the facts. But our law requires the case to be *of record in the court below,* and the judge cannot alter that after his term. But were such proceedings in our power, this Court could not reverse the judgment before the judge did certify, nor after that, upon facts contrary to those certified, or because the certificate did not appear to be full. If the inferior court were to withhold its decisions altogether from revision, the evil would hardly be greater than that of the superior traveling out of the record for a ground of decision. The discretion of such a tribunal, with no means for informing its discretion, would be intolerable tyranny; no verdicts would stand, nor any litigation be terminated.

Being confined to the statements in the record, the Court must say that it does not appear that the judge did give an opinion on the facts, and, therefore, that there is no error in this respect.

Thus far, the majority of the Court concurs in this opinion, and the reasons given for it. It remains now to consider another exception, on which there is a difference of opinion, and I have the (504) misfortune to stand alone here.

Upon the effect of the evidence of character, I think the error of the judge, if any, was on the side of the prisoner. I take the judge to mean, and that he must have been understood to mean, by the words "positively sworn to," sworn to directly by witnesses believed by the jury. In that case I think evidence of character has *no* weight. I conceive character is a circumstance which cannot repel the positive and affirmative statement of credible witnesses. In other words, that the character of the person cannot change or give color to the character of his acts, when these last are satisfactorily established.

The judge is more than supported, in terms, by respectable writers on evidence and crimes. Mr. Archbold (Crim. Pl., 73) lays it down that "evidence of character can be of avail only in doubtful cases." Mr. Starkie (Evidence, Pt. I., 35) says that "a presumption from good

character is too remote to weigh against evidence which is in itself satisfactory, and ought never to have any weight, except in doubtful cases." These writers only follow those who have treated the subject before them, and seem fully to sustain the judge in adopting the rule, at least to the extent he did. I think he is equally sustained by principle.

Although there is no certain test of truth to each individual but his own senses, yet when one is called on to determine, upon human testimony, how the truth is as to a particular fact, not the object of his own senses, he must proceed on that testimony as if it were the certain means of determining the inquiry. He must do so, not only because by the universal sense of mankind (founded on a general experience that a disinterested person will, under the sanction of an oath, ordinarily depose to the truth), such testimony has been held to be means adequate to the ascertainment of truth, but because it is the only means in (505) our power. If the interests of society would allow the determination to be avoided, it would be different. Each person might then claim the evidence of his senses before he pronounced his opinion affirmatively that the fact was the one way or the other. But our obligations to each other will not suffer us to evade a decision. The tribunals must act, and they are obliged to decide without that highest evidence, their senses. In coming to a decision, they must assume that the means by which the truth may be best attained by them—by which alone they have it in their power to attain it—are means positively sure and certain of determining the question of fact. When, therefore, the testimony of a witness is affirmative, positive, and direct, and it is not contradicted by the testimony of another witness, or the credit of the first witness is not impeached, there is no opening for doubt, unless we say, not only that there is no absolute certainty, but that we must act, or are at liberty to act, as if everything were absolutely uncertain—which is inadmissible. There is in such a case nothing, in the sense of weighing the testimony, to be left to the tribunal—whether judge or jury—to whom it is addressed, for there is no other relation touching the same fact with which to compare it; nothing to be put in the other scale. It must be taken as entirely true, because *the law* says, in admitting it, that such testimony under the sanction of an oath is a *sufficient* test of truth, and if it be uncontradicted, it is a perfect test, being the only one.

When a collateral circumstance is offered to shake a conclusion thus established, it is manifest that it is irrelevant to that end, if it be not inconsistent with the conclusion; or, at least, if it stand indifferent, admitting the circumstance to exist, whether the conclusion be true or false.

Such a circumstance I conceive general character to be. I admit it to be absurd to say that an honest man has committed a larceny. But the question is, whether such honesty is proved by a previous character for honesty, against direct proof of the very fact. It seems to me that it has no tendency to repel the positive testimony, unless (506) we say that it is as probable that one man with a good character will commit the crime of perjury, and is committing it, as that another man of like character did commit the crime deposed to. This may be true in the abstract. But it is a principle upon which we cannot act. We are obliged to proceed on the contrary principle, or let all offenses go unpunished, and all wrongs unredressed. Of all circumstances, that of character is the least satisfactory. It is extremely difficult to say, in the first place, what the character is. The estimation in which one is held by the world at large is not, like particular facts, capable of being certainly known. Still more difficult is it, if not impossible, to dive so deeply into the human heart, upon the most intimate acquaintance, throughout the longest period of intercourse, as to afford a reasonable certainty of gaining such a knowledge of the temper and disposition as would produce more than a faint inference, that there was not an original taint in principle, or such a latent infirmity of temper as might be surprised by sudden, though slight provocation, or such a secret love of wicked lucre as could not withstand temptation and opportunity. Men constantly do things which astonish those who knew them before; nay, the thought of which never, under different circumstances, entered their hearts at the very imagination of which they would at other times have been shocked. Such is our experience of the frailty of our nature. There can be nothing then in the evidence of the character of the accused, to *contradict* or *discredit* clear and direct testimony. It may be said then, that it is altogether irrelevant and ought to be rejected by the court as incompetent. So it ought, upon principle, in a clear case of affirmative evidence, for the presumption founded on it is remote in every case, and absolutely inadmissible against evidence otherwise plain and satisfactory. It always has been held so, as evidence of guilt. This could not be, if it were substantive evidence to establish the crime, but it would be admissible, as is every other circumstance tending to the conclusion. Neither in a clear case of positive testimony does it tend to establish innocence. The humanity of the law admits it (507) on behalf of the prisoner. But it cannot be laid down to a jury that they have a right to make what use they choose of it. It would be wrong to be governed by it in any case in concluding guilt; it is therefore never admitted for that purpose. It is equally inconclusive on the other side in general; but in favor of life and character it is admitted as a slight circumstance to operate where even slight circumstances will

avail—in a case of doubt and uncertainty. It cannot, in itself, make a case of doubt and uncertainty. Therefore, as I said, it is in principle incompetent, except in a doubtful case, and the court ought to reject it in every other. And so the court would as upon other questions of competency, if the court could determine the question upon which its relevancy depends, namely, the doubts entertained by the jury upon the substantive evidence to the fact. It is an anomalous case, and the evil arising from the admission of evidence when it ought not to be admitted, is sought to be corrected by advice to the jury, as to the state of facts in which that circumstance may be properly used. That, I think, was done here. The evidence was proper here, because there was a conflict in the testimony to the fact. If, upon that, the jury doubted, they could call in aid of the prisoner his good character as contributing to the presumption, that he did not perpetrate a murder. If they had no doubts as to which of the witnesses swore to the truth, as between themselves, character could not raise them. And that, it seems to me, is what the judge said.

I am, therefore, opposed to a new trial upon either of the grounds.

PER CURIAM. Judgment reversed.

Cited: S. v. Haney, 19 N. C., 399; *S. v. Barfield,* 30 N. C., 356; *Aston v. Craigmiles,* 70 N. C., 318; *Boon v. Murphy,* 108 N. C., 191; *Simmons v. Davenport,* 140 N. C., 411; *S. v. Hart,* 186 N. C., 586.

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(508)

WILLIAM WOODHOUSE ET AL. v. ABNER WILLIAMS ET AL.

1. Where, to debt on a bond for the payment of purchase money, the defendant pleaded performance, and offered in proof of his plea an acknowledgment of payment and release in a bill of sale: *It was held* that as he had not pleaded the release specially, it was mere evidence, and the plaintiff was not estopped to prove the contrary.
2. He who relies upon an estoppel must plead it specially, or the jury may find the truth.
3. But if from any cause the estoppel cannot be pleaded, the jury are bound by it.

(*Brocket v. Foscue,* 8 N. C., 64, explained and then approved.)

THIS was an action of debt upon a bond executed by the defendants, whereby they bound themselves to pay the plaintiffs $2,000, with a condition reciting that there was a treaty for the purchase of a vessel by the defendant Williams from the plaintiffs, and proceeding: "Now, if

in addition to the sum of money which the said Abner Williams hath already paid, he shall pay to the plaintiffs such further sum as the repairs they, the plaintiffs, have put upon said vessel since she hath been under repair, and shall receive from the plaintiff all such rigging, etc., as they may have prepared for said vessel, at a fair cash price, then the obligation to be void," etc.

This bond was dated 25 April, 1828.

Plea—performance of the condition.

On the trial, at CAMDEN, before *Swain, J.*, on the last spring circuit, the defendant in support of his plea offered a bill of sale for the same vessel as that mentioned in the bond, dated 29 April, 1828, whereby the plaintiffs sold the vessel to the defendant Williams, "for and in consideration of the sum of $2,000, to them in hand truly paid, at and before the sealing and delivery of these presents by" the defendant Williams, "the receipt whereof we do hereby acknowledge, and therewith are fully satisfied and contented," etc. To rebut this the plaintiffs offered a letter of Williams' to them, dated 30 April, 1828, authorizing them to deliver the vessel to the bearer, and promising to pay their bills for sails, etc., according to the contract.

For the defendants it was objected that this letter could not (509) be received to contradict the estoppel upon the plaintiffs, contained in the deed for the vessel, but his Honor permitted the evidence to go to the jury, who returned a verdict for the plaintiffs, and the defendants appealed.

No counsel for plaintiffs.
Iredell for defendants.

HENDERSON, C. J. An estoppel is the conclusive ascertainment of a fact by the parties, so that it no longer can be controverted between them. It is not solely the result of the act of the parties themselves, but may be by adjudication of a court appointed to try the fact. After an estoppel has thus arisen, if the existence of the fact, contrary to it, is averred by one of the parties, the other may show it by pleading if it be not already apparent upon the record, and pray judgment if it shall be controverted. But if the party seeking the benefit of the estoppel will not rely on it, but will answer to the fact, and again put it in issue, the estoppel, when offered in evidence to the jury, loses its conclusive character, becomes mere evidence, and like all other evidence, may be repelled by opposite proof, and the jury may, upon the whole evidence, find the truth. This is the rule only in cases where the party relying upon it has had an opportunity of pleading it as an estoppel, and does not do so, but takes issue on the fact. Where he has no opportunity of

pleading it is an estoppel, as in actions of ejectment and others, where the pleadings are general, there the estoppel retains its conclusive character, and the jury must find according to it. This is common learning and common sense; by departing from it we are involved in many difficulties and absurdities. The most competent evidence is to be rejected, because the other party has first got before the jury something of a higher and more conclusive character, but which the jury have not passed upon, even as to its genuineness, and if this lesser evidence be received, the jury are to be told first to pass upon the higher
(510) evidence, and if they find it to be genuine, then entirely to disregard the lesser; but if they should find it not to be genuine, then to turn their attention to this lesser evidence; and here we have it gravely contended, although the defendant has himself averred the fact, that he has *paid* the money for which this suit is brought, and has not relied on the acknowledgment of payment contained in the bill of sale, that the plaintiff shall not be permitted to read to the jury the defendant's own letter, requesting him to deliver to his agent the articles purchased, for the price of which this suit is brought, and promising that he will pay him for them. That this letter, coming from the defendant, and therefore competent—upon the subject in dispute, and therefore relevant—shall have no weight with the jury in determining a fact which they are sworn to decide according to the evidence. If the defendant had chosen, perhaps he might have concluded the plaintiff from alleging that the debt was not paid, but he shall not avoid the risk of pleading the release as an estoppel, and yet have all the advantages of its conclusive character before the jury. It is like pleading and demurring at the same time to the whole declaration.

We are aware that this decision is at variance with the principles declared in the case of *Brocket v. Foscue,* as applied in that case, but with the principles themselves this decision does not interfere. There, by an oversight, we did not take this view of their application, and we are indebted to our brother *Daniel* for it in this case. We hope by adhering to the law in its simplicity to avoid the perplexities so often encountered on the trial of causes, and that we shall seldom hear of objections to evidence the most competent and relevant because the jury have something before them already, but which they have not yet decided on, of a more conclusive character. If the lesser evidence has been first offered, telling the jury to pass first on the higher evidence, before they even look at the lower, necessarily, in the deliberations of a jury, leaves them to find one fact, before they turn their attention to another, and
(511) frequently one fact decides the cause, and if often so dependent on another that it is unnecessary to examine the latter before the former is disposed of. But it is rather novel for the jury to have before

them, at the same time, evidence of such different grades, that they must examine and dispose of one class before they can look at another. This is requiring of them more than they can do; necessarily they must take the whole evidence, upon one fact, into consideration; they cannot, if they would, do otherwise.

We wish again to repeat that we do not consider this decision at all at variance with the case of *Brocket v. Foscue.* It affects only the application of the principles; in the state of the pleadings there we think it was decided by the wrong forum. If the conclusiveness of the receipt and acquittance in the deed had been relied on, it should have been pleaded as an estoppel; this not having been done, but issue joined on the fact of payment, the deed was only evidence of that fact, and the jury should not have been concluded by it.

PER CURIAM. Judgment affirmed.

Cited: Wilkins v. Suttles, 114 N. C., 556; *Bullard v. Ins. Co.,* 189 N. C., 37.

HENRY SMITH v. JAMES MORGAN.

1. A guaranty of "a note and judgment against A. and B." is satisfied by a joint note of both, upon which judgment has been entered against one.
2. An undertaking by the guarantee to assist in the collection of a debt he is bound for does not justify laches in the party guaranteed.

ASSUMPSIT, upon the following guaranty:

"I, James Morgan, assign the note and judgment against Henry and John Wilkes, of the town and county of Halifax, which was made payable to me for the sum of $3,350, dated 15 February, 1823, to Henry Smith, and I, the said James Morgan, do guarantee unto the said Smith that the aforesaid note and judgment is good. 4 March, 1823."

Plea—*non assumpsit.* On the trial, before *Daniel, J.,* at NORTHAMPTON, on the last spring circuit, the case was as follows: At the time of making the guaranty, Henry Wilkes had confessed a (512) judgment to the defendant, but John Wilkes was not a party to it; John Wilkes was then perfectly solvent, and had a suit been brought against him then, or at any time before his death, in December, 1823, the debt mentioned in the guaranty would have been paid. Had an execution then issued to the counties of Bertie and Martin, against Henry Wilkes, it would have been satisfied, as he had property in those counties. Suit was not brought against John Wilkes until eleven

months after the qualification of his administrator; it was brought in the name of the defendant, but whether it was prosecuted by him or the plaintiff did not appear. Within ten days after the date of the guaranty the attorney who obtained the judgment against Henry Wilkes asked the plaintiff if he wished process to be issued against John Wilkes, but was informed that his, the plaintiff's own attorney, would attend to the business for him.

The agent of the plaintiff deposed that, learning there was no probability of having an execution in the hands of the sheriff of Halifax satisfied out of the property of Henry Wilkes, he had given the defendant notice of it, and that the plaintiff looked to him upon the guaranty; that upon receiving this notice, the defendant promised to attend to the collection of the debt, and threatened to make the money out of the sheriff, who he said had subjected himself. Whether this notice and conversation took place in November, 1823, or February, 1824, did not distinctly appear.

For the plaintiff it was contended that the defendant, in his guaranty, had stipulated that there was a judgment against Henry and John Wilkes, and that as it turned out that there was a judgment against Henry only, this was not a compliance with its terms. But the judge ruled otherwise. The counsel for the plaintiff, in his address to the jury, contended that if the conversation deposed to by the plaintiff's agent took place in November, 1823, before the plaintiff had been guilty of neglect in collecting the debt, it amounted, in law, to an agree-
(513) ment on the part of the defendant to attend to the collection of the debt himself, and discharged the plaintiff from all obligation to take any further steps for that purpose; that if it took place in February, 1824, the counsel admitted the plaintiff then to have been in default, but contended that if the defendant, at that time, was fully acquainted with all the facts touching the state of the debt, and the steps taken for its collection, his undertaking amounted to a waiver of any advantage by reason of the laches of the plaintiff; and for this, the counsel referred the jury to his Honor.

The judge charged the jury that if the defendant had promised to pay the debt with a full knowledge of the circumstances, he was bound by that promise, and could not object to the neglect of the plaintiff; but if he only agreed to assist the plaintiff in the collection of the debt, the latter was not thereby discharged from his obligation to use reasonable diligence in prosecuting the claim against the principal debtors, and that if he failed in using such diligence, he could not recover in this action.

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

Gaston and Badger for plaintiff.
Hogg contra.

HENDERSON, C. J. The matter assigned as the first breach, if there be anything in it, goes to vacate and annul the contract, and is not within the stipulation of the guaranty that the debt was good. But the words "note and judgment" are a mere description of the thing sold, and no part of the guaranty, and are not false in fact, for there could not be a note and judgment against both Henry and John Wilkes for the same debt at the same time, and especially if the note on which the judgment is obtained precede the judgment, for in such case the note is merged in the judgment. The description imports just such a thing as there is, viz., in a joint note taken against both, reduced to a judgment against one. But if it was a false description, and thereby the contract was vacated, and even if a count annulling a contract could be joined with one enforcing the same contract, yet the plaintiff, by (514) receiving the thing with a full knowledge of what it was, and retaining it so long, admits that it was in substance the thing purchased, and waives his right of vacating the agreement.

As little ground is there to support the objection taken to the charge of the judge below, although it is admitted that the charge did not meet the view of the plaintiff's counsel, and although, if the evidence made the point, either by positive proof or by an inference which the jury could draw, the judge should have declared the law upon it. I allude to the reference made by the counsel of the plaintiff, in his address to the jury, to the judge, as a matter of law, for him to decide, that if the conversation (with the agent) took place before Smith had been guilty of neglect, it amounted in law to an agreement on the part of Morgan to attend to the collection of the debt out of Wilkes, and discharged Smith from taking further steps in relation thereto. I do not know that I catch the counsel's idea, but take it either way, it cannot benefit the plaintiff. In the first place, there is nothing like the sole undertaking of its collection by Morgan. This engagement amounted to nothing more than that he would give his aid, and, by consequence, did not discharge Smith. Now, if the collection of the debt was of such a nature that two could not act in it, that the aid of one necessarily prevented the other from acting at all, if there be such a state of things, then, if Morgan undertook to act, or even to aid, and if this necessarily prevented Smith from acting, surely the agreement by Morgan to attend to, to aid, or assist in the collection of the debt necessarily discharged Smith—discharged him, I say, if necessarily the aid in attending to the debt prevented, that is, rendered it impossible for Smith to act in the matter. But I cannot see how it rendered it impracticable for Smith to act also. As a question

of law, I should therefore say that if, before Smith had been negligent, Morgan had promised to attend to the collection of the debt, that (515) Smith was not thereby discharged, unless Morgan, by words, discharged him; his agreement to attend to it did not have that operation, unless he had taken upon himself the exclusive collection of it. As to the express promise, the judge ruled that a promise of any kind, either expressed or implied, would bind Morgan, if made with a full knowledge that Smith had by his negligence discharged him. The charge was certainly as favorable to the plaintiff as the law warranted; nor do I perceive any impropriety in the judge's pointing out the difference between a promise to pay and a promise to assist in the collection of the debt. Taking the conversation to be either before Smith's neglect or after, then he can claim nothing from it, either in law or fact. If before, it did not amount to anything like a discharge to Smith from further diligence; if after, there was nothing in it like a promise; so far from it that if the jury had found for the plaintiff on that ground, the judge ought to have set aside the verdict as being against the evidence. The fact is, the sum is large, and the plaintiff when he brought this suit calculated on the chances. It is a most groundless claim.

PER CURIAM. Judgment affirmed.

Cited: *Ashford v. Robinson,* 30 N. C., 117.

RHODA WALLER v. JOHN MILLS.

1. Where a father, in pursuance of a family arrangement, conveyed part of his property to a daughter, and the residue to a son, upon condition the latter should pay his debts, the son is bound as a party to the deed to the daughter, although it is void as to the creditors of the father; and if the son takes an assignment of a judgment against the father, and buys the property of the daughter under it, he acquires no title.
2. In an action against a constable for wrongfully seizing goods of A., under an execution against B., the latter is not a competent witness to prove title to them in himself.
3. A settlement whereby the property of a father is vested in a son, and the latter charged with the debts of the former, is void as to creditors.
4. Neither party to a fraudulent conveyance can be aided by a court of justice.
5. Points which were not made on the trial, and if taken, might then have been disposed of, will not be examined on appeal.

TROVER, for a slave. Plea—not guilty. And on the trial at LENOIR, before *Martin, J.,* on the last spring circuit, the case was as follows:

John Waller, the father of the plaintiff, in November, 1826, conveyed the slaves in dispute to the plaintiff by a bill of sale, reciting a consideration of $260; at that time Waller, the father, owed debts (516) to the amount of $1,700; besides the slaves conveyed to the plaintiff, he then owned land worth $750, and other slaves worth more than $900, and some debts due him, and chattel property of value.

At the date of the bill of sale to the plaintiff, he conveyed a small slave, not one of the two above mentioned, to another daughter, to whom, and to the plaintiff, he also conveyed his land; at the same time he conveyed all the rest of his property to a son-in-law, one Bradham, upon condition that he, Bradham, would pay all his debts. Some time in the year 1827 Bradham, having in his possession judgments and executions in favor of several different persons against Waller, the father, placed them in the hands of a constable, and directed him to satisfy them out of the property which had belonged to Waller. Under these executions, and another in favor of one Jones, the slave in dispute, together with the one conveyed to the sister of the plaintiff, and also several horses, etc., were advertised for sale. At the sale, but before it commenced, Bradham purchased Jones' judgment and execution, and thus becoming entitled to receive all the money to be raised, he instructed the officer to sell for *specie* only, and purchased all the property sold at an under value, and took a bill of sale for the slaves conveyed to his sisters-in-law. These slaves were left by Bradham in the custody of the plaintiff and her sister until the month of April, 1828, when they were seized by the defendant, by Bradham's directions, under an execution against the latter.

The defendant offered Bradham as a witness, but he was rejected as incompetent. He then offered to prove, by common reputation, that Waller, the father, who died in 1831, was insolvent at that time, but his Honor rejected the evidence as irrelevant.

The judge charged the jury that although the bill of sale to the defendant might be fraudulent and void as to the creditors of her father, yet that it was valid to pass the title of the slave in dispute to the plaintiff against all other persons; that they should inquire (517) whether the title of the plaintiff was ever divested by a sale legally made, at the instance of a creditor of the father; that as to the sale under the judgments and executions which had been assigned to Bradham, they ought to ascertain whether those executions were for debts of the father, which Bradham was bound to pay; if they were, and that sale was made for the benefit of Bradham, and for the purpose of fraudulently defeating, for his profit, the title of the plaintiff, they ought to find for her.

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

J. H. Bryan and Mordecai for plaintiff.
Gaston contra.

RUFFIN, J. The case of *Bland v. Ansley,* 2 Bos. and Pul. New Reps., 331, establishes the incompetency of Bradham upon a clear principle. The slave had been seized by the defendant under a *fi. fa.* as the goods of the witness, and he is offered to prove property in himself. He has a direct interest in the event, for, if successful, he pays his own judgment debt. And our statute, which makes the defendant in execution liable to the purchaser if the latter be evicted by a paramount claimant, renders the reason for excluding the witness stronger here than it is in England.

It is unnecessary to discuss the questions whether the conveyance to the plaintiff was fraudulent in law, and whether, by consequence, the evidence of the father's insolvency in 1831 ought not to have been received. The judge assumed that the deed was void as against (518) creditors generally; but, admitting it to be so, he held, and we think properly, that it was valid as against Bradham, supposing the debt for which the negro was sold to have been then contracted. At the sale under execution Bradham owned that debt, and if it existed when the deed was made to the plaintiff, he was, by his contract with old Waller, to pay it. For the purposes of this controversy, that debt must be considered as satisfied. Bradham cannot hold the estates conveyed to him and yet go against the residue of the father's property for the very money which constituted the consideration of the conveyance to himself. The only question remaining was one of fact, whether the debt to Jones existed at the time of the contract between Waller and Bradham, and so was one of those to be paid by the latter. That was left to the jury, and found affirmatively. If so found without sufficient evidence, the Superior Court might have granted a new trial. We cannot. But it is said there was no evidence, and therefore the court erred in leaving it to the jury at all. If such were the fact, it would be error in a case where the *onus probandi* was on the side of the plaintiff. But we cannot take that to be the fact. It is not to be presumed that the judge would go out of the case made, and deal in mere abstract propositions. The record does not contain any objection in the Superior Court on this ground, and it was therefore unnecessary to state the evidence relative to it.

I have no doubt, however, that the debt existed in November, 1826, and think it extremely probable that all the deeds then made to Bradham and the daughters were fraudulent against Jones and Waller's other creditors. It was a family arrangement in the nature of a voluntary settlement of all, or nearly all, the father's property; and this, I say,

notwithstanding the price agreed to be paid by Bradham for what was then conveyed to him. If that price were the full value, yet his embarrassments, which plainly appear, show his responsibility to be an inadequate security to the creditors. A debtor cannot substitute for the solid value of his property the colorable provisions of an insolvent's engagement to pay the debts. The presumption is very (519) strong that the object of the sale under execution was to supply this defect, and that in this object all the parties concurred. The debt was in the name of Jones, who had a right to treat the deeds as nullities; *specie* was demanded to keep off other bidders; Bradham purchased, but, instead of taking the property, left it still with his sisters-in-law. It can hardly be doubted that Bradham and the plaintiff then understood each other, and that the design was, not to deprive her of the negro, but to confirm her title—she trusting to Bradham not to use his legal title to her prejudice. Bradham seems to have kept his faith until April of the next year, and then he and the present defendant commenced that course of conduct which produced the present action. If such was the true state of facts, and Bradham was the owner of Jones' judgment, it is manifest that the last sale was but a continuation of the first fraud, and a court of justice can, in such case, help neither party. The law leaves them where they place themselves. Had the defense been put on that point, and the jury drawn the same inferences of fact from the circumstances which I do, the plaintiff would have been barred, because she participated throughout in each act of fraud. But the jury was not required to make such inferences, nor the court asked to instruct them upon their effect, if drawn. This Court cannot, therefore, act on this part of the case, because we cannot say how it was, or might have been, answered, by evidence from the other side, if it had been relied on. Indeed, the point would not have been adverted to at all in this opinion, except for the wish not to be misunderstood. This construction of the acts of the parties seems to us to be so obvious as to induce the belief that it will be deemed the natural one by all other persons, and if no notice had been taken of it, it might be supposed the Court meant to approve and support such dealings. But the decision steers clear of the point, which is not open to this Court.

PER CURIAM. Judgment affirmed.

Cited: Quinn v. Rippey, 39 N. C., 187.

(520)

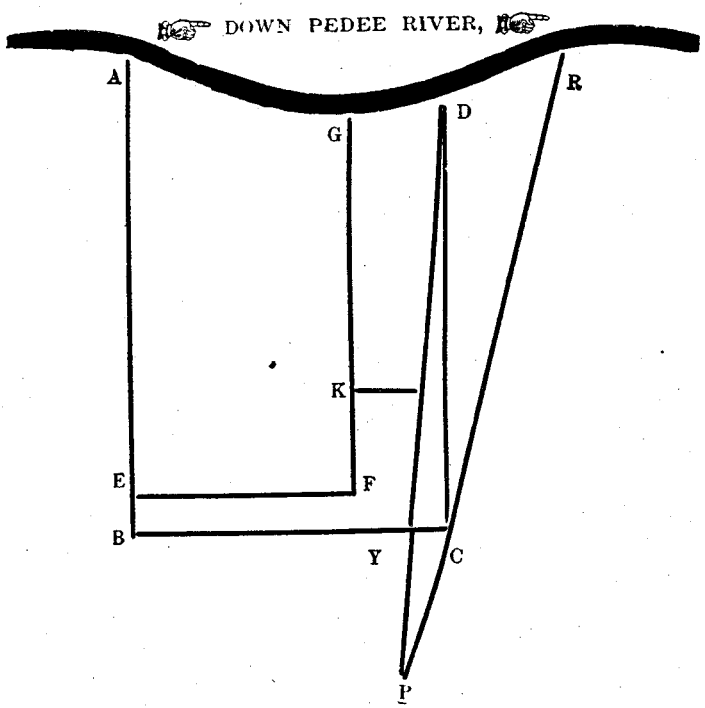
DEN EX DEM. DENNIS INGRAM v. THOMAS COLSON ET AL.

1. Where the parties to a deed intended to convey only land, to which the vendor had title, and also that it should set out the boundaries of the grant to him, but the land was especially surveyed and corners marked, and the deed made according to the survey, its courses are not to be controlled by those of the grant, and if it covers more land than the grant, it is color of title as to the excess.

2. A question of boundary discussed by HENDERSON, C. J.

EJECTMENT, tried on the last circuit, at ANSON, before *Daniel, J.*

The plaintiff claimed under a grant to his lessor, made in the year 1823, which covered the land in dispute. The boundaries of this grant are represented in the diagram by the lines D, I, K, G.



(521) The defendants contended that the land covered by the grant to Ingram was included within the boundaries of a grant to one John Clarke, dated in 1746, and that if it was not, that they, and those under whom they claimed, had been twenty-one years in possession of it,

under known and visible boundaries, with a color of title, and were protected by the Act of 1791 (Rev., ch. 346), for limiting the claim of the State.

The land granted to Clarke was bounded as follows: Beginning at a locust on the south bank of the river, running south 30 degrees west 160 poles to a pine; thence south 60 degrees east 190 poles to a gum; thence north 30 degrees east 184 poles to a red oak, on the bank of the river; thence to the beginning. The locust was admitted to have stood at point A in the diagram; the courses and distances of the boundaries are from A to E, F, and G upon the diagram. It was proved that a red oak, marked as a corner, formerly stood at G, and was an old tree.

For the plaintiff it was contended that the grant to Clarke should be confined to the lines A, E, F, and G, being the courses and distances of its boundaries. On the other side it was urged that its boundaries were A, B, C, and D. A pine marked as a corner stood at B, which was about 80 yards over the distance mentioned in the grant, viz., 160 poles; the mark upon the pine was made many years after the date of the grant to Clarke. At Y there was a gum marked as a corner, but much younger than the grant to Clarke. At D there was a white oak and a red oak marked as corners, one sixty-eight and the other forty-six years before the survey. In 1765 Clarke conveyed the land granted to him to one Walker, describing it exactly as it was described in his grant. Walker conveyed to Colson, the ancestor of the defendant, but before the deed was executed, a surveyor run off the land, beginning at A and running thence to B, C, and D; the deed from Walker to Colson described the land exactly as it was in Clarke's grant, except at D it called for an oak on the river instead of a red oak on the river. The white oak at D is the beginning of a grant which issued to one Stephens, in 1766, which is represented by the lines D, P, and R. From D to P (522) line trees were found corresponding in their ages to that of this grant. In that patent the white oak, its beginning, is said to be Walker's lower corner, and was thus described in several *mesne* conveyances, which were set out in the case. It was proved that the pine at B, the gum at Y, and the white oak at D had been called and known as Walker's and Colson's corners for more than twenty-one years before the grant to the lessor of the plaintiff; and further, that the defendants, or those under whom they claimed, had been in possession for more than twenty-one years before the same period.

His Honor charged the jury that if they thought the pine at B and the oak at D were the corner trees called for in Clarke's grant, the courses and distances mentioned in the grant would be controlled by the proof of the corners, and the grant would extend to them, but if they should find that those trees never were intended to be the corners of that grant, or if

the corners were unknown, then they must determine its boundaries by its courses and distances, until they came to the third line, where the river was called for, and that being a certain termination of the third line, it must be extended to the river; that if the marks were too young, or the other evidence did not justify them in finding that either the lines C D or Y D was the third line called for in the grant, and they should be driven to the courses and distances to locate the grant to Clarke, they must then adopt the lines A, E, F, G, in which event the land granted to the lessor of the plaintiff would not be within the boundaries of that grant; that if they thought the line F, G, to be the third line of Clarke's grant, another question arose, viz., whether the defendants or those under whom they claimed had been twenty-one years in possession of the land in dispute under known boundaries, and with a color of title; that the Act of 1791 (Rev., ch. 346) required three things to bar the State, or those claiming under it, viz., twenty-one years possession, known (523) and visible boundaries, and a color of title; that if the jury believed the evidence, the defendants' possession had been for more than twenty-one years, and the marked pine at B, the gum at Y, and the white oak at D were visible boundaries of that possession, within the meaning of the Legislature; that the defendants contended the deed from Walker to Colson was a color of title, as it was urged that it extended to the lines Y D or C D, and that the description of the boundary in the deed was different from that in the grant, as one called for an oak, and the other for a red oak; and, further, because it was proved that upon the purchase of Colson from Walker the lines were actually run to the white oak at D, and it was then marked as a corner. His Honor left it to the jury to say whether the description in the deed and the grant were so different as to vary the boundaries of the first, from those of the last, and whether the variance was so great as to make the deed cover land which the grant did not, informing them that it was color of title to all land it covered; that if they believed the boundaries of the deed from Walker to Colson were the same as those of the grant to Clarke, and if the latter extended no further than the line F G in the diagram, then there would be no color of title beyond that line; that the plaintiff was entitled to recover unless the grant or deed covered all the land between the lines D I, I K, K G and the river, although the defendants might have had a continued possession of all that land under known boundaries.

The jury returned a verdict for the plaintiff, and upon a motion for a new trial the judge observed that it was contended that the deed from Walker to Colson was color of title for all the land within the boundaries surveyed before its execution, which were the lines A, B, C and D, but that he thought it a question for the jury whether the boundaries of the deed were intended to be the pine at B and the white oak at D; if they

were, it was color of title up to those points, but if it was intended only to follow the boundaries of the grant, if the latter fell short of the point D color of title under the deed also would. A new trial was refused, and the defendants appealed. (524)

Mendenhall for plaintiff.
No counsel for defendant.

HENDERSON, C. J. Upon the third point in the case, the color of title, the judge after having disposed of the actual title, and limiting it to the boundaries of Clarke's grant, and after pointing out a difference in the calls of the grant and those of Walker's deed to Colson, the first calling for a *red* oak, and the latter for an oak only, at the termination of the third line, informed the jury that they must consider whether the descriptions were so different as to vary the boundaries of the deed from those of the grant, and whether the deed covered all, or any of the land in dispute, if it did, it was color of title for so much and no more; that if they should be of opinion that the boundaries of the land described in Clarke's grant went no farther than the line F G, and if they should think that the boundaries of the deed from Walker to Colson were the same as the boundaries set out in the grant, then there would be no color of title. If there could be any doubt of what the judge intended to say, and in fact of what he did say, it is rendered certain by his remarks on the motion for a new trial. The jury, he then observed, were to determine whether the boundaries of the deed were intended to be the pine at B and the white oak at D; if they were, it was color of title, but if it meant to convey only the land described in the grant, and the grant stopped short of D, then would color of title under the deed stop where the grant stopped. By this I understand the judge to mean, if the calls of the grant and the calls of the deed were the same (upon paper, upon their faces) and there was nothing to control the courses and distances of the grant, that is, nothing to designate the pine, the gum, and oak called for in it, so that we must resort to course and distance to locate it; its location was also the location of the (525) deed. In this I think the judge committed an error, for although the parties might have thought, and no doubt they did think, that they were surveying the lands granted to Clarke, and that his grant covered all the lands described in the deed, yet it is what the parties *actually did,* and not what they *thought* they did (in this particular) that we are to act on. Suppose in this case it was proven that the pine was marked at B and the oak at D as the pine and oak called for in the deed, could it be said that these were not the actual boundaries of the deed, because the parties thought that they were also the boundaries of

the patent? Would this displace the trees and obliterate the marks, and cause them not to be the bounds described by and called for in the deed? It is true, title passed no farther than the patent extended, because beyond that the vendor had none, but still the pine and oak would be the *termini* of the deed, because they were the objects called for by it. The judge was mistaken in supposing that because these were also the calls of the grant, and there being nothing to show that they were the trees called for in it, and of course that the grant could not be extended to them; so neither could the deed, because the parties thought that the lands conveyed by the deeds were the same with those covered by the grant. The jury should have been informed that if they believed the pine at B, the gum at Y, and the oak at D were called for in either of the mesne deeds, that those trees were the boundaries of the deeds and to them they should extend. I have no doubt but the evidence proved this, for although the facts are evidently stated as applying to the boundaries of the grant only, yet enough appears to show that the deed from Walker to Colson should go to B, C and D; not because the grant calls for a *red* oak, and the deed for an *oak* only, but because it is shown they were marked when the survey of the land was made, preparatory to the execution of the deed. I say marked, not only because the witnesses swear that they were then marked, but because the marks now found upon them (except the gum, which is not found (526) at C) corresponds in age with the date of the deed, and with the reputation of the neighborhood, that they are the bounds of Walker's and Colson's lands. The calls of coterminary grants and deeds, for a great number of years, also prove the white oak at D to be Walker's lower corner. This appears, although it is evident that the case was made to locate the patent and not the deed, as the age of the marks upon the pine is not stated, nor the date of the deed from Walker to Colson; it is only said that the marks on the pine were too young for the patent. We learn from an incidental remark of the judge that the marks on the pine correspond in age with the date of Colson's deed. From this I think it probable that the pine at B and the oak at D are the trees called for in the deed; and if so, what is there to control that description? Not the course and distance, because they are less certain than marked trees; not the patent, I think, for they were thought to be also boundaries of the patent; and if they are not, or rather are not shown to be, will that obliterate their marks and make them other than what the deed makes them, when proven to be the objects called for as its boundaries? Do they lose their identity because another description is also given, which turns out to be a false one, or incapable of being shown. It is true, that when a thing is called for as having two identities or distinguishing marks, both capable of being ascertained, if they exist,

as an oak with two chops upon it, and an oak with only one chop upon it is produced as the thing described, it is plain that this is not the oak called for, as that has two chops and that shown has but one. But the description here is a pine, a gum and an oak, and the grant is not even mentioned. But suppose the deed had described them as the trees described in the grant, it only negatively appears that they are not the trees called for in the latter. But suppose it was positively proved that they were *not*, which in this case could only satisfactorily appear by showing others. Here there are two descriptions, which create an ambiguity, for there is none upon the face of the deed. Which shall we take? The answer, by Lord Bacon, is that which is best sup- (527) ported by proof. A thing dehors the deed is shown by parol, it is a latent ambiguity, and shall be explained by parol. I have supposed two things, neither of which exist in this case; first, that the deed describes the trees as also the boundaries of the grant; and, secondly, that other trees, besides the pine, the gum and red oak, are shown as those boundaries. If this would not control the description, when it is shown that this pine, this gum, this oak, are the trees called for in the deed, I cannot understand how the mere course and distance of the grant can control it, as no other tree is shown as the boundary of the grant. To adopt this rule would be not to abandon a certain description under a pretense of greater certainty, and when called upon for this greater certainty, to refer to course and distance, which is admitted to be the least certain of any description, and only resorted to when all others fail. I must conclude, therefore, that whatever may have been the title of Walker to the lands without the grant, that his deed to Colson covered the lands up to those trees, if they are shown to be the trees called for as *termini* in his deed, and therefore the deed was color of title up to them. It seems to me also that the judge was too rigid in the rule respecting the *termini* of the grant; for if we are not permitted, in cases of very old grants calling for perishable *termini*, such as trees, to substitute something for the tree, which may long since have perished or been destroyed, such as a long continued possession under the grant, pointing to the place where the tree stood, and of the adjoining lands, the reputation of the neighborhood, and the calls of coterminary grants or deeds, we shall in almost every case of old grants, be remitted to courses and distances, which will give in many cases a different location to them, from that which they originally had. I do not say that this is one of the cases requiring it; it may or may not be, and therefore the new trial is granted on other grounds.

Where the calls of a grant and the calls of a deed, or of two deeds are the same, and the *termini* are unique, then as the *termini* are the same the locations are the same, for there are not two objects of the

(528) same kind as those called for in the grant and deed. But where the *termini* are not unique, as a pine, a hickory, an oak or a rock, as there are many pines, hickories, oaks and rocks, there may be proof to show that particular trees or rocks are the trees or rocks called for in the deed, though there may be no proof, or not sufficient proof to show that they are the trees called for in the grant, and the proof not being sufficient to fix the location of the patent, cannot remove that of the deed, and transfer it to the location of the patent by its courses and distances. I think the facts in this case duly exemplify and illustrate the above positions.

PER CURIAM. Judgment reversed.

Cited: Euliss v. McAdams, 108 N. C., 513.

WILLIAM G. ERWIN v. SARAH ERWIN.

An appellant who has failed to file his appeal is not entitled to a *certiorari* after a delay of three terms. He should apply at the first term, unless prevented by accident.

THIS was an application for a rule upon the defendant to show cause why a *certiorari* should not issue. The applicant swore that the judgment against him was rendered at the spring term, 1831, of RUTHERFORD Superior Court; that he then prayed an appeal, which was allowed; that the appeal bond and the record of the cause were sealed up and deposited in the postoffice at Rutherfordton, the postage being paid, directed to the clerk of the Supreme Court, in time to reach the office of that Court, within the first seven days of the ensuing term; that not hearing of any adjudication in the cause he had, since the last term of Court, caused inquiries to be made, from which he learned that the package above mentioned had never come to the hands of the clerk of the Supreme Court.

No counsel for applicant.

(529) RUFFIN, J. The appeal was taken in April, 1831, and this application for a *certiorari* is now made in December, 1832, eighteen months after the record ought to have been filed in this Court. We do not think proper to consider whether the grounds laid for the relief asked would have been sufficient had the motion been made at an

earlier and proper period. For the motion comes out of due time, and must on that ground be refused.

It is true the party swears that since the last term he learned for the first time that the transcript had miscarried. But his duty was to have inquired earlier; to attend to his cause, in person or by attorney, at the first term (unless prevented by accident), and then to have taken the necessary steps to have the case brought up and decided.

By the course of the Court the application for this extraordinary remedy must be made as soon as the party can, after losing the benefit of his appeal. It can no more be granted to one who is dilatory in asking for it than it can be to one who has neglected to pray an appeal when in his power. He who fails from negligence duly to prosecute an appeal, is as little entitled to aid as he who from the same cause failed to obtain an appeal. The rule is therefore refused.

PER CURIAM. Rule refused.

Cited: Hester v. Hester, 20 N. C., 456; *Lumber Co. v. Lumber Co.,* 169 N. C., 95.

THOMAS CLANCY, CHAIRMAN, ETC., UPON THE RELATION OF JAMES CARRINGTON, v. NATHANIEL CARRINGTON.

1. Where an administrator procures himself to be appointed guardian of the next of kin to his intestate, but does not return an account as guardian, or in any way designate the property of his ward, so that it can be identified, the sureties to the administration bond are not discharged.
2. The case of *Harrison v. Ward, ante,* 417, approved.

DEBT upon a bond, executed by the defendant, as surety of John J. Carrington, on his taking out letters of administration upon the estate of John Carrington. The bond was in common form of administration bonds and the breach assigned was the nonpayment by the administrator of the relator's share of the residue of the intestate's (530) assets.

After *oyer,* the defendant pleaded *performance* of the condition by the administrator.

Upon the trial, before *Martin, J.,* at ORANGE, on the last circuit, the facts were that the bond was executed in consequence of John J. Carrington's appointment as administrator at November sessions, 1817, of Orange County Court; that at the ensuing August sessions he was appointed guardian of the relator, and gave the usual bond with other

sureties, but he had never returned his account as guardian to the office of the county court.

His Honor ruled that John J. Carrington was, upon these facts, both administrator and guardian, and the assets being uniformly in his possession, that possession should be taken as being in the character in which it was rightful, which his Honor held to be that of guardian. In submission to this opinion the plaintiff was nonsuited and appealed.

W. A. Graham for plaintiff.
Badger for defendant.

HENDERSON, C. J. The principle of the case of *Harrison v. Ward,* decided at this term, *ante,* p. 417, governs this; indeed it goes farther, for in that case there was a return as administrator; here there was none as guardian. There is not the least proof here that the money due to the relator was at any time at, or after J. J. Carrington's appointment as guardian, in his hands. There is no return even acknowledging it as a debt—nothing but a bare presumption that he then had it, because it was his duty to have had it, and this presumption, if it arises, is in a great measure repelled by his not producing it when afterwards called on. The evidence offered by the defendant, or rather relied on by him, for it is the relator's evidence, only proves that he ought to have, not that he actually had it. This would be presuming too much (531) in order to apply the judge's maxim, for had the defendant actually shown that the administrator at any time after he became guardian had this money separated from other money, and marked as the ward's money, so as to make it the ward's property, or after two years from his administration had it marked and labeled as money of the estate, there would in the case first put be something wherewith to charge him as guardian, as by such appropriation it became the property of the ward, and in the second case there would be facts upon which the judge's rule might operate. But in the case stated there is nothing to make this sum the property either of his ward, or of the estate, so as to leave room for a presumption in which character J. J. Carrington held it. In *Clancy v. Dickey* the negroes had been of the estate, the executor became guardian, and had them in his possession after the time in which he could rightfully hold them as executor. The law therefore adjudged, in the absence of positive proof, that he held them as he rightfully might, viz., as guardian.

PER CURIAM. Judgment reversed.

Cited: Foye v. Bell, 18 N. C., 478; *Jones v. Brown,* 68 N. C., 555; *Harris v. Harrison,* 78 N. C., 213.

SAMUEL P. SIMPSON v. VARDY McBEE.

1. An agreement between the parties to a cause, made after the issuing, but before the return of the writ, referring the suit to arbitration, and making the submission a rule of court, does not authorize the entry of a judgment upon an award filed at the return day of the writ.
2. In this State judgments are entered upon awards where, by the rule of the common law, attachments would issue for their nonperformance.
3. The statute of 9 Will. III, respecting references, is not in force here.

THIS was an action on the case for slanderous words spoken of the plaintiff by the defendant.

The writ was issued on 27 August, 1831, returnable to the ensuing term of LINCOLN Superior Court. The defendant accepted service of the writ on the 31st of that month, and on the 1st of September following the parties entered into an agreement in writing, whereby the matter in controversy was referred to the arbitrament of two persons, "whose award, made as above, shall be a rule of court." The (532) arbitrators made their award on 22 October following, before the return day of the writ; and on the Monday of the ensuing Superior Court of Lincoln it was handed to the clerk, when the defendant filed exceptions to it and pleaded to the action. On the last fall circuit *Swain, J.*, overruled the exceptions and entered judgment according to the award, from which the defendant appealed.

W. A. Graham defendant.
Badger contra.

DANIEL, J., after stating the case as above, proceeded: The agreement of the parties, out of court, set forth in the submission that the award should be a rule of court, did not make the rule. And although the agreement was made during a *lis pendens,* yet no attachment could have issued, according to the principles of the common law, against the defendant for a violation of that agreement. A rule of court to stand to a submission and award was, according to the common law, a rule entered in some one of the courts at Westminster, where the record and pleadings in the cause were made up. A party who consented to have such a rule entered, and disobeyed it afterwards, was subject to an attachment for a contempt. We have, after diligent search, been unable to find any authority establishing the principle that an agreement of the parties pending a suit, to submit to arbitration, and that the submission and award should be a rule of court, was in fact such a rule as by the principles of the common law would authorize an at- (533)

tachment to issue for its violation. In this State it is the practice to enter judgment according to the award in those cases in which, by the rules of the common law in England, an attachment would have been granted for a disobedience of a rule of court to stand to the submission and award. We, therefore, think that the Superior Court had not power to enter the judgment which was rendered in this case. The statute of 9 and 10 Will. III, ch. 15, is not in force in this State. The judgment might have stood perhaps according to the provisions of that statute. As there was not such a rule of court entered in this case as would have authorized an attachment at common law, and the statute of Will. III not being in force here, we are compelled to set aside the judgment and award a *procedendo*.

PER CURIAM. Judgment reversed.

Cited: Cunningham v. Howell, 23 N. C., 10; *Tyson v. Robinson,* 25 N. C., 337; *Patton v. Baird,* 42 N. C., 259; *Debrule v. Scott,* 53 N. C., 74; *Myers v. Daniel,* 59 N. C., 4; *Moore v. Austin,* 85 N. C., 183; *Keener v. Goodson,* 89 N. C., 276; *Metcalf v. Guthrie,* 94 N. C., 450; *Jackson v. McLean,* 96 N. C., 479; *Peele v. R. R.,* 159 N. C., 62.

DEN EX DEM. RICHARD H. BONNER v. READING TIER.

A judgment on a *sci. fa.* against an heir, wherein his name is neither set forth in the writ nor in the return of the sheriff, is a nullity, and a purchaser at an execution sale under it acquires no title.

EJECTMENT, which was submitted to *Daniel, J.,* at BEAUFORT, on the last fall circuit, upon the following case agreed:

One Cherry obtained a judgment against the administrator of Andrew Christie, in which the plea of *fully administered* was found for the defendant. A writ of *scire facias* issued on this judgment, by which the sheriff was directed to "make known to ..... heirs or devisees of the said Andrew that," etc. This writ was returned, "not found," and an *alias* issued in all respects precisely like it, to which there was a similar return. Upon the return of the second writ, judgment by default was entered up, and the lessor of the plaintiff purchased under an execution issuing upon it.

(534) Upon these facts his Honor gave judgment for the plaintiff, and the defendant appealed.

Gaston was to have argued for the defendant, but the Court called upon Hogg and J. H. Bryan, who were for the plaintiff, to begin.

RUFFIN, J. The judgment on the *scire facias* is a nullity for the want of a party defendant. It is true, the heirs need not be named in the process, and frequently it is best not to name them, because if one be omitted, and advantage taken of it, by plea of the other, it may be difficult to get over it; whereas, if the process be general, and the sheriff fail to return all the heirs that, upon suggestion, may be supplied by further process. The defect here does not consist in the omission of the names of the heirs in the *scire facias,* but that omission runs throughout. Neither the plaintiff has named him, nor the sheriff returned him. So that in no part of the proceedings does it appear who is heir, nor certainly that there is one. It is said that he may be out of the State, and in that case there could not be service; and yet, the plaintiff could have judgment under the fourth section of the Act of 1784. But it must appear who in particular is out of the State, in order that there may be a person before the court. If the plaintiff name the heir, the sheriff may return that that person resides without the State. If the sheriff is commanded to summon the heir generally, and the heir resides here, he cannot return generally that he has summoned the heir, but must say who is heir, and that he has summoned him. And as the return of a foreign residence is only in the place of actual service, the sheriff must in that case say that such an one is heir, and that *he* resides out of the State. When no heir is known, the University is the owner of the land, and must be brought in.

The cases cited for the plaintiff have no application. There (535) the defendants were irregularly brought in, or proceeded against irregularly. Here no defendant is before the court in any manner, and the judgment is against nobody. It is void, and all proceedings under it.

PER CURIAM. Judgment reversed.

Cited: *Fry v. Currie,* 91 N. C., 438.

MARVILLE SCROGGINS v. LUCRETIA SCROGGINS.

1. Fraud in the contract of marriage, to entitle a party to a divorce, must consist of something more than mere concealment of defects—there must be such misrepresentations as would deceive a person of ordinary prudence; and where the husband, at the marriage, might have known that his intended wife was pregnant, and five months afterward she had a mulatto child: *It was held* that he was not entitled to a divorce.

2. The construction of the Act of 1827, ch. 17, giving the Superior Court exclusive jurisdiction in all cases of divorce, stated by RUFFIN, J.

THIS was a petition for a divorce. The petitioner stated that the marriage took place on 18 December, 1828; that the parties "lived together in uninterrupted harmony for near five months, when the infidelity and fraud of the defendant was manifested by an occurrence which admitted of neither explanation nor palliation, and dissipated all hopes of happiness, etc.; that on 1 May, 1829, the defendant became the mother of a mulatto child." The petitioner proceeded to negative the idea of condonation on his part, and prayed for a divorce, *a vinculo matrimonii.*

His Honor, *Martin, J.*, at BUNCOMBE, on the spring circuit of 1831, dismissed the petition, thinking that the facts stated in it, if true, did not authorize the sentence prayed for. From this judgment the plaintiff appealed.

J. Graham for plaintiff.
Dews for defendant.

(540) RUFFIN, J. The Legislature, in the Act of 1814, authorizes divorces in two cases: the one, impotency at the time of the marriage, and still continuing; the other, a separation by one party from the other, and living in a state of adultery. The Act of 1827, ch. 19, empowers the Superior Courts to divorce either from the bonds of matrimony, or from bed and board, whenever they may be satisfied of the justice of the application.

This act imposes a task of great difficulty on the courts, and one perhaps less agreeable than any they can be called on to perform, that of acting upon a most important subject without a rule laid down for them by the Legislature, or heretofore adopted by their predecessors. The jurisdiction is a new one to our courts, and we find no precedents in those adjudications from which we draw our learning upon other subjects. Where such a jurisdiction is created, and the Legislature marks out those boundaries within which, in their wisdom, they think it proper the courts should be confined, or to which they shall go, obedience is both an easy and a pleasing duty. It is when we are told to do what is right, but not told what they deem right, that we are lost in the mazes of discretion. I cannot suppose, however, that the discretion conferred is a mere personal one, whether wild or sober, but must from the nature of things be confined to the cases for which provision was before made by law, or for those of a like kind. This presumption is the stronger when the subject is one upon which it is known that specialists (541) and moralists have much disputed, differing as to the policy of divorces and their influence upon the parties themselves, during their union, and after their separation, and upon which lawgivers,

acting upon experience and disregarding theory, have generally been agreed in refusing them altogether, where the marriage was lawful, except in the case of impotency. If the Court could think that the duty to be performed was intended to be referred to the private opinions of the judges, it would be promptly, though reluctantly, executed; for there is no member of the Court who is not strongly impressed with the conviction that divorces ought in no case to be allowed, but in that already mentioned, and near consanguinity. We know that individuals may experience much misery by an unhappy connection, where tempers are incompatible, where there are disgusting personal defects, moral depravity, mutual injuries, proceeding even to unfaithfulness and unchastity. We know, too, that like consequences often follow from a mere change of affection, and that the growing indifference of the one not only produces pain to the other, but irritates and provokes reproaches, until hatred takes the place of former regards, and the tie between them is severed, as far as the law will allow it. If the consequence of dissolving the union entirely stopped with those parties, and conferred on them peace instead of the pain they suffered, it were but cruelty not to unloose the chain. But the knowledge that when this last stage of distress arrived, it would of itself bring relief, would precipitate its approach. Slight differences would grow into lasting dissensions, and a single act of unfaithfulness could easily be converted into habitual adultery. These evils are, in a great measure, avoided by the principle of our law, which declares the marriage contract to make a perfect union between the parties, so that they become one; and, to carry it out, they ought to believe and feel that they are ever to remain so—that absolute union is also indissoluble. That, and that alone, can impress upon each the necessity of mutual forbearance, of submitting to slight inconveniences, overcoming antipathies, and contributing to the enjoy- (542) ments of each other. We reconcile ourselves to what is inevitable. Experience finds pain more tolerable than it was expected to be, and habit makes even fetters light. Exertion, when known to be useless, is unassayed, though the struggle might be violent if by possibility it could be successful. A married couple, thus restrained, may become, if not devoted in their affections, at least discreet partners, striving together for the common good, and steady friends, ready to perform all offices of kindness required by the other, instead of the dissentient heads of a distracted family, driven by inflamed passions to a degree of madness not to be satisfied with less than an entire separation, though it bring disgrace on themselves and their offspring, and deprive the latter of the greatest earthly advantage, the nurture and admonitions of a parent. For these reasons, in most, and I believe in all, Christian countries, although the contract be regarded by the law merely as civil, it is usually

executed with some religious ceremonial; so, as in a degree to impress upon it in the eyes of the individuals themselves a character of holiness, that it may appear to be entered into before a witness who cannot be deceived or forget, and therefore to be infrangible. Our restless dispositions and capricious tastes and tempers require these checks and restraints. Why shall they be removed? Why give way to those very propensities in our nature, which it is our interest to repress? Is it not wiser, better, kinder to the parties themselves and their issue to declare the engagement to be unsusceptible of modification, much less abrogation; to make their union so intimate, so close, and so firm that no discoveries of concealed defects, more than supervenient disease, depravity, dissoluteness, or dissension could rend it asunder? Such being the case, the state would be the more discreetly entered into, and the intercourse through life be the more harmonious. Such considerations have produced the private convictions felt by those who are now the judges of the Court. But they seem not to have made the same impressions on all, and it is our duty, notwithstanding the unlimited powers (543) which we are commanded to exercise, to endeavor to ascertain, as well as we may, in what cases the Legislature would, upon ascertained facts, authorize the parties to abandon their former choice, and make a new selection.

To the extent of the Act of 1814, we consider the Court constrained to go. And from the second section of the Act of 1827, we suppose that we are not at liberty to stop there, since that implies that there are other cases besides those specified in that act in which divorces seem to have been expected to be properly applied for, and consequently granted. Yet, from the preamble of the last statute, one might infer the contrary, and that the great purpose of the Legislature was to free itself from applications which ought not to be granted, but which, from the hardship to the parties, and feeling in the members, were sometimes obtained, and to turn them over to tribunals which would do more impartial or exact justice. Indeed, it is difficult for persons to put a just interpretation upon terms, conferring in themselves such boundless power. We cannot intend that the meaning was that the courts should grant divorces where, under like circumstances, the Legislature had or might be expected to grant them by statute; for the contrary is implied by commanding the action of courts, usually regulated by fixed rules. The Court is then obliged to adopt the middle course, and prescribe to itself such principles as we think sound law-givers, who allow of divorces at all, would send as rescripts to a judiciary.

The case now before us rests upon a matter existing at the time of the marriage. And it must be admitted to be as strong a case as can well

be, if the petitioner acted properly and with reasonable discretion or caution on his part. The principle of the common law upon the question of divorcing for matter existing at the time is well established. If the marriage was not forbidden to both parties by their relationship, it was dissoluble at the instance of one for precontract and impotency. The former was of ecclesiastical origin, and no longer exists. The latter only remains, and is incorporated into our statute of 1814, at which time the Legislature thought it unsafe to go farther. And (544) since that time, although they allow the courts to go beyond that, they have been unwilling or unable to say how much farther. And the Court is perhaps no less at a loss, nor less reluctant to proceed. The petitioner puts the case upon the ground of fraud. If it were a marriage to which he had been compelled by force, or in which one woman personated another, where, indeed, there was no consent on his part, that would probably be cause for a divorce. But the fraud here consists in the other party not having the qualities and character he supposed her to have. It would be dangerous to lay down a rule of that sort. It is impossible to say where it would stop; what were the qualities in a wife which a husband wished or expected, or had reason to expect. It cannot be known what defects he knew of and disregarded; what were concealed and what communicated. Treaties upon this subject are generally conducted in secret, and the particulars cannot be proved. It is, moreover, perfectly understood that each appears and will appear to the best advantage. It is not to be expected that the parties will declare their own defects, as the seller of property would, and especially that they will publish their shame. Concealment is not a fraud in such a case—disclosure is not looked for—active misrepresentations and studied and effectual contrivances to deceive are, at least, to be required to give it that character; and the other party must appear not to have been voluntarily blind, but to have been the victim of a deception which would have beguiled a person of ordinary prudence. I know not how far the principle contended for would extend. If it embraces a case of pregnancy, it will next claim that of incontinence; it will be said the husband was well acquainted with the female, and never suspected her, and has been deceived; then, that he was a stranger to her, smitten at first sight, and drawn, on the sudden, into a marriage with a prostitute; that he was young and inexperienced, hurried on by impetuous passion, or that he was in his dotage, and advantage taken of the lusts of his imagination, which were stronger than his understanding. (545) From uncleanness, it may descend to the minor faults of temper, idleness, sluttishness, extravagance, coldness, or even to fortune inadequate to representations, or perhaps expectations. There is, in general,

no safe rule but this: that persons who marry agree to take each other *as they are.* Whatever defects there may be, some must have been counted on, and we cannot tell which. There are degrees in imperfection, as well as perfection, and the wife may prove much better than the husband expected; so, if she turn out worse, he must keep her because he chose her. It is not the policy of the law that man or woman who has once fallen shall be condemned to celibacy, and doomed to incontinence. Yet such would be the effect of allowing this petition. The woman must disclose her misfortune and crime, or else the marriage will be declared void, but if she disclose it, she loses that marriage, and places it in the power of the suitor to proclaim her shame, and preclude her from any other alliance, and from reformation. The safer, more politic, and more humane principle is to make it his interest to conceal the fault as well as hers, and by uniting their interests, to induce both to look forward to future proprieties, and be blind to what is behind. After the law upon this subject has been settled for ages, and when the Legislature has been unable to devise any alteration, founded on a general principle worthy of their adoption, it would be too much to expect a court to pretend to more wisdom than the Legislature and our forefathers united, and strike out new theories. And we cannot but say that nothing could be more dangerous than to allow those who have agreed to take each other, in terms *for better, for worse,* to be permitted to say that one of the parties is worse than was expected, and therefore the contract ought to be no longer binding.

These are the general principles by which the Court is constrained to limit and regulate the unrestrained liberty of rioting at large, to which it is left. The Court is, nevertheless, entirely sensible of the peculiar character of this case, produced by the odious circumstance of (546) color. It appeals powerfully to the prejudices, the virtues and vices of our nature. The stigma in our state of society is so indelible, the degradation so absolute, and the abhorrence of the community against the offender, and contempt for the husband so marked and unextinguishable, that the Court has not been able, without a struggle, to follow those rules which their dispassionate judgment sanctions. But there are other circumstances in this case which relieve us from all difficulty. The petitioner charges that he was married on 18 December, 1828, and that the child was born on 1 May, 1829; up to that time he lived with his wife, and upon that event left her. He does not venture to swear that he believed her chaste at the time of the marriage. It must be taken that he did not; if he had, it would have been the first thing thought of, to aggravate his case. Suppose that we are to presume that he means to admit a criminal conversation between themselves; and

that is the most favorable to him—what claims has he to relief, upon the ground of grosser incontinence than that in which he had participated? The Legislature gives us, in the Act of 1814, an analogous rule for our government in this case. They declare that condonation shall destroy the right of divorce, either because it evinces prior consent or an indifference to the crime, which alike render him unworthy to ask the interposition of the law. Upon the same principle, if a man will marry a woman, whom he knows to be a prostitute, and she takes no affirmative means of establishing a conviction in his mind that he alone has had access to her, he cannot complain if he has been betrayed by a confidence as irrational as it proves to be unfounded. No man in his senses can anticipate less. The fascinations and the total depravation of an unchaste woman have been proverbial, at least, since the days of Solomon. He who marries a wanton, knowing her true character, submits himself to the lowest degradation, and imposes on himself. No fraud can be said to be practiced on him by mere silence and concealment of other aberrations. But if such be not the fact in this case, then that which is necessarily the state of it leaves the petitioner as little merit. If he had not been himself guilty, he had the more reason to believe that others had. It is not alleged that the birth of the child was premature. Half the period of gestation had expired at the marriage. His intention must have been attracted to the person of the woman he was about marrying, and the long intimacy and courtship which he mentions must have enabled him to detect her situation. Why did he marry her? It may be possible that he was deceived, and not by his own negligence, at that period. But it is impossible that any art or device could have long prevented him from knowing the truth, that is, as far as this, that she was pregnant. If not by him, why did he live with her? Shall he be heard to say that he would have been content if the child, though not his own, had been white? We cannot but feel for his disgrace; but it is rather sympathy with him, as being one of the family of man, than as he is individually. His disgrace is voluntarily incurred, and he has no elevation of sentiment or feeling above it. We think him criminally accessory to his own dishonor, in marrying a woman whom he knew to be lewd; or, by continuing his cohabitation after he must have known it up to the happening of an event by which the world acquired the same knowledge. He now asks to be freed from his bonds, because the infamy of his wife has become notorious, though he could reconcile himself, in secret, to the crime which makes her infamous. Such a prayer must be rejected, and the judgment of the Superior Court affirmed.

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The full discussion thus entered into has been deemed due to the Legislature and the Court itself, that the principles which will guide

the Court may be plainly known. It is proper that they should be placed before the Legislature, that if thought wrong by them, the Court may be spared from running further into error by having an authoritative guide to future action in a rule prescribed definitely by the Legislature itself.

PER CURIAM. Judgment affirmed.

Cited: Moss v. Moss, 24 N. C., 57; *Long v. Long,* 77 N. C., 307; *Steel v. Steel,* 104 N. C., 635.

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JESSE BARDEN v. ANN M. BARDEN.

1. Where a man was induced to marry a woman by her representing to him that a child she had was his, and that, as to all the world but him, she was virtuous, and after the marriage he discovered that the child was black: *It was held,* RUFFIN, J., *hesitante,* that he was entitled to a divorce, if the color was so indistinct as to mislead a man of ordinary diligence, or if the child had been carefully kept from his view.
2. Per RUFFIN, J. A case of this kind is a concession to the deep-rooted prejudices of the community upon this subject.
3. The Act of 1827, ch. 19, giving the Superior Courts jurisdiction in cases of divorce, is retrospective in its operation.

THIS was a petition for a divorce, in which the petitioner alleged that at the time of the marriage he knew that the defendant had a child, but he thought it was his; that the defendant, by her artful conduct before the marriage, induced him to believe that she had ever behaved modestly and virtuously except in the instance above mentioned, which she pretended was the result of her attachment to him; that soon after the marriage he discovered that the child was a mulatto, upon which he had instantly parted from her. The plaintiff prayed a divorce, *a vinculo matrimonii.*

On the fall circuit of 1830, at WAYNE, the cause came on to be heard before *Donnell, J.,* when it appeared that the marriage took place before the Act of 1827, ch. 19, his Honor dismissed the petition, and the plaintiff appealed.

No counsel for either party.

RUFFIN, J. The Act of 1827, ch. 19, is not altogether prospective. The remedy given by it is not confined to cases that might thereafter

happen, but applies to those also in which the grievance then existed. This is plainly to be inferred from the preamble, which denotes the purpose of the Legislature to relieve itself forthwith and entirely from the consideration of any application for divorce, whether for existing or future causes.

Upon the merits, I confess that I am individually inclined to concur with the judge of the Superior Court, for the reasons upon which the case of *Scroggins v. Scroggins* was decided, *ante,* 535. But my brethren think there is a difference, and that this petitioner may prove (549) himself entitled to relief. The petition was dismissed upon the face of it, and therefore all the facts stated in it must be taken in this stage of the proceedings to be true. Among them is the one of deep dye, that the child is black; and to that is added the belief of the petitioner that it was his own, and that this belief was created by the artful representations of the defendant. It is thought by the majority of the Court that when a man is acting in good faith, and marries with the design on his part to repair the injury done to a female, whom he supposes to be the reluctant victim of his own solicitations, with a strong and exclusive affection for him made her unable finally to resist, advantage shall not be taken of his confidence and honorable principles of action to draw him on by false tokens and artful devices of this sort. If he had married before the parturition, he ran risks, and must patiently abide the results. The risks were obvious to his understanding. But by awaiting that event, and promptly following it up by consummating the contract, while the child was very young, it is but reasonable to conclude that the birth of the child, and the belief that it was his own, constituted a prevailing, perhaps the chief motive and inducement for this action. The obstacle with me upon this part of the case is that the color is an object of the senses, and that it can hardly be supposed that a man would marry a woman because he believed her to be the mother of his child without being drawn, even by curiosity, not to say instinctive affection, to see the child itself. But it may be that in so young an infant, whose mother was white, it might not be in the power of an ordinary man, from inspection of the face and other uncovered parts of the body, to discover the tinge, although it were so deep as to lead to the belief now that it is the issue of a father of full African blood; much more, if the father had a mixture of both races in him. I am therefore directed to express it as the opinion of my brethren, in which I do not refuse to acquiesce, that the petitioner ought to be allowed to prove his (550) case. He has many difficulties before him, for the ground of the opinion is not that the wife was delivered of a child by another father, or even by a black paramour; but that such being the fact, she induced, by false representations and active means, as the exhibition of the child

to the petitioner as his, a belief on his part that it was his own issue, and that he did not and could not from inspection ascertain the truth, or be reasonably supposed to be able to do it. If there were no representations in aid of the false token, or if there were, and the hue was visibly inconsistent with those representations, the petitioner was not deceived, or ought not to have been, and cannot have redress. The opinion of the Court, then, is that the judgment of the Superior Court must be reversed, and the cause remanded, to be proceeded in to ascertain the facts according to the statutes; and if it should, upon the proofs, turn out that the child is of mixed blood, that the petitioner and defendant are white persons, and that he believed at the time of the marriage that the child was white, and that belief was created by the representations of the defendant that it was the offspring of the petitioner himself, and that upon inspection at that time the real color was not so obvious as to be detected by the petitioner, or a person of ordinary diligence and intelligence, and not otherwise communicated to the petitioner, he would be entitled to a judgment of divorce from the bonds of matrimony. This is a concession to the deep-rooted and virtuous prejudices of the community upon this subject.

PER CURIAM. Judgment reversed.

Cited: Long v. Long, 77 N. C., 309; *Steel v. Steel,* 104 N. C., 635.

MEMORANDA

During the last session of the Legislature, THOMAS SETTLE, Esquire, of Rockingham, was elected a judge of the Superior Courts of Law and Equity, *vice* DAVID L. SWAIN, Esquire, elected Governor.

JOHN HALL, Esquire, on 15 December, resigned his seat upon the Bench of the Supreme Court, and JOHN J. DANIEL, Esquire, of Halifax, one of the judges of the Superior Courts of Law and Equity, was elected to the Supreme Court in his stead.

HENRY SEAWELL, Esquire, of Wake, was elected a judge of the Superior Courts of Law and Equity in the place of JOHN J. DANIEL, Esquire, promoted to the Supreme Court.

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STATUTES CONSTRUED, OR COMMENTED ON—*Continued.*