CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

NORTH CAROLINA

FROM DECEMBER TERM, 1833, TO JUNE TERM, 1834

REPORTED BY

THOMAS P. DEVEREUX

(4 Dev.)

ANNOTATED BY

WALTER CLARK

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CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA

DECEMBER TERM, 1833.

JOHN D. HOKE v. LAWSON HENDERSON.

A clerk appointed under the Act of 1806 (Rev., c. 693) has an estate in his office, and although the Legislature may destroy the office and by consequence the estate in it, yet the Act of 1832 which continues the office, but transfers the estate in it to another is unconstitutional and void.

On the last circuit, at LINCOLN, before his Honor, Judge *Norwood,* the plaintiff produced a certificate of the Sheriff of Lincoln, which set forth that at an election held in pursuance of Laws 1832, ch. 2, he, the plaintiff, had been duly elected clerk of the Superior Court of Lincoln. The plaintiff then tendered the bonds required by the act, and moved that he might be qualified and permitted to take upon himself the duties of office. This was opposed by the defendant, who proved that he had been appointed Clerk of that Court, in April, 1807, under the act of 1806 (Rev., ch. 693, sec. 10); that he had regularly qualified, and given bonds for the faithful performance of the duties of his office, and that those bonds had been renewed according to the several acts of Assembly requiring such renewal. His Honor disallowed the motion, because in his opinion, Laws 1832, ch. 2, was unconstitutional, and therefore null and void, and of consequence did not affect the defendant's right to the office. From this judgment the plaintiff appealed.

Iredell and *Devereux* for the plaintiff.
Badger for the defendant. (2)

The Act of 1832, is as follows:

AN ACT TO VEST THE RIGHT OF ELECTING THE CLERKS OF THE COUNTY AND SUPERIOR COURTS, IN THE SEVERAL COUNTIES WITHIN THIS STATE, IN THE FREE WHITE MEN THEREOF.

Be it enacted, etc. That at the next election for members of the General Assembly within this State, the sheriffs, deputy sheriffs, and inspectors and all persons holding the elections, shall open a poll and receive votes given for County and Superior Court Clerks, in the same manner and under the same rules and regulations that they now receive

and return votes for members of the General Assembly; and in case of the failure of persons appointed to hold said elections, or either of them, it shall be competent for a Justice of the Peace and two freeholders to supply such vacancy.

II. *And be it further enacted,* That all free white persons qualified to vote for members of the House of Commons in the General Assembly of this State, shall be entitled to vote for Clerks of the Superior and County Courts in their respective counties.

III. *And be it further enacted,* That the sheriffs or other persons qualified to hold said elections, shall at the court-house or place of returning or comparing the polls, declare the person or persons having the highest number of votes, duly elected Clerk of the County or Superior Court, as the case may be, who shall continue in office for the term of four years next after their qualification; and in the event of two or more persons having an equal number of votes for either of the offices aforesaid, then and in that case the Court of Pleas and Quarter Sessions, a majority of the acting justices being present, shall proceed to make the election as now prescribed by law in case of the election of sheriffs; and said Courts in manner aforesaid shall be a competent tribunal to decide all contested elections arising under this act.

IV. *And be it further enacted,* That the clerks elected under this act shall, at the first term of their respective courts, which shall happen after their election, execute and tender to the said Courts such bonds, and take such oaths as now are or hereafter may be prescribed by law: and where a vacancy shall be occasioned by failure to give the necessary bonds, refusal or neglect to qualify, death, resignation, removal or otherwise, the Court in which such failure may happen, shall proceed to fill the vacancy under the same rules, regulations and restrictions as are now required by law; and the person or persons so appointed shall continue in office until the next annual election for members of the General Assembly, or the first term of the Courts of Pleas and Quarter Sessions which shall thereafter happen.

V. *And be it further enacted,* That such person or persons and no others, who shall have attained to the age of twenty-one years, and have resided in the county in which they may have been chosen, twelve months immediately preceding the day of election, shall be eligible to the office of County or Superior Court Clerk: *Provided always,* that nothing herein contained shall be so construed as to repeal the law or any part thereof, which renders the Courts liable for neglecting to take sufficient securities of the Clerks of the County or Superior Courts.

VI. *And be it further enacted,* That this act shall be in force from and after the ratification thereof, and all laws and clauses of laws, coming within the meaning and purview of this act, be, and the same are hereby repealed.

(3) RUFFIN, C. J. The office of Clerk of the Superior Court of Law, for LINCOLN, is claimed by Mr. Hoke, by virtue of his election thereto, under Laws 1832, ch. 2; and his admission is opposed by Mr. Henderson, who claims the same office by virtue of a previous appointment thereto, under the act of 1806. The title depends upon the construction and validity of the act of 1832.

The decision in the Superior Court was in favor of the old clerk, and is rested by the Judge who pronounced it, distinctly

upon the ground that the act is unconstitutional and therefore void.

In support of the decision it has, however, been contended here, that it is not necessary, for the purpose of this controversy, to pass upon the correctness of the reasons of the Judge of the Superior Court; for that the act does not, in terms and according to a proper construction, oust the defendant from office.

It is true, the act does not immediately vacate the offices which were filled at its passage; nor does it expressly remove the incumbents upon the future elections to be had under its provisions. The question is, whether that effect arises from the necessary or fair construction of those provisions taken together? In construing an instrument, the cardinal point is to ascertain the meaning of those who speak in it, from the words used by them and the objects apparently to be affected. This is the rule for the construction of statutes, as well as other instruments; and it is the duty of the Court, to whose province it falls, according to the distribution of the powers of government in this country, to interpret statutes, to put a fair meaning upon the language of the Legislature, in order to effect, as far as they are constitutionally allowable, the ends in view. If the words are ambiguous, and the evils to be remedied not apparent, or not specified, and the remedy not plainly designated, the effects and consequences of the one construction or the other, may, and ought to be resorted to as important aids to the expounder. If in one sense the enactments are reasonable, (4) consistent with natural equity and a sound public policy; and if, in another sense, they invade private right, are retrospective in their operation in denouncing punishments for acts not before criminal, or in divesting property secured by previous laws, and the guaranty of public faith—if they are repugnant to the natural sense of justice, subversive of the principles of sound legislation, and conflict with a wholesome policy long established and sanctioned by the tests of experience and common consent; and above all, if they transcend the limits of the legislative authority as defined by the Constitution—a Court in such a case would not only be warranted but bound to receive the former and not the latter, as the true meaning of the Legislature, and to execute the act as thus interpreted. A decent respect for the Legislature, and a knowledge of the imperfection of language, and of the difficulty of expressing the meaning in such exact terms as to convey it with precision to the mind of another, would impose on the Court the presumption as an irresistible one, that general phrases of dubious import, were

not used in the harsh sense attributed to them, to destroy existing rights, but in the milder one (of which they are susceptible) of regulating the future actions of the citizen, and prescribing a new rule for the subsequent acquisition or enjoyment of property.

These considerations would induce the Court cheerfully to adopt the construction of the act contended for by the counsel for the defendant, were there nothing more in it than those parts on which he has animadverted. But there are other provisions, which are absolutely inconsistent with this construction. To mention a few will be sufficient since they are decisive. The first section enacts that the sheriff and all persons holding elections at the next election for members of the General Assembly, shall also hold an election for County and Superior Court Clerks in the same manner, and under the same rules and regulations that they receive votes for members of the Legislature. The fourth section enacts that the clerks thus elected shall at the first term of their respective Courts, which shall happen
(5) after their election, execute bonds for the faithful discharge of their duties, and take the oaths of office. It is thus seen that the enactment is, not that the elections thus to be held, shall be from time to time thereafter in each county, as a vacancy shall occur; but that a poll shall be opened at the then *next* general election, by *all* persons holding the elections for members of assembly. Indeed, no provision is made for any future election, not even one at the end of the four years, the prescribed term of service. In the event of a vacancy after one election, the Court is authorized to fill it, and the person appointed is to remain in office until the next annual election of members of the Assembly, *or* the first term of the Court of Pleas and Quarter Sessions thereafter; but even in that case, the persons who shall have the right to vote are not designated, nor is any person authorized to receive the votes. The very imperfection of the act in making no provisions for subsequent elections, proves that the great, almost sole end of it, was an election to follow its passage almost immediately, in every county in the State; as the words of the first section in themselves import. It is, however, said, that the act does not remove the existing clerks; and it is asked when their offices become vacated—at the passage of the act, at the election? at the qualification of the person elected? or at the next court? The answer is, that upon the grounds of the public service and the silence of the act upon the subject of removals, the offices could not, by construction, be deemed vacated until, according to the other provisions, another officer was ready to discharge the duties, or, at least the time

had arrived for him to enter on them. But by a necessary implication, when that time should arrive and the new clerk, whether elected by the people, or appointed by the Court, should have given bond and taken the oaths, the duties of the former clerk closed, and consequently, his rights as recognized in the act, also terminated. The admission of the new clerk is the expulsion of the old one; for both cannot be in at once, each having a right to the entire thing. Thus in every county a new clerk is to be elected and admitted in 1833; and, (6) therefore, all the former clerks are then ejected. This conclusion is unavoidable, as it seems to the Court; and is the more to be relied on as it accords with the general sense of the community, evinced by the elections held throughout the State under the act. In not a single county was an election omitted; nor have any scruples been before expressed that they were held in conformity to the requirements of the Legislature.

In executing such a statute a Court is not at liberty to disregard or evade its mandate upon any of the grounds, upon which are formed the rules for the interpretation of general terms of ambiguous import. These are rules for discovering the meaning of the Legislature, and not a justification for disobeying it. It is the province of the Court to expound their words so as to attain to the meaning; and to that end consequences and policy may be looked to. But when its meaning is discovered, the act as really intended, is obligatory upon the mind, the will and the conscience of the Judge, however mischievous the policy, harsh and oppressive in its enactments on individuals, or tyrannous on the citizens generally. Those are political considerations, fit to be weighed by and to influence the legislators; but if disregarded by them, their responsibility is to their constituents, not to the courts of justice. To a Court, the impolicy, the injustice, the unreasonableness, the severity, the cruelty of a statute by themselves merely, are and ought to be urged in vain. The judicial function is not adequate to the application of those principles, and is not conferred for that purpose. It consists in expounding the rules of action prescribed by the Legislature; and when they are plainly expressed, or as plainly to be collected, in applying them honestly to controversies arising under them, between parties, without regard to the parties or the consequences.

In the act under consideration, as far as it concerns the controversy between these parties, there is no ambiguity: the words are plain, the intention unequivocal, and the (7) true exposition infallibly certain. We cannot, under the pretense of interpretation, repeal it and thus usurp a power

never confided to us, which we cannot usefully exercise, and which we do not desire.

Since the meaning of the act cannot be doubtful, and according to that meaning Mr. Henderson had not, but Mr. Hoke had the right to the office of clerk at the time the Judge refused to admit the latter, the ground of the decision of the Superior Court, as stated in the record, recurs before this Court, and must now unavoidably be examined.

The act transfers the office of clerk from one of these parties to the other, without any default of the former, or any judicial sentence of removal. The question is, whether this legislative intention, as ascertained, is valid and efficacious, as being within the powers of the Legislature in the constitutions of the country; or is null, as being contrary to and inconsistent with the provisions of those instruments. To the determination of this question, the judicial function is competent. It involves no collateral considerations of abstract justice or political expediency. It depends upon the comparison of the intentions and will of the people as expressed in the Constitution, as the fundamental law, unalterable except by the people themselves, with the intentions and will of the agents chosen under that instrument, to whom is confided the exercise of the powers therein delegated or not prohibited. Such agents are all public servants in this State; and the agency is necessarily subordinate to the superior authority of the Constitution, which emanated directly from the whole people. Legislative representatives may order and enact what to them may seem meet and useful, upon all subjects and in all methods, except those on which their action is restrained by the Constitution; and such order and enactment is obligatory alike on all citizens, including those who are by a public duty to execute the laws, as well as those on whom they are to be executed. Courts therefore must enforce such enactments; for they are laws to them by the mere force of the legislative will. But when the representatives pass an act upon a subject upon which the people have said in the Constitution, they
(8) shall not legislate at all; or when upon a subject on which they are allowed to legislate, they enact that to be law which the same instrument says shall not be law, then it becomes the province of those who are to expound and enforce the laws, to determine which will, thus declared, is the law. Neither the reasons which determined the will of the people on the one hand, nor the will of the representatives on the other, can be permitted to influence the mind of the Judge upon the question, when reduced to that simple point. His task is the humbler and easier one of instituting a naked comparison be-

tween what the representatives of the people have done, with what the people themselves have said they might do, or should not do; and if upon that comparison it be found that the act is without warrant in the Constitution, and is inconsistent with the will of the people as there declared, the Court cannot execute the act, but must obey the superior law, given by the people alike to their judicial and to their legislative agents.

Although this function be in itself comparatively humble, and does not call for those high attainments required for wise legislation, which, as it affects all the diversified interests of society, ought to embrace a knowledge of all of them, and a just estimate of their relative importance to individual happiness and the common weal; yet the exercise of it is the gravest duty of a judge, and is always, as it ought to be, the result of the most careful, cautious, and anxious deliberation. Nor ought it to be, nor is it ever exercised, unless upon such deliberation, the repugnance between the legislative and the constitutional enactments be clear to the Court, and susceptible of being clearly understood by all. In every other case, there is a presumption in favor of the general legislative authority, recognized in the Constitution. The Court distrusts its own conclusions of an apparent conflict between the provisions of the statute and the Constitution, because the former has the sanctions of the intelligence of the legislators, equal to the apprehension of the meaning of the Constitution, of their equal and sincere desire, from motives of patriotism and conscientious duty, to (9) uphold that instrument in its true sense; and of the present and temporary inclinations, at least, of a majority of the citizens, which must be supposed to be known to their representatives, and to be expressed by them. But even these sanctions are not sufficient to overturn the Constitution, if the repugnance do really exist and is plain. For although the imputation is altogether inadmissible, that the Legislature intend willfully to violate the Constitution, and still less that the people themselves contemplate violence to the instrument consecrated by their own voices and the consent of our ancestors; yet all men are fallible, and in the dispatch of business, the heat of controversy, and the wish to effect a particular end, may inadvertently omit to scrutinize their powers, and adopt means, adequate, indeed, to the end, but beyond those powers. It ought not to surprise that such an event should sometimes happen. In other countries, such has been the practical difficulty of limiting the action of those in whose hands the powers of government are, that the effort to do so has been tacitly yielded up, and the will of the governors for the time being, admitted to be

the supreme law. In America, written Constitutions, conferring and dividing the powers of government, and restraining the actions of those in authority, for the time being, have been established, as securities of public liberty and private right. Still the agency of men is necessary to the operation of the government and the execution of its powers. The same frailties which cause men in power, through which they happen, in those countries where their own judgment and conscience are their only guides and restraints, to enact laws unjust or oppressive, may here also be expected sometimes to have the same effects, although their acts should involve a violation of the Constitution. It is astonishing that it does not oftener happen. That it does not, is a proof not only of the essential value of written Constitutions, but of the profound wisdom with which, in ours, the powers of government are distributed; so as to secure in every department the agency of public servants, not
(10) only capable of comprehending, but so solicitous of obeying the Constitution, in its true spirit, that they will not palpably violate it, nor incur the danger of doing so by the exercise of doubtful powers. Such praise is not only due to the Constitution for its wisdom, but the merit of scrupulously observing it must be allowed to those, who have been called to legislate under it, and have not, in the whole course of the legislation of nearly sixty years, been urged by passion or betrayed by carelessness into the adoption of, perhaps, half a dozen acts incompatible with it. When, unfortunately, such instances do occur, the preservation of the integrity of the Constitution is confided by the people, as a sacred deposit, to the Judiciary. In the discharge of that duty, the approbation of the Legislature itself is to be anticipated; for the principle of virtue which restrains them from a known and willful violation of it, will induce them to rejoice at the rescue of the Constitution from their own incautious and involuntary infraction of it. It remains now to inquire, whether the act under consideration be of that character.

The office of clerk is recognized in the Constitution; but the tenure is not prescribed in any part of that instrument, and is doubtless, within the discretion of the Legislature. Very soon after the adoption of the Constitution the Act of 1777 (Rev., ch. 115), for the establishment of courts of law, passed and provided, that the Courts should appoint clerks of skill and probity, who should execute official bonds and take certain oaths of office; and enacts in the fourth section, *that the clerks so appointed shall hold their offices during their good behavior therein.* In 1806, a new law passed which established a Superior Court of

Law, and a Court of Equity in each county, and provided that the Judges should appoint clerks, and clerks and masters in equity, of skill and probity for the Courts thereby established, who should be residents of the county at the passage of the act, and should continue to reside within the same during their continuance in office, and be subject to the same rules, regulations and penalties as the clerks, and clerks and masters of the Courts before established. Under this law, the (11) defendant was in April, 1807, appointed. The legal tenure of his office is therefore that created by the act of 1777, during his good behavior therein, and, as additionally qualified by the act of 1803, during his residence in the County of Lincoln. He has not been found guilty of any misdemeanor in office, but has discharged his duties faithfully; and it is not stated that he has removed from the county, but that he was qualified and therefore still resides there. The act of 1832 removes him from office and confers it on the applicant.

The great object of society is to enable men to appropriate among themselves the things which, in their natural state, were common. The purpose of the ordinary laws instituted by society, is to protect the right to the things thus appropriated to one individual, from the acts and wrongs of other individuals. The right is yet exposed to the action of the mass of individuals composing the society; and against that there can be no effectual resistance, because it is sustained by physical force. There is, nevertheless, an intermediate power between that of an individual, or a few individuals on the one side, and the whole society on the other, from which danger to individual right may be apprehended. It is that power which resides in the person, or the body of persons, on whom is conferred the authority to act in the name and with the sanction of the supposed will of the whole community; which may be observed and used, contrary to the will of the community, for the purposes of private wrong. The body possessing that power we designate as the government of a country, whether it consist of one or more persons. The great and essential differences between governments, as distinguished from one another by their constitutions, consist in the greater or less personal liberty of the citizen, and the greater or less security of private right, against the violence or seizure of those who are the government for the time being. It is true, the whole community may modify the rights which persons can have in things, or at their pleasure, abolish them altogether. But when the community allows the right and (12) declares it to exist, that constitution is the freest and best, which forbids the government to abolish the right, or

which restrains the government from depriving a particular citizen of it. In other words, public liberty requires that private property should be protected even from the government itself.

The people of all countries who have enjoyed the semblance of freedom, have regarded this and insisted on it as a fundamental principle. Long before the formation of our present Constitution, it was asserted by our ancestors on various occasions; and, in one sense of it, its vindication produced the Revolution. At the beginning of that struggle, while the jealousy of power was strong, and the love of liberty and of right was ardent, and the weakness of the individual citizen against the claims of unrestricted power in the government was consciously felt, the people formed the Constitution of this State; and therein declared "that no freeman ought to be taken, imprisoned or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner destroyed, or *deprived* of his life, liberty or *property*, but by the law of the land."—(Bill of Rights, s. 10.) By the fourth section it is declared, "that the legislative, executive and supreme judicial powers of government ought to be forever separate, and distinct from each other."

In absolute governments, whether hereditary or representative, the division of powers of government is unimportant; because that body in which resides the superior authority can, at will, make it supreme and absorb all the other departments. It does not follow, therefore, that because the British Parliament, whose supremacy is acknowledged, decides questions of private right and puts that decision, as it does its other determinations into the form of a statute, that whatever it does is legislative in its nature. It can adjudicate and often does substantially adjudicate when it professes to enact new laws. That faculty is expressly denied to our Legislature, as much as legislation is denied to our Judiciary. Whenever an act of
(13) Assembly, therefore, is a decision of titles between individuals, or classes of individuals, although it may in terms purport to be the introduction of a new rule of title, it is essentially a judgment against the old claim of right: which is not a legislative, but a judicial function. It may not be easy to distinguish those powers and to define each, so that an act shall be seen at once to be referable to the one or the other. But I think, that where a right of property is acknowledged to have been in one person at one time, and is held to cease in him and to exist in another, whatever may be the origin of the new right in the latter, the destruction of the old one in the former is *by sentence*. If the act of 1832 had been confined in its

terms to the clerkship of Lincoln, its judicial character would be obvious. If it had said, that Mr. Henderson had forfeited his office, or had conveyed it to Mr. Hoke, or that after forfeiture Mr. Hoke had been duly appointed, or was by that act appointed, or had been elected by the citizens and was approved by the Legislature; and therefore the one should go out and the other go in: it would be plainly as respects Mr. Henderson's title, an adjudication against it, although the subsequent investment of the title in Mr. Hoke would be legislative. Is the act the less of the former character because it does not recite an abuse by Henderson, or other cause of forfeiture? Is not such forfeiture assumed in it? For it is impossible in the nature of things, that Mr. Hoke can be rightfully put in, unless the other be rightfully put out; and Mr. Henderson cannot rightfully be deprived, unless the thing he claims was never property, or has ceased to be so, or unless he has parted from the property he had in it, by forfeiture or otherwise. This act, however, is not restricted to one county, but applies generally to all the clerks in every county; and it is said, for that reason, it cannot be a judicial act. It certainly, in that light, is wanting in precision and direct operation usually belonging to, and distinguishing judicial proceedings. But, nevertheless, it partakes of that character in its operation on the former officers. If valid, it compels the Courts to deprive the officers without further inquiry before a jury, into the fact or legal sufficiency of any cause of forfeiture or removal. If the Legislature cannot itself adjudge a forfeiture directly, still less it would seem, ought they to command the courts to remove without any cause, whatever. Nor does the extension of the sentence of expulsion to all the clerks in the State vary its character in this respect. The provision is not that of a law prescribing a rule of property, or modifying the extent of interest or the tenure *prospectively,* of which these offices shall be susceptible, or declaring that all property in them shall cease by the abolition of the offices themselves; but it is a provision, by which the office, preserved in the law and still regarded as the subject of property, is taken, and merely taken from one man and given to another. The only sense in which that transaction cannot be called judicial is, that no court of justice could have pronounced the judgment under the existing laws, upon the state of facts in this case. To have authorized such a sentence by a court, further legislation would have been necessary. It is true then, that the act is not purely judicial. But this is all that can be said in support of it. It is certainly true that it

(14)

is not purely legislative; for it leaves the nature of the office as it was, in duties, powers, privileges and emoluments, and confers it on one person as a lucrative place, *after taking it from the former possessor, who was before the acknowledged owner.* As far as the act is legislative, it is within the legitimate powers of the General Assembly; and it must be admitted that the elections allowed or commanded by it are constitutional and valid, and confer a good title on the persons elected, where a vacancy existed; and it may, perhaps, be admitted that they are also valid and confer a title, whenever the pre-existing rights of the incumbents shall expire by lapse of time, or cease by surrender, or by forfeiture for any cause declared by law.

The question is not now upon the validity of the title, under the new elections to the office, if vacant, or when it shall in future become so; but upon the right claimed under it to
(15) immediate induction, notwithstanding the office is already full by a previous legal appointment of another person. To sustain this claim the previous appointment must be vacated, or the officer adjudged out. When the act proceeds to do this, it becomes, in that respect, an adjudication. Although it is not purely so in all its provisions, and may not in any be conclusively and definitely so, because it does not decide *inter partes* by name; yet it partakes of that nature, for the reasons already stated, and the prohibition of the constitution is as imperative against the assumption of the judicial power by the Legislature in combination with their legislative authority, as if the act were a single and simple one of direct adjudication. Creating a right or conferring it on one, when not already vested in another, is legislation. So prescribing the duties of officers, their qualifications, their fees, their powers, and the consequences of a breach of duty, including punishment and removal, are all political regulations, and fall within the legislative province. But to inflict those punishments, after finding the default, is to adjudge; and to do it, *without default,* is equally so and still more indefensible. The Legislature cannot act in that character; and therefore, although their act has the forms of law, it is not one of those *laws of the land,* by which alone a freeman can be *deprived* of his *property.*

Those terms "law of the land" do not mean merely an act of the General Assembly. If they did, every restriction upon the legislative authority would be at once abrogated. For what more can the citizen suffer, than to be "taken, imprisoned, disseized of his freehold, liberties and privileges; be outlawed, exiled and destroyed; and to be deprived of his property, his liberty and his life," without crime? Yet all this he may suffer,

if an act of Assembly simply denouncing those penalties on particular persons, or a particular class of persons be in itself, a law of the land within the sense of the Constitution; for what is in that sense, the law of the land, must be duly observed by all, and upheld and enforced by the Courts. In reference to the infliction of punishment and divesting of the rights of property, it has been repeatedly held in this State, and (16) it is believed, in every other of the Union, that there are limitations upon the legislative power, notwithstanding those words; and that the clause itself means that such legislative acts, as profess in themselves directly to punish persons or to deprive the citizen of his property, without trial before the judicial tribunals, and a decision upon the matter of right, as determined by the laws under which it vested, according to the course, mode and usages of the common law as derived from our forefathers, are not effectually "laws of the land," for those purposes. Although, in some instances, the principle may have been misapplied, yet it seems, in every case in which it has come into discussion, to be admitted to be a sound one, and the true import of the constitution. It was early asserted in an anonymous case in 2 N. C., 29. It was acted on again in *Bayard v. Singleton,* 1 N. C., 5, in 1787; in which it was held that the act for conferring titles derived by purchase from the commissioners of confiscated property, which directed that suits brought by claimants of such property should be dismissed by the Court on affidavit of defendant, that he was a purchaser from the commissioner, was void. It was elaborately considered in *University v. Foy,* 5 N. C., 58, 3 N. C., 310; and declared again in *Hamilton v. Adams,* 6 N. C., 161. In *Allen v. Peden,* 4 N. C., 442, it was distinctly decided, that an act of the Legislature emancipating a slave against the will of his owner, was plainly in violation of the fundamental law of the land, and so void. And in *Robinson v. Barfield,* 6 N. C., 391, that a deed of a married woman, not executed according to the existing law, did not pass the title to lands, notwithstanding an act of the Legislature passed after her death, enacted that it should be good and effectual for that purpose.

It thus appears, that in respect to every species of corporeal property, real and personal, the principle has been asserted and applied. It has been adjudged, that the Legislature cannot seize the land or slaves of the citizen from him, (17) and confer them on another, and in *Allen v. Peden, supra,* it was applied in a remarkable manner, and to the extent that the Legislature could not enact that the property in a slave should cease and exist in no person—upon the ground, I pre-

sume, that it was not a general provision for the extinction of slavery, but the depriving of a single citizen of his property without any motive of public utility, or view to general expediency.

The sole inquiry that remains is, whether the office of which the act deprives Mr. Henderson, is *property.* It is scarcely possible to make the proposition clearer to a plain mind, accustomed to regard things according to practical results and realities, than by barely stating it. For what is *property;* that is, what do we understand by the term? It means, in reference to the thing, whatever a person can possess and enjoy by right; and in reference to the person, he who has that right to the exclusion of others, is said to have the property. That an office is the subject of property thus explained, is well understood by every one, as well as distinctly stated in the law books from the earliest times. An office is enumerated by commentators on the law among *incorporeal hereditaments;* and is defined to be the right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging. (2 Bl. Com., 36.) A public office has been well described to be this: when one man is specially set by law, and is compellable to do another's business against his will and without his leave, and can demand therefor such compensation, by way of salary or fees, as by law is assigned; to the doing of which business no other person but the officer, or one deputed by him, is legally competent. (*Carth.* 478; *Leigh's Cas.* 1; *Mumf.* 475.) That the purpose of creating public offices is the common good is not doubted. Hence, most of the rules regulating them have a reference to the discharge of the duties, and the promotion of the public convenience; they are *pro commodo populi.* Hence, they are not the subjects of property in the sense of that full and absolute dominion
(18) which is recognized in many other things. They are only the subjects of property, as far as they can be so in safety to the general interest, involved in the discharge of their duties. This principle demands that different rights of property should be recognized in different offices. It is one of the ordinary rights of property to alien and dispose of it at pleasure; but that is inadmissible in public offices, because the public require a responsible person to answer for defaults. Besides, the power of alienation is not the test of property; for doubtless, it is within the scope of legislative authority to restrict it or to deny it,—as in the laws which prescribe the ceremonies necessary to the validity of wills, or conveyances of infants and married women, and which deny altogether the power of conveying, and which interdict all conveyances made in *mortmain.* It

is another ordinary right of property to have the power of substituting another person to manage it, or to let it lie idle and unmanaged. But the former is not allowable in some offices, and the latter in none. The chief executive office and judicial offices cannot be delegated, while subordinate ministerial ones may; for there would be no security that, in the former cases, the delegate would be competent, and no responsibility of the superior would be adequate to answer the consequences; though in the latter it is otherwise. But *non user* is punishable in all public officers, and, at the election of the public, is a forfeiture. So a misdemeanor or corruption in office, may be punished by judicial sentence in any manner prescribed by law, including a motion as for a forfeiture. These are all restrictions and penalties to secure the public service, which is the object in creating the office. But with these limitations and the like, a public office is the subject of property, as every other thing corporeal or incorporeal, from which men can earn a livelihood and make gain. The office is created for public purposes; but it is conferred on a particular man and accepted by him as a source of individual emolument. To the extent of that emolument it is private property, as much as the land which he tills, or the horse he rides, or the debt which is owing (19) to him. Between him and another man, none will deny the right of property. For if one usurp an office which belongs to another, the owner may have an action for damages for the expulsion, for the fees of office received, and a remedy by *quo warranto* to inquire into the right of the usurper, and by *mandamus* to be himself restored. When we find these remedies established to enforce the right of admission into office, to secure the possession of it and its emoluments, we can no longer doubt that in law, an office is deemed the subject of property, and valuable property to the officer, as well as an institution for the convenience of the people. If it be so, it falls within those provisions of the Constitution which secure private interests; and cannot be divested without some default of the officer, or the *cesser* of the office itself.

These are the general principles that lead the Court to the conclusion that the act of Assembly is invalid.

In opposition to them, several arguments have been urged, which the Court has anxiously considered; but without a change of opinion.

It was principally urged, that, whatever may be the rule of the common law, yet in this country and under our republican institutions, public offices cannot be admitted to be private property; but the offices must be regarded as created solely for the

public use, and therefore as subject to abolition when required by the general interest, of which the Legislature is exclusively to judge. This argument was illustrated by the additional observation, that by the contrary doctrine, a system requiring officers for its execution, once fixed, would be unchangeably permanent; the absurdity of which was strongly insisted on and proved by the various changes in our judiciary system; which have all been acquiesced in, without a scruple of their constitutionality.

The Court does not perceive the least reason to doubt the validity of any one of those laws; nor to question any part of the propositions stated by the counsel, except that offices (20) cannot be the subjects of private property. Undoubtedly, the creation of an office is a question of political expediency; so is the qualification of the officer; and so are his duties, perquisites, punishment, and the tenure by which he holds his office. By consequence, they are the subjects of legislative regulation. And as the creation, so is the continuance of the office, a question of sound discretion in the Legislature; of which a Court cannot question the exercise. If the Legislature increase his duties and responsibilities, or diminish his emoluments, he must submit except in those cases in which the Constitution itself has declared the duty and fixed the compensation; because, in the nature of things, those are the subjects of such regulations as the general welfare may from time to time dictate, and the office must therefore have been conferred and accepted, subject to such regulation. The Legislature is charged with the duty of securing the rights of suitors, and of all persons who have their business done only by the clerks, against loss through the person thus appointed by the law, as well as with the duty of securing a reasonable compensation to the officer for his time and labor. It is competent therefore to call for large official bonds, and to increase or diminish the fees; *for all that concerns the interest of the community at large.* So, also, it is yielded, for the like reasons, that the office itself, when it ceases to be required for the benefit of the people, may be abolished. There is no obligation on the Legislature or the people to keep up an useless office, or pay an officer who is not needed. He takes the office with the tacit understanding, that the existence of the office depends on the public necessity for it; and that the Legislature is to judge of that.

But while these postulates are conceded, the conclusions drawn from them, cannot be admitted. They are, that there cannot be private property in public offices; and if there be, that the officer may be discharged at the discretion of the Legislature. Neither

of these propositions is believed to be correct. The former has been already considered at large; and to what has been said may be added the provisions in our own Constitution guaranteeing adequate salaries to certain officers, and declaring (21) that no person shall hold more than one *lucrative* office at one time. The latter by no means follows from the premises. It may be quite competent to abolish an office; and true, that the property of the officer is thereby, of necessity, lost. Yet it is quite a different proposition, that although the office be continued, the officer may be discharged at pleasure, and his office given to another. The office may be abolished, because the Legislature esteem it unnecessary. The common weal is promoted by that law; at least, it is the apparent object, and must be deemed to be the real one. But while the office remains, it is not possible that the public interest can be concerned in the question, who performs the services incident to it. The sole concern of the community is, that they should be performed, and well performed, by somebody. That they should be done by one particular person more than by another, is not therefore a matter of expediency, in any sense; and hence it cannot be the subject of legislation, that one man, who has the faith of the public pledged to him, that he should have the employment for a certain term, and who has, upon that faith, entered upon the employment and faithfully executed it, should be deprived of it and supplanted by another man, who is to do, and can do the community no other services than those already in course of performance by the former. It is true that a clerk, like all other officers, is a public servant; but he has also a private interest. He is not merely a public servant and political agent. If he were, and had no interest of his own, he might be discharged at pleasure. The distinction in principle, between agencies of the two kinds is obvious. The one is for the public use exclusively, and is often neither lucrative nor honorary, but is onerous. To be deprived of such an office is often a relief, and never can be an injury. The other is for the public service conjointly with a benefit to the officer. To be deprived in this last case is a loss to the officer. If it arise by the destruction of the office, it is a loss without an injury; because the right of the officer is neccessarily dependent upon the existence of the office, as (22) an establishment in the political economy of the country. But if it arises from the transfer of the emoluments, the loss then becomes an injury; because that which belongs to one man, as a thing not simply of ideal, but of real value, is taken from him and given to another. The distinction which I am en-

deavoring to express and explain, may be fully exemplified by the difference between the public agency exercised in appointing a clerk, and that exercised in discharging the duties of a clerk. By the law, the Judges of the Superior Courts and the Justices of the County Courts, were authorized to appoint the clerks of their respective Courts. That power is an *office* in the extended sense of that word, which originally signifies *duty*, generally; but it is not a lucrative or a valuable office. It was a duty to be performed exclusively for the public convenience, and with reference to it alone, without any benefit, immediate or remote, to the Judges and Justices as individuals; who were required, by oath, not to make any private advantage from it, but to give their voice for the appointment of only such persons as appeared to them to be sufficiently qualified, and to do that without reward or hope of it, or any private motive, whatsoever. The Courts were, in this respect, not exercising a judicial function, nor serving for emolument, but were the mere ministers of the law, and naked agents of the body politic to the effect and end purely public. Such political agents the Legislature can discharge, whenever it shall appear to them that the end can be better effected through other agents. But when the country has through those agents appointed a person to the office of clerk, though he also is a servant of the public, yet he is something more than a naked, uninterested, political instrument. For the term for which the law assures the office to him, he claims and can claim, to continue to be the agent of the public to discharge the duties of that place, while there are duties remaining to be discharged, and he is ready and willing to perform them. Nor is there anything in our constitution, the form or nature of our government, to change the character of this right. There
(23) is no reason why a public office should not be given during good behavior. The services are what concern the country; and they may be expected to be best done by those, whose knowledge of them, from time and experience, is most extensive and exact. Some offices can, under the Constitution, be granted or conferred for no other term but that of good behavior. Such is the provision respecting the office of a Judge and Justice of the Peace. Certainly that is not introduced solely for the benefit of the persons holding those offices, but upon the great public consideration, that he who is to decide controversies between the powerful and the poor, and especially between the government and an individual, should be independent, in the tenure of his office, of all control and influence, which might impair his impartiality—whether such control be essayed through the frowns of a bad man, or through the adultation of

an artful one, or such influence be produced by the threats of the government to visit nonconformity to their will, by depriving him of office, or rendering it no longer a means of livelihood. For these reasons the Constitution has fixed the tenure of the judicial office to be during good behavior. The people have said, that the liberty and safety of the citizen required that it should not be held upon any other tenure. It is clear, therefore, that our ancestors did not entertain the notion that such a tenure was not consistent with our institutions generally. It is true, that it does not put clerks upon the same basis. There was not the same reason for it. The public interest did not require that any law should be laid down to the Legislature as to the tenure of those offices; but it was left to their discretion, as expediency might from time to time require it to be altered. It was, therefore, in the power of the Legislature to confer such offices for life, or during good behavior, or during pleasure, or for any term of years, determinable with life at an earlier day. For an absolute term of years it could not be granted; as upon the death of the officer, it would in that case go to his executor, which would be inadmissible, since the office concerns the administration of justice, and an incompetent person (24) might be introduced into it. It, however, pleased the Legislature to make the tenure, during good behavior. When they did so, it was quite within their competency to alter it subsequently. But such alterations must operate prospectively, and as regulations for future appointments and future enjoyment. As to those to whom the grant was made for life, an estate, a property vested; which cannot be divested without default or crime.

This course of reasoning in some degree anticipates some other arguments urged for the plaintiff; which, however, it may be more becoming to state distinctly and consider more particularly.

It was said, that as the tenure was necessarily at the will of the Legislature, he who took the office received it subject to such alterations of tenure, as well as of duties and emoluments, as the Legislature might prescribe. And the distinction between the tenure of the judicial office, as being constitutional and unalterable, and that of a clerk as being statutory and therefore alterable, was strongly urged.

The distinction is admitted; but not the argument derived from it. The Constitution restrains the Legislature from appointing a Judge or Justice of the Peace, except during good behavior. It does not restrain them in respect to a clerk; but allows that office to be given for a longer or shorter term, as

may be most expedient. The question is, what is the effect of a grant for a particular period? Can the duration be afterwards lessened to the prejudice of a grantee? We think not; because he acquires a property. That it may be lessened in reference to new appointments cannot be contested; but that it can, in respect to existing ones, involves the propositions already discussed, that an office is not the subject of private property, and that private property may be seized without judicial sentence, and even without compensation. This property does not differ from that in other subjects, as far as it is allowed at all. In lands, there may be estates in fee, for life, or for years. The Legislature may grant the public domain in any of those
(25) estates; but if it please them once to grant it, the grant is irrevocable and the estate cannot be resumed. It becomes the land of a citizen and cannot be taken from him by law, without the action of his peers as a jury to pass on the facts, and of a Court to determine the title. It is further said, that the distinction between these offices as derived from the constitution and a statute, is exhibited in the power to alter the compensation: that the clerk must be considered as holding office at the will of the Legislature, while the fees depend entirely on their pleasure; whereas, a judge, who holds his office independent of that will, is necessarily entitled to his salary, as stipulated to be paid to him. Upon this latter proposition, a person in my situation cannot be expected to express, and cannot properly express an opinion. But taking it to be true, it does not establish the point to which it is adduced. If it be true, it arises as an incident to the independent tenure of the judicial office fixed by the Constitution. No such object was in view in respect of a clerical office. All that is intended is, that the Legislature shall allow such fees as are adequate to the livelihood of the clerk, and as a compensation for his labor. It is supposed that a sense of justice will ever influence the Legislature to do this, and if not, that the public interest will. For this argument assumes that the office is still necessary to the public convenience, and continues, by law, to exist. Without a competent officer with a competent livelihood, the office must be unfilled, except by compulsion, and if occupied, the duties will be unperformed. No danger, therefore, could have been apprehended, that the legislation on this subject would be unjust to the officer—who in the line of his official duty, can never be called to do an act which will render him obnoxious to the government, or the men of power of his day. Nor was the danger more to be expected, that the public interest would suffer by the Legislature not providing proper and sufficient offices, in which the business of the

citizens might be transacted; and if such inconvenience should at any time arise, it could be only temporary, and would be redressed upon another election of representatives. (26) The analogy between those offices in this respect, does not therefore exist, as supposed; and it may well be that the Legislature can regulate the emoluments and prescribe the duties and punishments of the clerk, without possessing the power of depriving him of his office, merely for the sake of benefiting another person.

Nor do those powers, nor that of abolishing the office altogether, which are readily conceded to the Legislature, involve the further one of depriving the officer of his office, while it continues.

It has been urged that it is vain and futile for the Court to refuse to execute this law, and to uphold Mr. Henderson's title, because if the Legislature be determined in their purpose, they can be still more unjust by destroying the office itself, or taking away the fees.

There are several answers to that argument. The abolition of the office depends upon the necessity for it in the opinion of the Legislature and of the people: if useful, doubtless it will be preserved; and if it be not, private interest must yield to general convenience. But admitting it to be necessary, and that Mr. Henderson is constitutionally entitled to it during his good behavior, it is not to be expected, nor apprehended—it cannot be imputed to the Legislature, that it will, *for the indirect purpose of expelling by starvation,* render the office more onerous, without adequate compensation, or take away the compensation altogether, while the duties remain as they are. If such a law were to pass, it would itself be unconstitutional—that being the object. If the purpose were declared in the law in such terms, that the Court could say, that the act was passed upon no other, the same duty would then be imposed on the Court which we are now discharging. But if the law be couched in general terms, so that the Court, which cannot inquire into motives not avowed, could not see that the act had its origin in any other consideration but public expediency, and therefore would be obliged to execute it as a law; still it would not, in reality, be the less unconstitutional, although the Court could not pro- (27) nounce it so. It would be law, not because it was constitutional, but because the Court could not see its real character, and therefore could not see that it was unconstitutional. It would not be constitutional as a provision, which deprives a citizen of his property; but it would be held so, because we should be obliged to regard it as not having such a provision.

The argument is therefore unsound in this: that it supposes (what cannot be admitted as a supposition) the Legislature will designedly and willfully violate the Constitution, in utter disregard of their oaths and duty. To do, indirectly, in the abused exercise of an acknowledged power not given for, but perverted to that purpose, that which is expressly forbidden to be done directly, is a gross and wicked infraction of the Constitution; and the more so, because the means resorted to, deprive the injured person, and are designed to deprive him of all redress, by preventing the question becoming the subject of judicial cognizance. But that is not the only test of the constitutionality of an act of the Legislature. There are many laws palpably unconstitutional which never can be made the subjects of legal controversies. Not to allude to the causes which have been recently the themes of the bitterest political controversies, several instances of much simplicity may be adduced from our State government. The Constitution of this State provides, that the Governor, Judges, Attorney-General, Treasurer, and other officers shall be elected by the General Assembly by ballot, and that certain of them shall have adequate salaries during their continuance in office. Suppose the Legislature to refuse to elect those officers; or to give them salaries; or, after assigning them salaries in the statute, to refuse to lay taxes, or to collect a revenue to pay them. All these would be plain breaches of constitutional duty; and yet a court could give no remedy, but it must be left to the action of the citizens at large to change unfaithful for more faithful representatives.—Yet no one will say, that the Legislature can by law remove the
(28) Governor, or a Judge, or any other head of a department, because they can unconstitutionally refuse to provide salaries for them, and the Courts cannot compel the raising of such salaries. Nor can it be said, because there cannot be such compulsion, that therefore, the law is constitutional. All that can be said is, that such is the imperfection of all human institutions, that it is not possible to anticipate and provide against all vices of the heart, more than all errors of the head; and that after every precaution, much reliance must be placed in the integrity of our fellow men, and that such confidence is liable to be abused. But I think it may safely be assumed, as is done in the Constitution, with all the responsibilities of the legislative representative to their constituents under frequent elections, with all the clear declarations of the rights of the citizen in that instrument, with the division of the powers of government made in it, whence arise the powers and the duty of the judiciary to ascertain the conformity of a statute

with the constitution: that with all these guards against abuse, the danger of a willful and designed violation, is never to be apprehended. No arguments therefore in favor of the necessity of executing a particular act, apparently inconsistent with the Constitution, can be drawn from any supposed ability of the Legislature to effect the same end by indirect means, which are beyond the cognizance and control of the judiciary. When such an abuse shall occur, it will devolve on the people themselves to correct it, and not on us as a portion of their subordinate agents.

I have omitted to consider in its proper place, another objection made by the counsel for the defendant, and must therefore now take notice of it. It has been said, that the obligation to continue in office ought to be mutual to be complete, and that such is not the case, because the officer may at his pleasure resign. The argument on behalf of the power to discharge an officer assumes the right of the officer to discharge himself; and in that point differs entirely from the law as it stands in the conception of the Court. An officer may certainly resign; but without acceptance, his resignation is nothing and he remains in office. It is not true, that an office is held (29) at the will of either party. It is held at the will of both. Generally resignations are accepted; and that has been so much a matter of course with respect to lucrative offices, as to have grown into a common notion that to resign is a matter of right. But it is otherwise. The public has a right to the services of all the citizens, and may demand them in all civil departments as well as in the military. Hence there are on our statute book, several acts to compel men to serve in offices; as ch. 5, sec. 4 Laws of 1741*, which inflicts a penalty on one appointed a constable and neglecting or refusing to qualify; ch. 8, sec. 3, 1777†, which compels a sheriff to serve at least one year; the various acts directing the appointment and services of overseers of the road; and the recent statutes restraining certain militia officers from resigning under five years, and the like. Every man is obliged, upon a general principle, after entering upon office, to discharge the duties of it while he continues in office, and he cannot lay it down until the public, or those to whom the authority is confided, are satisfied that the office is in a proper state to be left, and the officer discharged. The obligation is therefore strictly mutual; and neither party can forcibly violate it.—If indeed the public change the emoluments of office, it is another question, whether that be not an implied permission

*23 State Records, 162.
†24 State Records, 95.

for the officer to retire at his election, unless the contrary be provided in the law. For I cannot doubt, that the Legislature has the perfect power, if it choose, arbitrarily to exercise it, of compelling—not indeed a particular man designated in a statute by name, but any citizen elected or appointed, as by law prescribed, to serve in office, even against his will. I have mentioned some instances in which it is done; and there is no reason why, making due compensation, it may not be done as to all offices. It is true, that non-user of an office is a forfeiture of it; and that is spoken of as a penalty and punishment in itself. But it is not the only punishment; and is a punishment only when the office is itself valuable. Such a forfeiture does not discharge the officer, but at the election of the sover-
(30) eign; for that would be to say, that an onerous office could not be conferred.—The officer may be punished by removal for non-user, as a forfeiture; or he may be kept in office and punished personally, for non-user as a crime.

It is lastly said, that it can be no injury to remove an officer; because the salary is taken to be but a just compensation for his time and labor, and when the public do not take the latter the officer can have no demand for them. This position is rather an artful than a solid or fair argument. It is true that to the officer is left the command of his own time, and the application of his own labor and the fruits of it. But it is not true that he does not suffer by being deprived. Of what is he deprived? Of an employment—the immediate source of livelihood—the preparation for which has been the great business, it may be, of his life, to which he has served a long apprenticeship, and to which he has devoted himself, abandoning other lines of life, or other roads to fortune which were once open to his free choice. True, he is free to work at other employments; but he is fit for none; he knows but this. He is in the situation of one bred to the agriculture of our country; to whom the Legislature should say: "Till the ground no more; go and spin silk, or weave muslin." His labor is not the subject of conscription; but he hangs a burden on himself, because the only employment to which he is competent is denied him. The loss is therefore undeniable. The only question is, whether it be such an one as the Legislature can rightfully inflict.—We think, as already stated, that they may, if it be merely the incidental consequence of a general law really passed for the purpose of abolishing useless offices, as a species of governmental institution. But that they cannot, if the offices are retained and the officer is deprived of his property therein, without default and without trial, for the single and sole purpose of giving it to another.

It became the Court to consider this subject dispassionately in all its bearings. We have done so, without a desire to swerve to either side from the direct line of the law and (31) the Constitution, but with the utmost respect for the opinions and intentions of those from whom we differ. But having reached the conclusion above stated upon which no member of the Court doubts, we are obliged to pronounce it as a duty not to be evaded; and, being a known duty, we do so without reluctance, in support of the right of the citizen, and of the inviolability of the fundamental law of the land. The judgment of the Superior Court must therefore be affirmed.

PER CURIAM. Judgment affirmed.

Cited: R. R. v. Davis, 19 N. C., 469; *Green v. Cole,* 35 N. C., 428; *S. v. Moss,* 47 N. C., 68; *Thompson v. Floyd, Ib.,* 315; *Cotton v. Ellis,* 52 N. C., 548, 9; *S. v. Glen, Ib.,* 327; *Barnes v. Barnes,* 53 N. C., 372; *Gatlin v. Walton,* 60 N. C., 329; *Galloway v. R. R.,* 63 N. C., 170; *S. v. Smith,* 65 N. C., 371, 2; *King v. Hunter Ib.,* 612; *Clark v. Stanly,* 66 N. C., 67; *Brown v. Turner,* 70 N. C., 99; *Vann v. Pipkin,* 77 N. C., 410; *Bunting v. Gates, Ib.,* 284, 5; *Lyon v. Akin,* 78 N. C., 261; *Prairie v. Worth, Ib.,* 173; *Rea v. Hampton,* 101 N. C., 54; *McNamee v. Alexander,* 109 N. C., 246; *S. v. Cutshall,* 110 N. C., 545; *Board Education v. Kenan,* 112 N. C., 568; *S. v. Womble, Ib.,* 867; *Trotter v. Mitchell,* 115 N. C., 193; *Harkins v. Cathey,* 119 N. C., 661; *McDonald v. Morrow, Ib.,* 676; *Wood v. Bellamy,* 120 N. C., 216; *Russell v. Ayer, Ib.,* 200; *Caldwell v. Wilson,* 121 N. C., 468; *Ward v. Elizabeth City, Ib.,* 3; *Miller v. Alexander,* 122 N. C., 721; *State Prison v. Day,* 124 N. C., 366; 372, 4, 5, 6, 380, 2, 9, 390, 1, 3; *Bryan v. Patrick, Ib.,* 664, 9, 679; *Wilson v. Jordan, Ib.,* 683, 707, 710; *Hutton v. Webb, Ib.,* 758; *White v. Hill,* 125 N. C., 200; *Greene v. Owen, Ib.,* 214, 222; *McCall v. Webb, Ib.,* 248; *Abbott v. Beddingfield, Ib.,* 263, 5; *Gattis v. Griffin, Ib.,* 335; *S. v. White, Ib.,* 689; *White v. Auditor,* 126 N. C., 576, 607; *Taylor v. Vann,* 127 N. C., 245; *Fortune v. Comrs.,* 140 N. C., 331.

Overruled, Mial v. Ellington, 134 N. C., 136, 9, 146, 154, 168, 9, 171, 6, 183.

JAMES TAYLOR v. EDWARD STANLY.

Headnote, same as in *Hoke v. Henderson, ante,* 1 q. v.

APPEAL from the judgment of *Settle, J.,* at CRAVEN.

J. H. Bryan for the plaintiff.
Badger for the defendant.

RUFFIN, C. J. The facts in this case are the same as in that of *Hoke v. Henderson, ante,* except that Mr. Stanly was not appointed to office during good behavior, but for the term of four years from the 4th Monday of March, 1832, under the act of 1822 (Rev., c. 1149). His term was unexpired at the time Mr. Taylor was elected, and applied to be admitted. Until its expiration his right was perfect; and the case falls within the principles discussed and established in the case just mentioned. The Judges of the Superior Courts however, entertained opposite opinions upon those principles, and upon the grounds on which the judgment in *Hoke v. Henderson* has been affirmed, that given in this cause must be reversed, and the title of Mr. Stanly declared valid, and he restored to his office, and the same be certified to the Superior Court of Craven.

PER CURIAM. Judgment reversed.

JONATHAN WEST, *qui tam,* v. THOMAS RATLEDGE.

The Statute (5 Geo. I, c. 13) for the amendment of writs of error, and for preventing the arresting or reversing of judgments after verdict, is in force in this State. Therefore, when the writ was to answer the plaintiff of a plea of debt for $213.32, and the declaration was in debt *qui tam* for $160, it was held that the variance was cured by a verdict for the plaintiff.

DEBT in which the plaintiff claimed in his writ to recover of the defendant the sum of $213.32 which the defendant
(32) "owes and detains to his damage $213.32." The declaration contained two counts: The first was in debt for $213.32 upon the Statute of usury (Laws 1741, Rev., c. 23) for the corrupt loan by the defendant to one John Cook and Daniel Casey of $80, and taking for the forbearance thereof, from 26 September, 1826, until the same day in the following year, the sum, $106.66, with the usual averments. The second was precisely similar, except that in it the plaintiff sought to recover of the defendant the sum of $160.

PLEAS—*Nil debet* and Act of 1808 (Rev., c. 743) limiting the time within which penal actions shall be commenced.

On the Fall Circuit of 1832 at Rowan the cause was tried before *Norwood, J.*, and a verdict returned for the plaintiff, the entry of which was in the following words, "who find all the issues in favor of the plaintiff, and assesses his damages to one hundred and sixty dollars." The defendant then moved in arrest of judgment because of the several variances between the writ and the declaration. The motion was overruled and the defendant appealed.

Nash for the defendant, in addition to the objection taken in the Court below, moved here to arrest the judgment: 1st. Because the verdict was general, and one of the counts bad. 2d. Because the jury had assessed the plaintiff's damages and judgment was given for them.

W. A. Graham for the plaintiff.

DANIEL, J., after stating the case proceeded: In deciding the question, whether a variance between the writ and declaration can, after verdict, be taken advantage of by the defendant in arrest of judgment, it becomes necessary to make some observations upon the law and practice of the courts in England, as well as the law and practice of the courts of this State, and also on the decisions that have been made in this Court on the subject. In England, when a person is about to commence a suit, the usual course of proceeding is, in the first place, to execute a warrant to an attorney of the Court to have the writ (33) issued, and the pleadings in the cause made up. The attorney then gives instructions for the original; these instructions are contained in a paper called the *præcipe* in which he sets forth the cause of action. Formerly, the practice was to take the warrant and the *præcipe* to the Chancery, where the *original* writ was caused to be made out by the Master of the Rolls; which original recited the action as stated in the *præcipe*. The *original* is a mandatory letter in parchment from the King tested in his name, and sealed with the great seal. It is directed to the sheriff or other returning officer of the county where the plaintiff intends to lay the venue, and is made returnable to the Court either of the King's Bench or Common Pleas, at Westminster. If the sheriff return on the original *non est inventus,* the original is then left on file in the Court, and a judicial writ or process issues, called a special *capias ad respondendum,* which is grounded upon the original. If the sheriff return on the capias, *non est inventus,* the plaintiff then may issue an *alias,* and a *pluries,* and so on into outlawry, to compel an appearance by the defendant. When the defendant appears in Court in consequence of the service of the *original,*

or an arrest on any process which issues upon it, the plaintiff then files his declaration, and serves a copy on the defendant, who defends either by demurrer or plea. If he pleads to the action, then the whole of the pleadings to the making up of the issue are completed in the Superior Court of Westminster. A *nisi prius* record is then made out and transmitted to the Court of *nisi prius,* or the assizes of the county where the venue is laid, that the issues may be there tried by a jury. When a trial takes place, and a verdict is rendered, it is entered on the *nisi prius* roll, or some paper attached to it which is called the *postea,* and delivered to the party in whose favor the verdict is rendered, who returns it into the Superior Court, at Westminster, where the record belongs; and on notice being given to the adverse party, a motion is then made for judgment;
(34) which, if no cause is shown to the contrary, is rendered by the Court, upon which issues the execution.

In modern times the practice of commencing suit by *original* purchased out of Chancery, has been tacitly waived by the profession. The practice is now, for the attorney to leave the *præcipe* and a memorandum of his warrant at the filazer's office, and the filazer thereupon issues a *capias ad respondendum,* in the first instance, keeping the *præcipe* as instructions for the *original,* if it afterwards becomes necessary, by a writ of error being brought after a judgment by default, on demurrer, or on plea of *nul tiel record;* for the want of an original is aided after verdict, by Stat. 18 Eliz., c. 14. If a writ of error should be brought, for the want of an *original,* in any of those cases where the defect is not cured by the Statute of Elizabeth, the plaintiff may, by a petition to the Master of the Rolls, obtain an *original* and move the Court where the record is, to amend by adding the original, which is always granted. So that the record is complete, when in obedience to the writ of *certiorari,* it is transmitted into the Court of Errors. The plaintiff in error will then have nothing in the record upon which he can assign errors, and will fail in his effort to reverse the judgment. (1 Saund. 318, a. Archb. P. K. B. 73.) By the rules of the common law, great nicety and exactness were required in the proceedings and pleadings in a suit; small errors and inaccuracies were always sure to be fatal to the party making them; as for instance, in bailable actions, the declaration should always correspond with the writ in the names of the parties, and in the cause of action (*Bingham v. Dickie,* 1 Eng. C. L., 276. Archb. Prac. 68, 69, 124), and if there was a variance in these, or in the sum demanded, between the writ and declaration, it would be fatal. (Archb. 68.) The Legislature has from time to

time, endeavored to remedy what it considered an evil, and has passed several statutes of jeofails and for the amendment of the law, to prevent justice being strangled in a net of forms and technicalities. The Legislature, further to aid the administration of justice passed the statute 5 Geo. I, c. 13 (in 1718). The statute is as follows: (35)

"An Act for the amendment of writs of error, and for the further preventing the arresting or reversing of judgments after verdict.

"Whereas great delay of justice hath of late years been occasioned by defective writs of error, which, as the law now stands, are not amendable: For remedy whereof, *Be it enacted,* etc., that all writs of error wherein there shall be any variance from the original record or other defect, may and shall be amended and made agreeable to such record by the respective courts where such writ or writs of error shall be made returnable; and that where any verdict hath been or shall be given in any action, suit, bill, plaint or demand, in any of his Majesty's courts of record at Westminster, or in any other court of record within England or Wales, the judgment thereupon shall not be stayed or reversed for any defect or fault, either in form or substance in any bill, writ, original or judicial, or for any variance in such writs from the declaration or other proceedings: *Provided, nevertheless,* That nothing in this act contained shall extend or be construed to extend to an appeal of felony or murder, or to any process upon any indictment or presentment, or information of or for any offense or misdemeanor whatsoever." (5 Brit. Stat. 43.)

If the aforesaid statute is in force in this State, it cures the defect in this case arising from a variance between the writ and declaration. It becomes us now to inquire, whether it is in force or not. When this country was first settled, it was foreseen that the establishment of courts of justice was absolutely necessary for the well being of the society of people who were about to inhabit it. By the fourth clause of the great charter, power is given to the Lords Proprietors by and with the consent of the freemen or their delegates in General Assembly, to pass laws and make constitutions, establish courts of justice, and appoint judges and magistrates. The first judiciary system established in this State, was under this charter. We learn from history (1 Martin Hist. of N. C., 303, 304) and from (36) the archives of the province, that there was a court of chancery held by the Governor and Council, and a general court of common law jurisdiction held by a Chief Justice and Associates, and inferior courts of limited jurisdiction, called pre-

cinct courts, held by magistrates. In 1728 the Lords Proprietors surrendered their power of governing the province into the hands of the King, who in 1730 sent out a Governor, who was empowered with the advice of the Council, to call assemblies to exercise legislative powers according to former usage, and to establish courts of justice. I do not discover that any alteration was made in the judiciary system which had before existed, except that the Governor and Council were authorized to hold a court of errors. I learn from secs. 7 and 20, ch. 2, Laws 1746*, that the suitors in the general court commenced their actions by *capias ad respondendum,* issued by the clerk and signed by the Chief Justice. The general court held its terms at Edenton. In 1746, the Assembly passed another law for establishing courts of justice, and regulating the proceedings therein. By this act the Court of Chancery, and the General or Supreme Court, were permanently fixed at New Bern. The General Court was composed of a Chief Justice and three Associate Justices. Courts of Assizes were to be held by the Chief Justice twice a year at the district court-houses of Edenton, Wilmington and Edgecombe; county courts with limited jurisdiction were established instead of the precinct courts. Writs issuing from the general court were returned into it at New Bern, and the pleadings and proceedings thereon, were then carried on and transacted there, until the cause was at issue; when by a writ of *nisi prius,* it was sent down to the proper place for trial according to the practice of the courts of Common Pleas and King's Bench, at Westminster. By section 40 of the act, it is enacted "that all the statutes of jeofails which are now in force in England, are hereby declared to extend to, and be in force here; and that the same shall be duly ob-
(37) served by all Judges and Justices of the several Courts of Record within this province." The King, after the Lords Proprietors surrendered the powers of government into his hands, directed that all the provincial acts of Assembly should be sent to him, and on revision by himself in Council, if they were disallowed they were to cease having any force. (2 Martin Hist. N. C., 2.) In 1754, ch. 1, the Assembly passed another act concerning the judiciary, which was repealed by the King's proclamation. (Davis 167.) The people having spread over a large portion of the province east of the mountains, it became necessary to establish an additional number of district courts. In 1776, ch. 5, the Assembly passed a new court law dividing the province into six districts, and established a Superior Court of Justice in each of said districts. This act was

*23 State Records, 253, 256.

limited to five years. In section 45, it is declared that, all the statutes of jeofails and amendments, which now are in force in England, are and shall be in force here. (Davis 872.) This act went into operation; for it was the only law passed before the Revolution which gave the Judges power to hold the Superior Courts at Hillsboro and Salisbury; and we know from history that the Superior Courts were held at both of those places before the Revolution. (2 Martin 263.) In 1773, ch. 1*, the Assembly re-enacted the court law, which had just expired by efflux of time, containing the same clause relative to jeofails and amendments. A suspension clause was added restraining its operation until his Majesty's pleasure should be known. A dispute arose between the King and the House of Assembly, relative to the section in the act authorizing attachments to issue against the property of debtors who were not, and never had been, residents of the province. The House of Assembly refusing to strike it out of the bill, the King thereupon refused to ratify the law. (2 Martin 302.) The Revolution took place and the province was changed into an independent State. In 1777† (2d sess.) ch. 2, the Legislature passed a court law, (Rev. c. 115) in which is to be found the following section: (§35.) *"And it be enacted,* that all the statutes of England and Great Britain for the amendment of the law, commonly (38) called statutes of jeofails, and which were heretofore enforced in this territory by any act or acts of the General Assembly under the late government, are hereby declared to have continued and to be now in full force in this State, and shall be duly observed by all Judges and Justices of the several Courts of Record within the same, according to the true intent and meaning of the said statutes, unless where the same are, or may be altered by this or any other act." We know that the acts of 1746 and 1768 had been in force in this territory, under the provincial government. It would seem then upon this review, that the statute of jeofails and amendments referred to and enforced by these acts of the colonial Legislature, including the Stat. of 5 Geo. I, are as completely embraced within this Legislative enactment as though they had been incorporated into the act of 1777, and if so, they must be "duly observed by all Judges and Justices of the several Courts of Record within the same."

Doubts however have been thrown over this subject by conflicting judicial opinions and decisions, and the painful and perplexing duty of endeavoring to remove these doubts and giving, if possible, certainty to the law, has devolved upon us. In

*23 State Records, 872.

†24 State Records, 48.

Hutchins v. McLean, 1 N. C., 327, decided in 1800, by the Court of Conference, these statutes are recognized as being in force. The Court decided in that case, that the judgment could not be arrested because of the defect there existing, *after verdict,* for that it was (in the language of the reporters), excused by several *acts of the General Assembly,* for the amendment of the law. The expression is a little inaccurate, as we have no act of Assembly which *of itself,* cures any defect by a verdict. The phrase should have been, by the act of Assembly enforcing the several statutes for the amendment of the law. But in *Dudley v. Carmolt,* 5 N. C., 339, decided in the Supreme Court in 1810, there was a direct and express decision upon the point. It was held that these statutes were in force here, and par-
(39) ticularly that of 5 Geo. I, and upon this ground the motion in arrest was overruled. *Foscue v. Foscue,* 10 N. C., 538, came before this Court in 1825. The writ, or leading process, called on the defendant to answer the plaintiff as executor of Simon Foscue, deceased, and the declaration alleged a detention from the plaintiff personally. After verdict for the plaintiff the defendant moved in arrest because of this substantial variance between the writ and the declaration—this motion was overruled, and the defendant appealed because of this and other alleged errors. The cause was elaborately argued here, but the objection in arrest was expressly given up as utterly untenable, and not admitting of an argument, and this Court *affirmed* the judgment. So far all the adjudications had been in entire consistency with the unambiguous enactments in the act of 1777. At the next term after the decision in *Foscue v. Foscue,* came on the case of *Stamps v. Graves,* 11 N. C., 102, in which an objection was made here in arrest of judgment (after a verdict and judgment below for the plaintiff) for a variance between the writ and the declaration, for that the former was in *debt,* and the latter is *assumpsit.* The defendant's counsel was proceeding to show that the Stat. 5 Geo. I, was in force when he was informed by the Chief Justice as a matter perfectly settled—"It is in force. It has been so decided in this Court." The argument stopped, and the point was not discussed on either side. The judgment of the Court was given upon other points in the case, but in delivering the judgment an opinion was expressed by Judge HENDERSON which shows that he thought the objec- fatal to the plaintiff. In this opinion he takes no notice whatever of the statute, and does not say whether it is a part of our law or not, but rests this part of his opinion upon the injury that might probably arise to the defendant himself upon a judgment by default, or injury to the bail. His reasoning, so far as

it related to any supposed injury that might happen to the defendant, was not applicable to the case then before the Court. In that case, there was not a judgment by default, but an appearance, plea, trial, and verdict. It does not ap- (40) pear that any objection was raised on account of variance, until the case came into this Court, the objection below rested entirely on a different point. The Stat. Geo. I, does not profess to cure a defect for a variance between the writ and declaration, until after a general verdict; a judgment by default taken on such erroneous pleadings will not cure the defect; a writ of error might be brought and the judgment reversed. It is said that the bail might be entrapped and subjected in a very different case from the one they supposed they had entered into as bail. The Court, in *Stamps v. Graves,* say that, in England the bail to the suit are discharged by the defendant's appearance —the condition of the bail bond is fulfilled. The bail to the action cannot be injured, because they contract their obligation after appearance, and this obligation is evidenced by what is called the bail form, on which the particular action is specified in which they are bail, and they can be made liable in no other. All this is true; but I would ask where do the bail get the particulars of the action which are specified in the bail form? A short copy of the writ, with the sum sworn to (if the action be by bill), is obtained either from the signer of the writ, or at the sheriff's office. If the action is commenced by original, the filazer furnishes a short copy of the *capias,* and also the sum sworn to. (Archb. 103.) The particular action and the sums which are inserted in the bail piece, are taken from what is contained in the writ, and in the affidavit to hold to bail, and not from the declaration. If, therefore, the plaintiff declares for a different cause of action from that mentioned in the writ or affidavit to hold to bail, he thereby discharges the bail from their liability (2 Saund. 72a. *Holly v. Tipping,* 3 Wilson, 61); as if the writ be in trespass on the case, and the declaration be in debt. (7 T. R., 80. Archb., p. 317. *De la Cour v. Read,* 2 H. Black, 278.) It is said that the bail here are bail to the writ and bail to the action. But as a judgment by default may be taken here without an appearance by the defendant, it seems to me that the bail are substantially, only special bail to (41) the action. The bail gets the particular action and the sum which is inserted in the bail piece or bond, from the writ in the hands of the sheriff; if, therefore, the plaintiff declares in a different action, I cannot see why the same law will not discharge the bail here as it does in England. I confess therefore that the reasoning in this opinion is not satisfactory, and at all

events does not bear with decisive force on the question whether a variance between the writ and declaration is cured by a verdict. The Court however did not arrest the judgment in that case, but granted a new trial upon another point, so that the plaintiff might move to amend in the Court below. But there is a case decided in opposition to the adjudged cases before mentioned, and which, if correctly decided, establishes that the variance here is not remedied by the verdict. *Herring v. Glisson,* 13 N. C., 156. The writ was in *trover,* and the declaration in *detinue,* and there was a general verdict for the plaintiff. The Court said, that the Stat. 5 Geo. I, was for certain purposes, in force here, and as to all matters of form was to have full effect, and complete operation; but this was such a matter of substance as could not be aided by that statute, and upon the force of the reasoning in the opinion expressed in *Stamps v. Graves,* 11 N. C., 102, arrested the judgment. I can find no warrant for the middle ground here taken. If the statute be one of those declared by the Legislature to be in *full* force here, then are the Courts bound to render to it *full* obedience. That statute cures defects *both in form and substance,* of all such things as are mentioned in it; and it expressly declares, that after verdict, no judgment shall be arrested for a variance between the writ and declaration. I am sensible that no case which has been decided by this Court should be overruled, but upon great deliberation and a thorough conviction that the decision was wrong. But after a full examination, I feel myself bound to say the legislation upon this subject is plain, positive and precise, and that the judgment in this last mentioned case is not only repugnant to a long series of previous adjudi-
(42) cations, but to the explicitly declared will of the Legislature. That will must be observed, and therefore, after verdict, no variance between the writ and declaration will authorize the Court to arrest the judgment.

The second ground taken by the defendant in arrest is, that the declaration contains two counts, one of which is bad, and the jury have rendered a general verdict upon the plea of *nil debet.*

If there be a general verdict and the jury have assessed entire damages, and it shall appear that one of several counts in the declaration is bad, it is fatal, and the judgment shall be arrested. (2 Doug. 730. *Cook v. Cox,* 3 M. & S. 110.) But where a general verdict has been taken, and evidence given only on the good counts, the Court of King's Bench have permitted the *postea* to be amended by the notes of the judge who tried the cause, by permitting the verdict to be entered specially on the

good counts. (1 Doug., 376, 2 *Ib.*, 746, *Williams v. Breden*, 1 B. & P., 329. 2 Saund. 49a. *Spicer v. Teasdale*, 2 B. & P., 171.) The jury in this case have found upon the issue made up upon the plea of *nil debet*, that the defendant owes the sums or penalties set forth in both counts. We see that the sum set forth in the good count, to wit, double the money loaned is specific, and the jury have found that the defendant detains the sum. What is there to prevent the plaintiff having judgment for that sum? It is not like a case where entire damages are assessed, and the Court is unable to see how much is assessed on the good, and how much on the bad counts. I think this reason offered in arrest is not sufficient.

The third reason offered in arrest is, that this being a penal action, the jury have assessed damages to the plaintiff for the detention, and the Court gave judgment for the same. This reason is good in law. The plaintiff only obtained an inchoate and an imperfect degree of property by commencing suit for the penalty; but it is not consummated till judgment. (2 Bl. Com., 436, 7.) No damages can accrue or be assessed to the plaintiff for the detention of a debt, which he had not a (43) complete property in, until the rendition of the judgment. The verdict rendered in a penal action regularly, after finding the debt, should immediately pass on to the assessment of cost, (*Frederick v. Lookout*, 4 Burr, 2018; *Cuming v. Sebly, Ib.*, 2489; Archb. p., 217.) The judgment for this reason must be reversed, so far as relates to the damages, and also for the debt, so far as relates to the sum of $213.66, mentioned in the first count of the declaration. And as this Court is to render such judgment as the record shows, the Superior Court should have rendered; it is further considered and adjudged by the Court that the plaintiff Jonathan West, who sues as well for the State of North Carolina as for himself, recover against the defendant, Thomas Ratledge, the sum of $160 for his debt, it being the sum which the verdict of the jury finds that the said Thomas owes on the second count of the plaintiff's declaration, and also that the plaintiff recover his costs incurred in the courts below—and it is further considered and adjudged that the plaintiff pay the costs of this Court.

PER CURIAM. Judgment affirmed.

Cited: Lassiter v. Ward, 33 N. C., 445.

DAVID DICKEY and others v. JOHN H. ALLEY and others.

A Sheriff's bond executed by an acting Justice of the Peace "to A B, and the rest of the Justices composing, etc.," is void.

DEBT upon a bond given by the defendant, Alley, as principal, and several others as his sureties, to "David Dickey, chairman of the County Court of Rutherford, and the rest of the Justices composing said Court," with a condition for the faithful discharge by Alley, of the duties of Sheriff of that county.

PLEA—*non est factum.* On the trial before his Honor Judge *Daniel* at Rutherford, on the Fall circuit of 1831, it ap-
(44) peared that Abraham Crow, who was one of the obligors, was, at the time of his executing the bond, one of the Justices of the Peace composing the County Court of Rutherford. Upon this appearing his Honor nonsuited the plaintiffs, who appealed.

No counsel appearing for the plaintiffs.
Devereux for the defendants.

GASTON, J., after stating the case as above, proceeded as follows: The case comes directly within the principles settled in *Justices v. Shannonhouse,* 13 N. C., 6, and *Justices v. Armstrong,* 14 N. C., 284, and of other adjudications of this Court. The judgment of nonsuit must be affirmed.

PER CURIAM. Judgment affirmed.

NOAH H. ROUNTREE v. MATTHIAS E. SAWYER, admr.

A judgment *quando* does not alter the dignity of a debt, nor fix the defendant with assets, and as to a *sci. fa.* upon it, he may show that he has paid subsequent assets to debts of higher dignity, it follows that payment of a judgment *quando* upon a simple contract debt, after notice of an outstanding bond, does not protect the executor against the latter.

DEBT upon a bond of the defendant's intestate.

PLEA—*plene administravit.* On the trial before *Daniel, J.,* at CHOWAN, on the Fall circuit of 1829, the only question was, whether the defendant could protect the assets in his hands from the claim of a specialty creditor, by the payment of a prior judgment *quando* upon a simple contract debt, after notice of the specialty.

By the direction of his Honor, a verdict was returned for the plaintiff, and the defendant appealed.

Kinney for the defendant.
Mordecai for the plaintiff.

RUFFIN, C. J. Payment of an open account after notice of a specialty is a *devastavit*. The question is (45) therefore, whether payment of a judgment *quando* on an open account, after such notice, be different. Such a judgment does not fix the executor with assets: and if they be subsequently received, the executor is not chargeable in debt suggesting a *devastavit* of those assets, but they must first be ascertained on a *sci. fa.* on the judgment *quando*, suggesting that they have come to hand. Consequently on such a *sci. fa.*, the executor is not absolutely liable on proof simply of assets received; but he may still show their application to other debts in a course of administration. (*Parker v. Atfield*, 1 Salk., 312, Ld. Raym., 679.) If such be the case, notice of a bond before suit on the judgment *quando* on open account, or payment of it, must make the assets applicable to the bond; because they have not been applied, nor conclusively declared by law to be applicable to the open account. A specialty creditor is preferred in law to one by simple contract; but he loses that preference if the latter receives payment, or gets a judgment attaching on the assets. Why? Not for any reason arising out of the merits of the respective creditors; but for the protection of the executor, who ought not to be liable to one creditor, after honestly paying another in ignorance of the superior claims of the former. But that cannot be affirmed as to him, in whose power it still is, to pay the preferable creditor, and protect himself by plea in the suit of the other. Such is the case when the executor gets notice of a bond after a judgment *quando* upon open account, because upon the *sci. fa.* suggesting assets, he can plead the outstanding bond. We think therefore, the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Henderson v. Burton, 38 N. C., 264; *Gaither v. Sain*, 91 N. C., 307.

(46)

JOHN COWAN v. JAMES SILLIMAN.

In the sale of a chattel, neither the words "warrant and defend," nor the words "warrant to be good, sound property, and healthy," constitute a covenant of title. The first is for quiet enjoyment, and the last apply to the state and quality of the article sold.

COVENANT upon the following deed: "Received of James Cowan, four hundred and seventy-five dollars, it being in full payment of a negro woman called Dorcas, which said negro woman I do warrant and defend the same, to James Cowan, his heirs and assigns forever; this said girl I do warrant to be good sound property, and healthy. Witness, etc., James Silliman."

The breach assigned was, 1st, the defect of title in the defendant at the time of the sale.

2d. The disturbance of the plaintiff's possession by the demand of one Alexander Silliman who had a title to the slave at the time of the sale.

PLEAS—*Non est factum,* and *non infregit conventionem.*

On the trial before *Norwood, J.,* at ROWAN, on the Fall Circuit, 1831, the case was that the sale was made in June, 1818; that one Alexander Silliman then had title to the slave, and demanded possession of her of the plaintiff in the fall following, which was refused, and that, thereupon, he threatened to bring suit for her, but never had done so. The slave died soon after the demand, and this suit was commenced in March, 1826. His Honor charged the jury that the bill of sale contained a covenant of title, and in legal construction a covenant that the defendant had title in the slave at the time of the sale. That if the covenant was for quiet enjoyment only, the demand of Alexander Silliman was a disturbance of the plaintiff's possession which gave him a right of action, as by that demand his possession was rendered adverse, and Alexander Silliman might charge him with the value of the slave, notwithstanding her subsequent death. And further, that the fact of Alexander Silliman's not having brought suit against the plaintiff for more than three years after his demand, was no defense to the present
(47) action, because, as the slave died in the same year, the plaintiff could not have had an adverse possession of her, which, under the act of 1820 (Rev., ch. 1055), would have given him a title.

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

Winston for the defendant.
Nash, contra.

RUFFIN, C. J. The view which I take of this case differs almost entirely from that of the Judge of the Superior Court.

Regarding the covenant as one of title, the plaintiff was, as I conceive, entitled to recover only nominal damages; for such only he sustained. The slave, herself, could not, if alive, be recovered from him; nor could damages for the conversion. Every action by Alexander Silliman, the owner, was barred by the statute of limitations before this suit was brought; and *Wilson v. Forbes,* 13 N. C., 30, is in point for the defendant.

If the covenant be for quiet possession, I think it has not been broken. In the Superior Court it was held that the demand of the owner was a breach because it rendered the present plaintiff chargeable in an action for the value. That cannot govern the case, because he was so chargeable without demand, upon his purchase, possession and claim of property; or, at all events, would have been by sale, which would have been of itself a conversion. This would be to sink the distinction between a covenant for title and that for quiet enjoyment.

That a warranty of chattels, constituted in this deed by the words "warrant and defend," is a covenant for quiet enjoyment, is a settled rule in this State. It has been understood by the profession too long, to admit now of a question. Hence, upon eviction, the value at that time is the measure of damages. It is familiar doctrine in reference to land, that suit and even recovery, is no breach, unless the loss or disturbance of possession follows. I had thought it equally so in rela- (48) tion to chattels. The reason is the same. The covenants respect the possession. The opinion of the Court is, that in holding a demand by the owner of the slave, to be a breach of the covenant for quiet possession, the Superior Court erred.

It is further contended for the plaintiff, that besides the covenant for quiet enjoyment, created by the words "warrant and defend," the words "warrant to be good sound property," make a covenant of title, or for the property in the slave. It is, however, the opinion of the Court, that those words relate to the state and quality of the slave, and not to the title. After them follows, "and healthy"; which shows the meaning. There are not three covenants in the deed, but two. Both begin with "I do warrant"; and a part of the latter expressly includes the health of the slave. It is not to be taken, that with the latter, would be mixed a stipulation respecting the title, which would have naturally connected itself with the preceding. But *"sound"* interposed between *"good"* and *"property;"* clearly affixes the proper meaning to the whole. We may say "good property," when speaking of the title, but we never say "sound property, and

healthy," in respect of anything but the condition of the subject of the contract. "Property" is here used for "negro," or other description of thing sold.

We think this is the proper construction of the deed, and that the plaintiff cannot recover. This conforms too, to the justice of the case; for Alexander Silliman never brought suit, and the plaintiff enjoyed the slave as long as she lived, and now seeks to throw on the defendant the loss, which arose not from the better title of another, but by her death. There must be a new trial.

PER CURIAM. Judgment reversed.

Cited: Webster v. Laws, 89 N. C., 229; *Hodges v. Wilkinson,* 111 N. C., 59, 61; *Britton v. Ruffin,* 123 N. C., 69.

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(49)

ESSEK ARNOLD, v. JOHN SHEPHERD.

On an appeal from the judgment of a Justice of the Peace, after a plea in the County Court, the defendant can not object to any irregularity which took place before the Justice, as that the judgment was rendered after the return day of the warrant.

IT appeared from the transcript of the record, that the plaintiff commenced his action by a warrant, dated 3 January, 1831, returnable before a Justice of the Peace within thirty days after the date thereof, Sundays excepted; that a judgment was rendered thereon, on 22 February, 1831, and an appeal taken from that judgment to the County Court; that pleas were there entered, issues joined, a verdict given, and a judgment rendered; that from this judgment there was an appeal to the Superior Court.

On the trial before *Martin, J.,* at MOORE, on the last Spring Circuit, upon opening the case; it appeared that the judgment before the Justice of the Peace, had been rendered more than thirty days after the date of the warrant, and thereupon, his Honor nonsuited the plaintiff, who appealed.

No counsel appeared for either party.

GASTON, J., after stating the case as above, proceeded: By our acts of 1794, and 1803 (Rev., chs. 414 and 627), the justice has authority to adjourn or postpone the trial on good cause shown, so that such postponement shall not exceed thirty days. Although the acts do not expressly require that such postponement

shall be made in writing, it is certainly proper that it should be so, and probably a neglect to endorse such continuance on the warrant, would render a judgment after the return day of the warrant erroneous. If so, the appropriate remedy for reversing the judgment would be by a writ of false judgment, and it is not certain that this could be done on an appeal. However, this may be, we hold that after pleas are entered in the County Court, all objections to irregularities before the justice come too late. The matter then to be tried, is such as arises from the warrant and the pleadings, and the regularity (50) or irregularities of the judgment vacated by the appeal, is wholly immaterial to the controversy. But in this case, the verdict in the County Court cured all discontinuances and miscontinuances antecedent to such verdict. The nonsuit ought to be set aside and a new trial awarded.

PER CURIAM. Judgment reversed.

ARTHUR GREGORY v. ALFRED PERKINS.

A deed absolute on its face, but executed upon a parol agreement for redemption, is, in law, fraudulent and void against the creditors of the vendor.

DETINUE for six slaves, tried on the last Spring Circuit at CURRITUCK, before *Norwood, J.*

On *non detinet* pleaded, the case was that the plaintiff claimed under a bill of sale made by William Perkins bearing date, 9 July, 1826, which was proved in November, 1830, and registered in February, 1832. The defendant claimed under a sale upon execution against the same William Perkins, made on 30 November, 1829, and a bill of sale from the sheriff dated 1 December following and registered the next day.

The deed to the plaintiff purported to be absolute, and to convey two female slaves, one of the age of twenty, and the other of nineteen years, and to be made upon the consideration of $400, then paid.

Evidence was given on the part of the defendant, that at the time of this conveyance, the plaintiff paid the sum of $250 only, and that for the balance he gave no security, but afterwards paid it. And that it was also then agreed by parol, that William Perkins might at any time redeem the negroes upon the payment of $400, and in the meantime keep them upon an annual hire of $40. Of the payment of the hire there was no

evidence. But under the agreement, Perkins retained the possession of the slaves, in another county for three years
(51) and a half, and until each of them had two children; when, in November, the six were sold under execution.

The defendant prayed that the Court would instruct the jury that the deed to the plaintiff was void, as against him, for want of due registration: First, because it was, in fact, a mortgage, and was not registered within six months; secondly, because if absolute, it was not registered within twelve months after its execution, nor until after the defendant had purchased, and registered his deed. The Court refused to give either of those instructions.

The defendant then prayed that the jury might be instructed, that if there was a secret agreement for redemption as stated in the evidence, the deed to the plaintiff being absolute and purporting to be for an entire consideration then paid, was fraudulent and void against the creditors of William Perkins. His Honor also refused to give this instruction, and ruled that the question of fraud was for the jury alone. A verdict being returned for the plaintiff, the defendant appealed.

Iredell & Kinney for the defendant.
Devereux for the plaintiff.

RUFFIN, C. J., after stating the case, proceeded as follows: The recent case of *Jones v. Sasser,* 14 N. C., 378, sustains the Judge of the Superior Court upon the second point. The objection of the defendant upon the first ground seems to be a misapplication of the act of 1820 (Rev., ch. 1037) to his case. That act has for its object, the giving of notice of the existence and extent of encumbrances, which is to be effected by the registry of the instruments by which they are created. That purpose cannot be effected in that mode, if the instrument itself does not purport to be a security; and the words of the act are "mortgage, deed or conveyance in trust." It is enacted that those conveyances shall be void, if not registered in six months. The meaning must therefore be, that all instruments, which appear in themselves, to be deeds of trust or mortgages,
(52) shall be so registered, or, if not, that though they thus purport, they shall not be good as deeds of trust or mortgages. But the act cannot mean, that those instruments which do not profess to be securities, shall be rendered good as such, by registry within six months, as the objection that they are bad without such registry, in respect of the time merely, assumes. The truth is that the period of registry of a deed abso-

lute in form, is, under the act of 1820, immaterial; because the instrument is substantially insufficient to answer the ends the act had in view, at whatever time the registry is made. If the contract for redemption had been put into the form of a separate defeasance, the objection would apply both at law and in equity; for both instruments make but one deed, and both are capable of registration, and show the true transaction as fully, when registered, as if they had been engrossed on the same paper. Such instruments may be set up in any court as encumbrances; because they purport to be so. When thus set up, they must be supported by due registry; or, if in equity, and against a subsequent purchaser, by notice to him. But the plaintiff here claims as absolute owner, and is not allowed by parol evidence, to give to his deed another character, in which, if it appeared on the deed itself, it might be supported. The defendant may, indeed, impeach it by such evidence; but that is on a distinct principle—that it is fraudulent because it is absolute, and therefore does not admit of registration, as the real transaction required it should. It is narrowing the objection, to rest it on the mere point of time. The true question is, whether if it was really, as between the parties to it, a security, it is not void under the act of 1820, by its proper construction as a statute against fraudulent encumbrances. This brings to view, the remaining exception of the defendant.

He prayed further an instruction, that if there was a secret agreement for redemption, as stated in the evidence, the deed to the plaintiff, being absolute and purporting to be for an entire consideration then paid, was fraudulent and void, as against the creditors of Perkins. His Honor refused to (53) give the instruction; and ruled, that the question of fraud was to be decided by the jury only. In this we think there is error.

The opinion of the presiding Judge was probably founded on the decision of this Court, upon the effect of the possession remaining with the vendor of chattels. If so, those cases, as we conceive, are misunderstood; and the misapprehension ought at once to be corrected. Fraud is matter of law. It is stated in the books to be a conclusion of law upon facts and intents found or admitted. The word is expressive of a legal idea, and admits of a legal definition; and, therefore, is correctly stated as a general proposition, to be matter of law. When an act or intent is stated, it is the province of the Court to pronounce whether that is injurious and covenous. But as persons perpetrating frauds seldom express them explicitly, but generally conceal them under the appearance of fairness, it is often—indeed, sel-

dom otherwise—difficult to ascertain the real purpose of the transaction. It is then the province of the jury to find the actual intent. In that sense, fraud is called a mixed question of law and fact. But it is never exclusively one of fact, as was supposed in this case; nor do the cases in this Court alluded to, support such an idea, when properly understood. In England it was held, that possession retained by the vendor was *per se* fraudulent; upon the ground that it implied a secret trust, by which the beneficial ownership was in the possessor, or that it might give him false credit, and tended to delude creditors and purchasers. Those purposes deemed to be established by the fact of possession, are held to be legally covenous purposes. The rule was adopted, and for some time prevailed in this State. But it was necessary both in England and here, to admit as exceptions, so many cases, in which it was proper to leave to the jury the inquiry, whether those intents in fact existed, that it might be said that as a positive principle, the rule itself hardly remained. This Court thought it useless to retain it with all the modifications, and that the plain and safe principle
(54) was to leave to the jury the possession as a fact and ground of presumption, under all the circumstances of the parties, the subject, the length of possession, and the notoriety of the title of the vendee and of its acquisition, whether or not there was a secret trust between the parties, or whether the possession was retained with a view to false credit, or gave such credit to the vendor. Such is the principle of those cases. It is not held, that the jury shall give to those intents, or to a delusive credit, such effect as to them may in each case seem proper. That the law declares, and the security of the creditors depends upon the fixed principles of the law, and not on the uncertain judgment of jurors as to what is covin. If a debtor convey his property without consideration and in trust for himself, it is fraudulent; and if that appear in the conveyance, the Court adjudges it to be void—for the party cannot show the deed under which he claims title, without also showing the intent. If it be not so expressed, but be secretly reserved, then its existence must be found by the jury. Then the same consequence, as a legal consequence, follows from the fact thus found by the jury, as from the same fact as admitted by the party.

That an absolute deed made upon a secret trust for the party making it, who retains the possession, is fraudulent has so long been settled, as to be now unquestionable. The right to redeem the slaves is an interest of value to him who has it; and to reserve it in such a way, as leaves it altogether in confidence between the parties, and enables them to perform the trust as be-

tween themselves, and at their pleasure to deny its existence, and refuse its execution for the benefit of creditors and purchasers, is so plainly deceptive and dangerous, and so directly a hindrance to creditors, as to fall within the act of 1715. But if it did not, the act of 1820 is strictly applicable to it in this respect, and avoids the deed. It declares mortgages void which are not registered within six months. If this deed had spoken the truth, it would now be null within the letter of the statute. To say it is not so, because it does not upon it face appear to be a mortgage, would be to defeat the act altogether, and enable and tempt men to evade it, simply by giving a (55) false character to their contracts. Under this act, this deed is void, not merely upon the time of registration, but because it does not bear upon its face the true contract; so that by no possibility, could *the deed* at any time be registered, as by the act, *that contract* ought to be registered, that is, so as to inform the world what encumbrance it created. While mortgages are required to be made public or be null, absolute deeds, intended by the parties to operate as mortgages, must be null. As mortgages, they cannot be supported, because the registry does not convey the information required by the statute; nor as absolute conveyances; because they were not intended to be such, and that intent creditors may show from circumstances or by parol, though the parties themselves must abide by their words. It is not surprising that with the experience of the evils of secret liens and pretended encumbrances, the Legislature should require, when the contract in its terms creates an encumbrance, that notice should be given of it, that others may know how to deal with the former owner. For the like reason, and as a necessary consequence, when nothing but an encumbrance was meant, the parties must frame the evidence of their contract accordingly. In the former case, the encumbrance is lost, because the owner will not register it. In the latter, because, by his folly, he cannot register it.

It is not supposed that the nature of the trust or interest reserved to the vendor, which is meant by the Court, can be misunderstood. But to prevent misapprehension, it may be proper to mention that it is supposed the reservation of it entered into the contract upon which the deed was made and formed a material part of the stipulations and treaty between the parties; and is of such a nature as, if inserted in the deed, would give to the vendor a valuable interest in the property.

In this case there was evidence, both in the testimony and in the circumstances of the price, of the possession and the length of it, and also the fact that the slaves were breeding women,

whose services could not be worth the hire agreed for, from which the jury might have inferred that Perkins' possession was founded on a subsisting and substantial interest in himself, not expressed in the deed, but resting in confidence between the parties. The defendant had, therefore, a right to ask the instruction he did; and for the reasons stated, we think it ought to have been given.

(56)

It is not stated in the case, but I think it probable, that hire was introduced into the bargain, for a purpose somewhat different from that of compensating the plaintiff for the use of the negroes as his property. It might be rather as compensation for the use of his money; which would account for the form of the deed. The circumstance, be it as it may, is not material to the defendant, and is only alluded to for the purpose of remarking, that the deed is not the less fraudulent against a creditor, though made upon terms illegal and oppressive on the borrower.

PER CURIAM. Judgment reversed.

Cited: Walton v. Stallings, post, 57; *Skinner v. Cox, post,* 61; *Saunders v. Ferrill,* 23 N. C., 104; *Newsom v. Roles, Ib.,* 182; *Halcombe v. Ray, Ib.,* 342; *Doak v. Bank,* 28 N. C., 325; *Sturdivant v. Davis,* 31 N. C., 368, 9; *Foster v. Woodfin,* 33 N. C., 344; *Womble v. Battle,* 38 N. C., 197; *DeCourcy v. Barr,* 45 N. C., 187; *Duke v. Jones,* 51 N. C., 15; *McDaniel v. Nethercutt,* 53 N. C., 99; *Sharpe v. Pearce,* 74 N. C., 602; *Cheatham v. Hawkins,* 76 N. C., 339; *Gulley v. Macy,* 84 N. C., 439; *Peck v. Manning,* 99 N. C., 160; *Waters v. Crabtree,* 105 N. C., 399; *Gorrell v. Alspaugh,* 120 N. C., 371; *Bernhardt v. Brown,* 122 N. C., 591.

TIMOTHY WALTON v. WHITMEL STALLINGS.

When the plaintiff prays proper instructions as to the title of the defendant, which are refused, a new trial will be granted, although if the defendant had prayed proper instructions as to the title of the plaintiff, the judgment would have been correct.

DETINUE for a female slave and her child, tried before *Norwood, J.,* at GATES, on the last Spring Circuit.

PLEA—*non detinet.*

The plaintiff claimed title under one Elisha Walton by a purchase made in consideration of the sum of $250, which was evidenced by a bill of sale, dated in February, 1832.

The defendant claimed under the same person, and it appeared that Elisha Walton had purchased the slaves of him at public sale, and to secure the purchase money ($304), had executed a bond with one Baker, as his surety—that (57) Baker being doubtful of Elisha Walton's solvency, applied to the defendant to take some steps to compel the payment of the bond, and that in September, 1831, when there was a balance of $204 due on the bond, the defendant took an absolute bill of sale for the slaves, reciting that sum as the purchase money, and surrendered up the bond to which Baker was surety. At this time, the slaves were worth $325.

The bill of sale to the defendant was not registered until more than a year after its date. The slaves were permitted, both by the plaintiff and the defendant, to remain in Elisha Walton's possession for some time after their respective purchases—but the defendant produced a note of his for three dollars, and proved that it was given to secure the hire of the slaves from the time of the sale to him, until the ensuing Christmas.

For the plaintiff, it was insisted that as the bill of sale to the defendant was not registered until more than a year after its date, it was void as to him. Also, that if from the evidence the jury should infer that the bill of sale to the defendant was taken as a mere security for the debt, $204, it was void because not registered within six months. And further, that if there was a parol agreement between Elisha Walton and the defendant, that the negroes should be surrendered upon the payment of the balance of $204, the bill of sale was thereby rendered fraudulent and void.

His Honor left the question of fraud to the jury, and upon the other points ruled that the bill of sale, as an absolute conveyance, was well registered, and that as to its registration within six months, the act of 1820 (Rev., ch. 1037), applies only to deeds which were upon their faces, mortgages.

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

Kinney for the plaintiff.
Iredell, contra.

RUFFIN, C. J. The points in this case are the same as those in *Gregory v. Perkins, ante,* 50, which has been before the Court at the present term; and the decision in that (58) case must, of course, govern this. The only difference consists in the strength of the evidence tending to establish the supposed trust or agreement, that the deed to the defendant

should be a security only. Upon that evidence the court neither feels the liberty nor the inclination to comment, further than merely to say a presumption of fact might be drawn from it, upon which the plaintiff had a right to ask the instruction of the Court as to its legal effect, if the jury should draw it. There was testimony to some inadequacy of price, and to the possession remaining at a small hire with the vendor. The sufficiency of that evidence is with the jury; it being proper for the Court to say only, that the jury ought to be fully satisfied, that it does prove the trust, and if they are so satisfied that the trust makes the deed, in point of law, fraudulent.

It is, however, to be remarked, that the title of the plaintiff is in this case, exposed to the same animadversions, which are applicable to that of the defendant. He gave but little more than the defendant gave; and also, notwithstanding his absolute deed, left the possession with the vendor. Admit the deed to the defendant to be fraudulent, yet none but a *bona fide* purchaser can impeach it; and that character the plaintiff must establish in himself.

But as it seems to us, that proper instructions were refused by the Court, and none were prayed for by the defendant respecting the title of the plaintiff, we think there should be a new trial.

PER CURIAM. Judgment reversed.

Cited: Duke v. Jones, 51 N. C., 15.

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(59)

Den ex Dem. LEMUEL SKINNER and others v. JOHN COX.

A deed executed to secure recited debts is a mortgage, although it contains neither a *proviso* for redemption nor a declaration of its trusts, and the fact of the trust of the surplus being declared in a separate and unregistered paper, will not vitiate it as a security for the recited debts.

EJECTMENT, tried on the last circuit at CHOWAN, before *Seawell, J.*

The plaintiff claimed title under one Halsey, and produced a deed whereby the latter conveyed the premises in dispute, to the lessors of the plaintiff, by a deed which recited several debts to which they were his sureties, and that he "was desirous of securing the said Lemuel, etc., against any loss or injury they may sustain, by reason of their several abligations, aforesaid.

Therefore, for and in consideration of the premises, as well as the further consideration of the sum of ten dollars to him, etc., he hath bargained, etc." This deed contained no proviso for redemption, nor any declaration of the trusts upon which it was executed. It was proved and registered within six months, and the only question was whether it was avoided by the following facts which were deposed to by Halsey. He swore that at the execution of the deed, the lessors of the plaintiff "executed to him a paper writing or defeasance, in which it was stipulated that whatever surplus there might be over and above satisfying the debts for which they were bound, should be paid over to his creditors." He also proved the loss of this deed.

His Honor instructed the jury that the deed to the lessors of the plaintiff was upon its face a mortgage, being made to secure specified debts, and that the omission to record the deed executed at the same time, the contents of which were deposed to by Halsey, was but a circumstance, and did not *per se* render the deed of Halsey fraudulent in law. A verdict was returned for the plaintiff, and the defendant appealed.

Iredell and Devereux for the defendants. (60)
Badger for the plaintiff.

RUFFIN, C. J., after stating the case, proceeded as follows: The deed from Halsey to the lessors of the plaintiff is, upon its face, a security. It recites several debts to the bargainees, and others, for which they were jointly or respectively bound as sureties for the bargainor; and that "he was desirous of securing the said L. S. and J. H. H. against loss by reason thereof." It then, "in consideration of the premises and of the sum of ten dollars," conveys to them the premises in dispute and other things. It does not authorize the bargainees to sell and is, though not in the most approved form, substantially a mortgage. It is probable, from the statement of Halsey, that it was contemplated by the parties, that the lessors of the plaintiff should sell the estates conveyed, and discharge the debts, although not so provided in the deed. For he says that after he had executed the deed, but on the same day, the lessors of the plaintiff gave him a written paper (which he calls a defeasance), purporting to be an agreement on their part to pay any surplus of the proceeds of sale, after the payment of the debts secured by the deed, to certain others of his creditors, or amongst his creditors. The deed itself was registered within six months; but the paper delivered to Halsey has never been registered and is now lost. For this reason, the defendant prayed an opinion of the Court, that the deed is void: which was refused.

The opinion of this Court accords with that of the Judge who tried the cause. The deed itself is a mortgage on its face, and the registry of it communicates full information of the nature of the interests of all the parties, at least so far as the debts mentioned in it extend, and for the purposes for which it is now used. No evidence was given that those debts have been discharged, so as to show that the lessors of the plaintiff are
(61) now using their legal title as trustees for the persons claiming under the separate instrument. The nature of that instrument appears very indistinctly. It certainly was not a defeasance, though executed at the same time with the deed; for it did not stipulate for the divesting of the estate conveyed by the deed, but was only a further declaration of other trusts to attach to the proceeds of the sales of the property. It did not form part of the contract on which this deed was given, but was a subsequent and distinct arrangement entered into for the satisfaction of Halsey, as to his having the benefit of any possible surplus. But if it had been, the only effect of not registering it would be to render void those trusts, and repel persons claiming under that paper as against Halsey's general creditors. The case if very different from what it would be, if the deed to the lessors of the plaintiff was absolute. The whole would then be void, as the Court has decided in *Gregory v. Perkins, ante,* 50: because no information could then be gained from it that it was a mere encumbrance. But this deed, as to the demands mentioned in it, imports everything within the meaning and purposes of the act of 1820; and no other defect being imputed to it, it must be supported.

PER CURIAM. Judgment affirmed.

Cited: Waters v. Crabtree, 105 N. C., 399.

CORNELIUS DOWD v. STEPHEN DAVIS.

An indenture of apprenticeship taken under the Act of 1762 (Rev., c. 68, secs. 19 and 20), but which neither binds the master to teach the apprentice a certain trade, nor to read and write, and which was made by the chairman on behalf of the justices and "their," instead of "his successors," is valid as between the master and one who harbors his absconding apprentice.

CASE in which the plaintiff declared against the defendant for harboring a female mulatto by the name of Lydia Burnett,

who had, with four others, been bound to him by the County Court of Moore, and who had absconded from his service.

PLEA—Not guilty.

On the trial before *Martin, J.*, on the last Spring Cir- (62) cuit, the plaintiff, to prove the relation of master and servant between him and the apprentice, produced the order of the County Court for binding the apprentice to him, and the following indenture:

"This indenture made, etc., between Thomas Gilmore, Esq., Chairman, etc., on behalf of the justices of said county and their successors in office, of the one part, and Cornelius Dowd, of the other part, witnesseth, that the said Thomas Gilmore in pursuance of an order of the said County Court made, etc., and according to the directions of the act of Assembly in that case, made and provided, doth put, place and bind unto the said C. D., five certain, etc., with the said C. D., to live after the manner of servants until they shall attain the age of twenty-one years, they being born of a free woman and begot by a negro slave, during all which time, the said children, their master or his heirs, faithfully shall serve, his lawful command everywhere readily obey, they shall not at any time absent themselves from their said master's service without leave, but in all things as good and faithful servants, shall behave towards their said master. And the said C. D. doth covenant, promise and agree to, and with the said T. G., that he will constantly find and provide for the said servants during the time aforesaid, sufficient diet, washing, lodging and apparel fitting for servants of color, and also all other things necessary, both in sickness and in health. In witness, etc." Upon an objection taken for the defendant, the presiding Judge held the indenture to be so defective as not to create the relation of master and servant between the plaintiff and the apprentice, and that if the latter upon arriving at the years of discretion, chose to leave the service of the former, no action could be maintained against any person for harboring her.

In submission to this opinion, the plaintiff suffered a nonsuit and appealed.

Mendenhall for the plaintiff.

Winston and *W. H. Haywood* for the defendant. (63)

GASTON, J., after stating the case, proceeded:

This case involves several questions of an interesting character. There is a numerous and helpless portion of the community subject to the operation of those laws which create an involuntary obligation of service, and it is of high im-

portance that these laws should receive such a construction as will protect them from oppression and injury, while at the same time it secures the rights of their temporary masters. Sections 19 and 20 of the act of 1762 (Rev., ch. 69), contain the principal enactments which authorize and direct the County Courts to bind out apprentices, and regulate the mode in which this power shall be exercised. They direct that when the estate of an orphan shall be of so small value that no one will educate and maintain him or her for the profits thereof, such orphan shall by the direction of the Court, be bound apprentice, every male tradesman, merchant, mariner, or other person approved by the Court, until he shall arrive at the age of twenty-one years, and every female to some suitable employment till her age of eighteen years. They also declare that such Court may in like manner bind, apprentice all free baseborn children, the female child of a mulatto or mustee until she shall attain the age of twenty-one years; that the master or mistress of such apprentice shall find and provide for him or her, diet, clothes, lodging, and accomodations fit and necessary, shall teach, or cause him or her to be taught to read and write, and at the expiration of the apprenticeship, shall pay every such apprentice the like allowance as is by law appointed for servants by indenture or custom. The act then enacts that the binding of such apprentice by order of the Court shall be by indenture, to be made in the name of the presiding acting justice and his successors, of the one part, and the master and mistress of the other; that this indenture shall be acknowledged or proved in Court and recorded, and a counterpart to be kept in the clerk's office for the benefit of the apprentice; and that the person
(64) injured, may prosecute a suit thereon in the name of such justice or his successors, and recover all damages sustained by reason of the breach of the covenant therein contained. The Court entertains no doubt but that it is indispensable that every binding of an apprentice, by order of the Court, must be by indenture. This is demanded by the plain words of the act, is consistent with the adjudications in our country, and in conformity with the law and usages which obtained in England respecting the binding of apprentices generally, and probably prevailed here before the passing of the act of 1762. An order of Court therefore, not carried into execution by an indenture must be regarded as absolutely null. It is very clear too that in order to execute the requisitions of this act, the indenture ought to contain covenants for the performance of each and every of the duties which the law enjoins, and for the non-performance of which it gives a remedy by suit on the indenture. It may be

unnecessary to insert on the indenture a covenant for the payment to the apprentice at the expiration of the term of apprenticeship "of the like allowance as is by law appointed for servants by indenture or custom," because the very section which imposes this obligation on the master adds immediately thereafter, "that on refusal he shall be compelled thereto in like manner," and upon looking into the act of 1741 in relation to servants, we find that all their complaints may be received on petition in the court of the county wherein they reside without the formal process of an action. But for a violation of the other duties enjoined, the remedy contemplated by the act, is by an action in the name of the presiding justice or his successors on the indenture, in which actions damages are to be recovered for the breach of the covenants contained in that indenture. But what discrepancies between the indenture required, and that given, shall make the instrument *ipso facto* null, or prevent the relation of master and servant from being created; what shall render the indenture voidable, or authorize a dissolution of the relation—and when such indenture is voidable by whom, and in what manner it shall be avoided, are inquiries of (65) much moment, and perhaps of some difficulty.

The indenture which was executed in this case is set forth, and many objections have been urged against its validity. In the first place, it is objected that the Act of 1762 requires that the indenture shall be made "in the name of the presiding Justice and his successors of the one part, and the master of the apprentice, of the other part," and that this instrument purports to have been made between "the chairman of the County Court of Moore on behalf of the justices of said county and their successors in office of the one part and Cornelius Dowd, of the other part." It is certainly always to be desired that office bonds should correspond precisely with the forms prescribed; and immense and unexpected inconveniences have frequently resulted from carelessness in this respect. Here is a double deviation from the act. The indenture does not name as it ought the successors of the chairman, and it names what it ought not, the successors of the justices. The word "their" immediately preceding the word "successors" has been improperly inserted instead of the word "his." But this objection is not as formidable as it appears. The words "their successors in office" as here used, have no operation and no meaning. The chairman acting in behalf of the justices of the County Court can act *only* in behalf of the then justices. Those who may thereafter succeed or be appointed, may indeed be bound by this act; not, however, because it is *their* act but because it was a legitimate act, author-

ized by their predecessors, and conferring rights which all are bound to acknowledge. These words therefore may be rejected altogether as nugatory and without object or meaning. This objection, then, to the indenture becomes restricted to the omission of the words "his successors." But it was decided many years since, and so far as we can find precedents on this subject, we are solicitous to follow them, that in bonds taken under this act, the insertion of these words is unnecessary, for that wherever an engagement is entered into by a public officer
(66) for the benefit of others in his official character, and by the appointment of law such contract attaches to him in that character only, and when he is divested of that character, it belongs to his successor. (Anonymous, 2 N. C., 146.) According to this construction, then, the indenture is made with the chairman and his successors, although the successors be not named.

But it is further objected that this indenture does not specify "the suitable employment" to which this female should be bound, nor does it contain any covenant on the part of the master for teaching, or causing her to be taught to read and write. These matters ought to have been inserted in the indenture, and the omission of them constitutes a very serious objection to the instrument. We have no adjudications in our State to guide us in deciding what is the effect of such omissions. Thus circumstanced we have deemed it our duty to inquire into the decisions which have taken place in analogous cases in England, upon the statutes which existed there before our ancestors left that country, and which have been kept in view by our Legislature in the provisions of their Act of 1762. By the Statute, 5 Eliz., c. 4, divers rules and regulations are enacted respecting the qualifications of persons entitled to take, and to become apprentices; respecting also the length of time for which the apprentice shall be bound, and the mode of binding such apprentice; and in the 41st section it is expressly declared "that all indentures for taking any apprentices otherwise to be made than by that statute is appointed, shall be clearly void in the law, to all intents and purposes." Under this statute several cases have occurred, as well between the parties to the indentures as between one of them and third persons, or as between third persons altogether, where the indentures have departed from the statute quite as widely as this departs from the Act of 1762, and where it was held that the indentures were not absolutely void, but liable to be made void. A leading case is that of *Rex v. Inhabitants of St. Nicholas, in Ipswich,* which was decided in 1736 by the Court of King's Bench, when Lord *Hardwick* presided there, and which

is referred to in the later cases as of undoubted authority. We find a report of it in Petersdoff's Abridgment (Title Apprentice, B, c. 3). A dispute had arisen be- (67) tween two parishes in regard to the alleged settlement of James Blythe, a pauper. By the statute 3 and 4 William and Mary, it is ordained that if any person be bound an apprentice by indenture, and inhabit in any town or parish, such binding and inhabitation shall be adjudged a good settlement therein. Among the requisitions of the statute 5 Eliz., there is one that in a city or a town corporate, the binding shall be *for seven years at least.* Blythe had entered into indenture to a master in the incorporated town of Ipswich for four years only, and it was insisted that the indentures were clearly void to all intents and purposes, that Blythe had not been bound an apprentice, by indenture, and that no settlement could be acquired by an inhabitation under such pretended binding. The Court felt and acknowledged that the words of the 41st section were very strong, but nevertheless, held that the indentures were not absolutely void, but voidable only by the parties, if they choose to raise this objection against them. In coming to this conclusion, the judges declared themselves not a little influenced by the consideration that if a want of any single qualification required by the statute, made the indenture absolutely void, there probably was not a valid settlement acquired under an indenture for fifty years past. This decision has since been followed by many of a like kind in England, and has been sanctioned in the Supreme Court of New York in *Overseers of Hudson v. Overseers of Tughkunac* (13 Johns., 245). Upon the authority of these decisions, we feel ourselves justified in holding, that the variance between the stipulations contained, and those which ought to have been contained in the indenture before us, do not annul the instrument so as to prevent the relation of master and servant from having been created by it; and we rejoice that we can thus decide, as we perceive that this defective instrument is copied from a form which is found in Haywood's (68) Justice, a book of general use in this State, and there is great reason to fear that most of the indentures recently taken are equally faulty. The consequences which would result from considering all of them as nullities might be extensively mischievous.

The next question that recurs is, if this indenture be voidable, had not Lydia Burnett a right to avoid it, and has she not exercised that right, and vacated the indenture by withdrawing herself from the service of the plaintiff? This directs our attention more directly to the point on which the Court ordered

a nonsuit. The Judge held that the voluntary abandonment of the plaintiff's service by Lydia after her arrival at years of discretion, put an end to this voidable relation of master and apprentice. It is plain that the Judge did not mean by the phrase "arrival at years of discretion," the arrival at the full age of twenty-one years. The indenture would expire by its own limitations at that time. He meant her obtaining an age in which she could be supposed to have the capacity to discern what was for her own good.

Now, it is to be remarked that Lydia Burnett was not a party to this indenture. There is an important difference between the parties to an indenture under the statute of 5 Elizabeth, and the parties to an indenture of apprenticeship under our act of 1762. To an indenture under that statute, the infant and the master are the parties; but to an indenture with us, the chairman of the Court and the master are the parties. In this respect our indentures much more nearly resemble those which are taken in England on the binding of parish apprentices by church wardens, under the Stat. 43 Eliz., ch. 2, and subsequent statutes, than those we have been considering. If the indenture in question be voidable at the election of the parties thereto, or of that party who can object to it as defective or irregular, it seems to us that the act of avoiding it must be done not by the apprentice, but by the County Court or its Chairman. Nor is this to be re-
(69) garded as a technical distinction. In its principle and its consequences, it seems necessary for following out the scheme of the Legislature, and for taking proper care of the interests of the apprentice. Were the power of vacating the indentures to rest with him during his minority, he might be seduced into an unfit service, and lured away to vice and idleness and ruin. The power of dissolving the connection would seem more appropriately to belong to those who had been entrusted with the power of forming it. In the case of orphans whom death has deprived of their natural protectors, and of illegitimate children who never had any, the law regards the Court of the county as charged with their care and protection.

But if the infant apprentice were to be regarded as in truth, one of the parties to this indenture, yet it does not follow that an abandonment of the master's service avoids the indenture. It is, we think, fully settled, and wisely settled, that where an apprentice can himself avoid a voidable indenture, he must do so by some formal and authentic notice of his intention to dissolve the contract, and that it will not do when he is called on to answer for misconduct, such as quitting his master's employ-

ment, to allege his very offense as an apology, on the ground that it was done with intent thereby to avoid the indenture; nor can the third person who has harbored or maintained him, set up the misconduct of the apprentice as a justification for his invasion of the rights of the master *de facto*. The cases which we think conclusively establish this doctrine are those of *Rex. v. Evered,* cited in 16 East., 27; *Archcroft v. Bertles,* 6 Term, 652; *Grey v. Cookson,* 16 East., 13; *Smedley v. Gooden,* 3 M. & Sel., 189; and *Barber v. Dennis,* 6 Mod., 69.

Upon the whole, the Court is of the opinion that the nonsuit was improperly ordered, and will therefore direct it to be set aside and a new trial awarded. At the same time it feels it a duty to call the attention of the Justices, not only of Moore County, but of all the counties in the State, to the indentures which have been taken from the masters of apprentices, so that wherever they are defective, new ones may be required, stipulating for all the obligations which ought to be found in them, and on failure of the masters to comply with such (70) requisition, to cause the indentures to be vacated, and the apprentices placed with new masters under regular indentures. They will remember, also, that with respect to colored apprentices, the law requires a bond to be given not to remove them out of the county, and to produce them before the Court at the expiration of their term of service.

WARREN ANDREWS v. ALEXANDER SHAW.

The plaintiff in trover must have both the right of property and of present possession, and when one who had hired a slave for a year sold him, and the owner brought trover during the term; it was held that he could not recover, although the defendant claimed an interest in the slave.

TROVER for a slave, tried before *Strange, J.,* at PITT, on the last Spring Circuit.

The plaintiff produced a deed, whereby one William Butler conveyed the slave in dispute to him in trust for his, Butler's, family. The subscribing witness to this deed swore that he saw the deed signed and sealed by Butler, and heard it acknowledged by him, and that he was directed in Butler's presence, to hand it to the attorney who drafted it, and that at the time this took place, the plaintiff was not present.

Other witnesses proved that the plaintiff hired the slave to Butler, for a nominal hire for one year, during which, the latter

removed him to a distant part of the state and sold him to the defendant, who claiming under this purchase, refused to deliver him to the plaintiff. The action was commenced during the year when the slave was thus hired.

For the defendant, it was objected:

1st. That since the act of 1806, the subscribing witness must be able to depose to the delivery, as well as to the signing and sealing of a deed of gift.

2d. That as the action was commenced during the year for which the slave was hired to Butler, the plaintiff had not
(71) the right of possession, and could not recover.

His Honor ruled against the defendant upon both grounds, and a verdict being returned accordingly, he appealed.

Devereux for the defendant.
Badger, contra.

RUFFIN, C. J. The subject of the first exception taken by the defendant, has been considered in several other cases recently, and has been determined by the Court to be against him, as expressed in *Vines v. Brownrigg, post,* 265. We think the statute of 1806, and others which require the due execution of deeds of gift and bills of sales of slaves to be proved on the trial by the subscribing witness, are merely a form of expressing that they shall not be read upon the former *ex parte* probate and registration, as deeds for land are; but shall be proved as at common law. The acts do not intend to introduce a new rule of evidence as to them, but to restore the old rule of the common law; that the execution must be proved by the subscribing witness as far as he can or will; and at the point where he fails, either from want of knowledge, or memory, or integrity, the party may furnish the necessary proof by other witnesses.

The other point discussed at the bar is, in the opinion of the Court, with the defendant. The case is, that the plaintiff hired the slave to Butler for a year, and that within the year, Butler sold absolutely to the defendant, who refused to deliver him to the plaintiff upon demand, and insisted upon his purchase; when this action was brought, also within the year.

The counsel for the plaintiff does not deny the case of *Gordon v. Harper* (7 Term, 9), nor the cases in this Court, founded on that authority: but admits that to maintain trover, the
(72) plaintiff must have both the right of property and the right of present possession. He insists that the bailee, Butler, was guilty of a conversion by selling the whole property, and not his term only, and that the defendant is likewise guilty

of one by asserting an absolute ownership, after notice of the plaintiff's title. I do not perceive any ground for the argument. The authority on which it is advanced, *Loeschman v. Machin*, 3 Eng. C. L., 359, is a *nisi prius* decision of Chief Justice *Abbott*, and is not satisfactorily reported. It does not appear, that the action was brought within a month, to the end of which the hirer would have a right to the possession according to the original contract. The hiring was for an indefinite period, from month to month, at so much a month; and if the hirer during one month, sent the piano to auction, certainly neither he nor the auctioneer would have a right to it after the expiration of that month, after such a use of it, although the owner might not give notice at the end of the month. The hirer by his own act, had determined the contract, at all events, at the end of the month. If it is meant in that case to say, that a bailee upon hire for a determinate period, forfeits his interest by abuse of the article, or by a wrongful sale, so that a purchaser from him gets nothing, I think it is not law. I do not know of any such doctrine of forfeiture as applied to personal chattels. Nor do I think that the Chief Justice intended so to lay it down; because it is at variance with his own subsequent decision in *Paine v. Whitaker*, 21 Eng. C. L., 390, in which he fully recognizes *Gordon v. Harper* as sound law. It is said that the act of the party differs from that of the sheriff; because the hirer has an interest which is subject to his creditors, and therefore, the sheriff is justified in selling. True: the sheriff may sell; but what? The debtor's interest only. That the hirer can himself do as rightfully as the sheriff can. If either sell more, it is a wrongful act; and as wrongful in the one as in the other. The question is what is the owner's remedy? It may be, that he has no remedy while the term of hiring continues; for during that period, he sustains no injury, not being entitled to the possession. But (73) if he has a remedy, it cannot be trover; which is an action to repair the wrong done to his right to the possession. If he may bring trover after the term, for the conversion by an absolute sale during the term, he cannot during the term bring the action. For in *Gordon v. Harper*, that was the point; the sale by the sheriff not being of the interest of the defendant in execution, but of the entire property, and the suit having been immediately brought. I cannot perceive a difference between such a sale by the sheriff on an execution against the hirer, and a sale by the hirer himself, as an act of conversion; and therefore, I am of opinion the plaintiff cannot maintain this action, and that there must be a new trial.

PER CURIAM. Judgment reversed.

Cited: Lewis v. Mobley, 20 N. C., 470; *Harper v. Burrow,* 28 N. C., 32; *Murchison v. White,* 30 N. C., 54; *Barwick v. Barwick,* 33 N. C., 82; *Gaskill v. King,* 34 N. C., 212; *Jones v. Baird,* 52 N. C., 154.

JOHN MUSHAT v. EPHRAIM BREVARD.

One claiming a slave against a subsequent purchaser from his vendor must produce a bill of sale registered according to the Act of 1784 (Rev., c. 225), or prove a delivery of the possession, which under the Act of 1792 (Rev., c. 363) will dispense with it. And where a slave was sold at auction, and the plaintiff being the highest bidder, the crier said to the slave, "there is your master," and the vendor being present, did not object, but entered the plaintiff's name and bid in the account of sales, and gave him time to comply with the terms, but afterwards sold the same slave to the defendant—it was held that no title vested in the plaintiff so as to enable him to recover the slave in detinue.

"This was an action of DETINUE, tried at IREDELL, on the last Fall Circuit, before *Seawell, J.,* to recover a slave. The plaintiff made title by an alleged purchase at auction, under the following circumstances. The property of the slave was in one Thomas. His executors advertised the sale of the personal estate of their testator at public auction to the highest bidder, and the terms of the sale were for the purchaser to give bond with approved security before the close of the sale. The slave in question was set up by a crier appointed by the executors, and
(74) bid off by the plaintiff, and knocked down to him as the purchaser, when the crier, the slave being then present, said to the slave or the plaintiff, 'there is your master,' alluding to Mushat as the purchaser. There was no particular evidence given to show whether the executors were actually by-standers when the plaintiff purchased, nor whether any particular power was given to the auctioneer to deliver the property sold. Where the executors were, when the bid was knocked down, and the auctioneer made the declaration, and the authority of the auctioneer, were not affected by other proof than that the executors generally attended and managed the sale. There was no delivery proved by actual corporal touching. Evidence was given, that on the evening of the day of the purchase, and after the purchase, and before the close of the sale, it was agreed between the executors and Mushat, the plaintiff, that the bond was to be given the next day, if the price of the negro was not settled in the price of the tract of land, which Mushat was to convey to them, or one of them, the next day, under some agreement for

a sale. The plaintiff gave evidence to show that he, on the following day, when the agreement for the purchase of the land fell through, tendered a bond with sufficient surety and he also proved that some small article, such as an auger, of the estate of the testator, was sold on the day when the tender of the bond was made. The plaintiff also proved that an account of the articles sold was kept by the executors, and that on the slave being cried out and knocked down to him, he was entered on the account as purchaser. The plaintiff proved the refusal of the executors to deliver the slave on tender of the bond and demand of the slave; that on the next morning, before the arrival of Mushat, on the day of tender, the executors declared that they would not let him have the slave, that he gave too little, that another man would give more, and this was repeated when the demand was made, with the allegation that there was fraud in the sale, and that the plaintiff had not complied with the terms of the sale by giving bond the day before (75) as prescribed. There was evidence also that the executors forbade the plaintiff from taking the slave, but it appeared also in evidence, that Mushat had possession for several days, till the slave by some means got into the possession of the defendant, who subsequently to the day of the tender of the bond, purchased from the executors. The Judge in his direction to the jury, said that the auctioneer was to be regarded in law as the agent of the vendors, that if he knocked down the slave to the plaintiff's bid, and the slave was entered on the account of sales as purchased by the plaintiff, and if a delivery was then made by the auctioneer to the plaintiff, although he had no right to the *possession* of the slave till a compliance with the terms of sale, yet, nevertheless, *the title* passed to him, and the death of the slave in the interim would have been his loss. The Judge further stated to the jury, that if after the purchase, it was agreed by the executors and the plaintiff to postpone taking the bond till next day, or if in fact the sale did not close until next day, and bond with sufficient surety was tendered the day following the bid, that gave a right to the plaintiff to demand the possession. He instructed the jury that corporal delivery was not necessary; that if the slave was present, and declared by the owners or auctioneer to be the plaintiff's property, so that the plaintiff might take hold of him, and no objection was then stated, in law, *that* would amount to a delivery and the title would pass. A verdict was found for the plaintiff, a motion made for a new trial on the ground of misdirection, which was refused, and judgment having been rendered for the plaintiff, the defendant appealed."

Pearson for the defendant.
Devereux, contra.

GASTON, J., after stating the case as above, proceeded: The statement in the case "that an account of the articles
(76) sold was kept by the executors, and that on the slave being bid off by the plaintiff, he was entered on the account as the purchaser," and those parts of the charge brought before us for review which direct the jury, "that the auctioneer was to be regarded as the agent of the vendors, that if he knocked down the slave to the plaintiff's bid, and the slave was entered on the account of sales as purchased by the plaintiff, and if a delivery was then made by the auctioneer to the plaintiff, although he had no right to the *possession* of the slave till a compliance with the terms of the sale, yet *the title* passed to him, and the death of the slave in the interim would have been his loss,"—and furthermore, "that if after the purchase it was agreed between the executors and the plaintiff to postpone the taking of the bond till the next day, or, if in fact, the sale did not close till next day, and bond with approved surety was tendered on the day following the bid, *that* gave a right to the plaintiff to demand the possession,"—all these seem designed to call upon this Court for an exposition of the statute of 1819, "to make void parol contracts for the sale of land and slaves." Were it necessary for a correct determination of the cause to decide whether in this case there was such a written memorandum of the contract, signed by the vendors or by any person thereunto authorized by them, as conformed to the requisitions of this statute, we should much regret that the facts in relation to the account of sales were not more fully set forth. We should then desire to know whether the terms of the sale were expressed in it; whether it was, in fact, signed by any person, and if so, by whom; whether it purported to contain the full evidence of the several contracts of sale, or was a mere memorandum to help the memory of the executors, and contained but the names of the articles set up for sale, of the persons who became the highest bidders, and the prices at which the articles were severally bid off. It appears to us, however, wholly unnecessary to decide this question, if in truth it was intended to be presented for our decision. The plaintiff has not instituted an ac-
(77) tion against the executors for a breach, or non-performance of their contract, but sues the defendant for a detention of his slave, which he alleges became his property by virtue of the executed contract of the executors. If the executors were bound in law to comply with their contract for a sale but

refused to execute it, the property in the slave was not changed, and the plaintiff cannot maintain this action. If the executors were not bound to execute the contract, but nevertheless did execute it, the plaintiff became the legal owner of the slave, and is entitled to this remedy against any person who withholds from him the possession of the slave. The act of 1819 applies to executory contracts and to these only. *Choate v. Wright,* 13 N. C., 289.

The act of 1784 (Rev., ch. 225), and 1792 (Rev., ch. 363), furnish the law by which the case is to be decided. The first requires that sales of slaves shall be in writing attested by at least one credible witness, and shall be proved and registered, in all cases where the claims of creditors or purchasers may be affected. The second enacts that all sales of slaves *bona fide* made and accompanied with the *actual* delivery of the slave or slaves to the purchaser, and which would have been held good and valid before the act of 1784, shall be good and valid without a bill of sale. The plaintiff and the defendant both claim the property in dispute as purchasers from the executors of Thomas. It became necessary for the plaintiff to show that the executors had transferred the slave to him, and this could only be done by exhibiting such a written transfer as the act of 1784 requires, or proving such a sale and delivery as the act of 1792 declares shall be valid. No written transfer was produced or alleged; and the plaintiff undertook to prove a *bona fide* sale accompanied with the actual delivery of the slave. No evidence was given of a delivery in any way by the executors or either of them *personally.* It is not stated that the plaintiff had the actual possession of the slave, issued any order to, or exercised any dominion over him, before he tendered his bond to the executors and demanded a delivery from them. When this tender and demand were made, the executors repudiated (78) the contract, and refuse to make the delivery—and after this refusal sold the slave to the defendant. Unless the facts which occurred at the time the negro was bid off, and on the evening of that day, that is to say, the declaration of the crier to the negro (for it could not have been *to the plaintiff*), "there is your master," the negro being present, and the executors, who might have heard the observation, saying nothing to the contrary, and the agreement between the executors and the plaintiff, to defer until the next day the taking of the bond and surety for the purchase money—unless these facts amounted in law to an actual delivery, or furnished evidence from which the jury might infer the fact of an actual delivery, the alleged transfer to the plaintiff was invalid, because it was not accompanied by a

delivery. It is with reference to these facts that the most important part of the charge remains to be examined. "The Court instructed the jury that a corporal delivery was not necessary; that if the slave was present and declared by the owners or the auctioneer, to be the plaintiff's property, so that the plaintiff *might* take hold of him, and no objection then stated, it amounted in law to a delivery." As there was no evidence of such a declaration by the owners, and as the charge states the law to be the same whether the declaration were made by them or by the auctioneer, the appellant has a right to require that the instruction shall be considered as though the words "by the owners" were stricken from it.

We are compelled to dissent from this instruction. Unquestionably the actual delivery required by the act of 1792, may be made without a manual touching of the body of the slave, but we hold that it must be manifested by some act or acts, from which it can be seen or clearly inferred, that the possession of the slave has been unequivocally relinquished by the vendor and taken by the vendee. The statute is emphatic in requiring not delivery merely, but *actual delivery,* and we think that nothing short of such a change of possession as manifests that the bargain is consummated, and that nothing remains to be done between the parties in relation to the subject matter of the
(79) bargain, will satisfy this requirement. To prevent frauds and perjuries, to shut the door on the misapprehensions and contradictory statements and misrepresentations of witnesses, and to give authenticity and notoriety to the transaction, such a delivery must be proved, or a written, attested and registered transfer produced, whenever the title of a creditor of the vendor, or a purchaser from him, is attempted to be disturbed by a sale alleged to have been previously made. If the declaration of the crier and silence of the executors constituted such a delivery, then the negro became absolutely the property of the plaintiff; the condition in the terms of sale, that bond and approved surety should be given before the close of the sale was waived, and the executors were to give a personal credit for the purchase money to the plaintiff. It cannot be believed that the parties, either the plaintiff or the executors, understood what was *said* by the crier (for nothing was *done*) as amounting to *such* a delivery. After this declaration, we find them negotiating on the subject of paying or securing the payment of the purchase money, and postponing the completion of this very material part of the bargain until the next day. The vendors too, were executors, making sale of the personal estate of their testator. The law imposed it as a duty on them to take security

from the purchasers before they delivered the property; and from the advertisement down to the tender of the plaintiff and his demand of a delivery, and of their refusal to make it, there is not a circumstance indicating an intent to part with the possession, until the price was paid or secured to their entire satisfaction. Was the declaration of the crier evidence from which an inference could be drawn, that *he* undertook to waive this part of the bargain, and to deliver possession before the price was paid or secured? We think not. The executors were in truth the auctioneers, and the crier but their servant. The advertisement for the sale was made, not by him, but by the executors. The bonds were to be taken not to him, but to the executors, and the sufficiency of the sureties passed on, not by him, but by them. The account of sales is kept (80) not by him, but by them, and *they* (the case states) generally attended to and managed the sales. No agency of any sort is shown to have been performed by him except to cry the property, and without some evidence of an authority to act further, the law cannot imply that he possessed it. If this then, was his only authority, the declaration must be understood as made with reference to it, and as merely the annunciation to the slave, awaiting anxiously the result of the competition, of the person ascertained to be the highest bidder, and who, of course, was expected to become his master. If indeed, after this declaration the plaintiff had proceeded to exercise unequivocal acts of ownership over the slave—as by sending him to the plaintiff's home or avowedly claiming the possession of him as then the plaintiff's property, *such acts* done in the presence, and with the knowledge and acquiescence of the executors, might have been left to the jury as evidence (whether strong or weak, I shall not pretend to say) of a waiver on their part of any further act to be done for the completion of the bargain, and an absolute delivery of the slave by them to the plaintiff. But the declaration of the crier at the moment the bidding terminated, "there is your master," although the slave and the owners were present—although the plaintiff might take hold of him, but did not—the owners saying nothing and doing nothing—there being no apparent change of the possession—no money then paid, nor secured to be paid, nor personal credit to be given, is not, we think, either a delivery in law, or evidence from which a jury could infer a delivery in fact.

It is the opinion of the Court that the judgment rendered in the Superior Court be reversed, and a new trial granted.

PER CURIAM. Judgment reversed.

Cited: White v. White, 20 N. C., 564.

(81)

JOSHUA BURNETT v. JOHN ROBERTS.

A limitation over, of slaves, after a bequest for life, upon the executor's assent to the legacy, becomes a vested legal estate, which may be assigned, and which can not be destroyed by any act of the legatee for life.

This was an action of TROVER for the value of several slaves, and was tried in LINCOLN, at Fall Term, 1831, before his Honor, Judge *Daniel*.

Walter Pollard by his will, made in 1768, bequeathed three negroes to Morris Roberts and his wife during their lives, and after their death, to Joshua, Martin, Mary, Susan and Jane Roberts, and the defendant, equally to be divided between them. The plaintiff intermarried with Mary, one of the legatees in remainder, and in 1805, by a deed executed by himself and his wife, and reciting a consideration paid, of one hundred and fifty dollars, the payment of which was proved on the trial, conveyed their share of the slaves to William Magness, who died intestate in 1816, and the defendant administered. In 1828, Morris Roberts, the survivor of the legatee for life, died, and in 1819, the plaintiff and defendant with the other persons named in the bequest over, by deed, reciting that questions had arisen about the division, and about certain allowances in respect of the slaves, appointed certain persons as arbitrators to settle those questions, and to allot and divide the slaves, which had then increased to a large number. This deed was executed by the defendant for himself, and also for the plaintiff, who resided in Indiana, under a power of attorney, constituting him the plaintiff's agent. The negroes were divided by the persons appointed, at which time the defendant was present, and stated that the plaintiff and wife had given a bill of sale for their interest in the negroes many years before, that he knew of its execution at the time, but it was lost, and he could neither find the bill of sale itself, nor the entry of it on the register's book. The slaves allotted to the plaintiffs, were delivered to the defendant and received by him as the plaintiff's agent, and were by
(82) him, shortly after, hired out; he declaring that he did not well know whether they belonged to the plaintiff, or his intestate Magness, as neither the bill of sale or the registration of it could be found. Some time afterwards, it was discovered upon a more particular search of the register's book, that the bill of sale had been registered, and therefore, the defendant claimed the slaves as administrator of Magness, and refused to deliver them up to the plaintiff. On the trial, it was

contended that the bill of sale did not pass anything to Magness, because the interest in the slaves was at its execution, a mere possibility which the husband could not assign, and also that the defendant having received possession as the agent of the plaintiffs, was estopped to deny his title. On both these questions, the presiding Judge was of opinion against the plaintiff, and directed a verdict for the defendant, and the plaintiff appealed.

Devereux for the plaintiff.
Badger for the defendant.

RUFFIN, C. J. The nature of the interests passed by the bequest of a chattel to one for life, with a limitation over to another, has been very fully discussed at the bar, in this case. The Court, however, does not feel called on to enter into the ancient learning upon the subject, because we consider the question entirely settled by repeated adjudications through a long series of years in this State, and if we should draw the conclusions from the law, for which the counsel for the plaintiff has contended, we should still be compelled to obey his own decisions.

There can be no doubt that it has long been received here as law, that such a bequest of slaves is good by way of executory devise, to vest, upon the assent of the executor, the legal estate in the taker for life, with a legal remainder over. Many actions have been brought at law by the tenant for life, and also after his death by the remainder man, and during the life of the tenant for life, many bills have been filed by the remainder man upon his title as a legal one, for a *ne exeat.* (83) The ulterior limitation has never been considered as creating a mere equity, which would be defeated by a sale without notice; but as a vested legal interest which could not be destroyed by any act of the first taker.

In *Dunwooddie v. Carrington,* 49 N. C., 355, it is laid down that the assent of the executor to the legacy for life, is an assent to that in remainder by way of executory devise. In *Ingram v. Terry,* 9 N. C., 122, the same doctrine is stated; and a bill by one taking an interest in the nature of a remainder, against the first taker as his trustee, was dismissed upon the ground that the title was a legal one, and that the remedy was at law. In *Alston v. Foster,* 16 N. C., 337, a bill was brought by remainder men, upon their title as a legal one by the assent of the executor, and relief granted upon that ground. And in *Jones v. Zollicoffer,* 4 N. C., 645, the same character was given to the interest of a remainder man. That was as strong a case as it

could be. The plaintiffs filed the bill for the recovery of the issue of certain slaves bequeathed to the widow of the testator for life, with remainder over to the plaintiffs and others and for a division of them. Zollicoffer purchased one of them from the widow who was also executrix, and relied upon that, and want of notice. The case was several times argued upon petitions to rehear, and a bill of review, and the decision of the Court was upon two occasions given, once by Judge HENDERSON and again by Judge SEAWELL, that the defendant's purchase did not protect him, because the widow had assented to the legacy to herself, and held as legatee when she sold, which vested a legal remainder under the ulterior limitation, against which the equity of a purchaser without notice could not prevail.

The interest of the plaintiff's wife therefore, was neither an equity nor a mere possibility, but a vested remainder in a chattel not consumed in the use, and therefore capable of assignment.

It is objected, however, that it did not pass by the husband's assignment. I believe that at law the rule is, that the
(84) husband may assign every chattel interest of the wife, whether immediate or expectant, which from its nature would be legally transferable, were the interest the husband's in his own right, with the exception of property so limited to the wife as that it cannot possibly fall into possession during the coverture. It is so laid down in the best authorities (3 Thomas Coke, 333, note m. 1 Roper, Property, 236). But if this would not be so as against the wife, had the husband died while the interest was yet expectant, and she had survived, yet in the event which has happened, namely, that both have lived until the life estate expired, and the remainder has been reduced into possession, the assignment is valid against the husband as a conveyance.

It has been also contended for the plaintiff, that the defendant is estopped to deny the plaintiff's title by acting as his agent in the division of the negroes, and taking possession in that character, of his share. It is generally true, that he who acquires possession under another shall not deny the title of him under whom he holds, so as to prevent her from reassuming the possession. But this, as is said by Chief Justice HENDERSON in *Yarborough v. Harris*, 14 N. C., 40, is not upon the strict principles of an estoppel, but upon one of morality and good faith analogous to it, and ought not to be adhered to, when it would work injustice, and especially to the right of third persons, the duty of protecting which has not been officiously assumed by the party, but has been confided to him by the law. Whether indeed it can, apply in any case but one in which the landlord or

bailor is seeking the possession of the thing, and the possession only, may admit of some question, as in action of *detinue* or *ejectment.* For even strict estoppels cease with the estate to which they are annexed; and after the party bound by them surrenders the possession, he is remitted to his ancient right, and can enforce it by action. The estoppel, or principle in the nature of an estoppel, of which we are here speaking, grows out of the acquisition of the possession, and would seem to be confined to controversies for the possession. If it should be applied to the present action of *trover,* in which the plaintiff seeks to recover the full value of the property as damages for (85) a conversion of it, the rule would work the grossest injustice; for the plaintiff would then be paid, not for what upon this principle, he has a right to demand from the defendant, namely, the mere naked possession of slaves, but for the full value, and the defendant would be concluded; for neither in his own right, nor as administrator, could he have an action for the money. I do not think that a rule, the object of which is to compel the observance of honesty and good faith should be perverted to a purpose of so much wrong. It is not strictly true either, that the defendant acquired the possession under the plaintiff; for they were tenants in common and had a previous joint possession. And it seems to me, that taking all the acts of the defendant, together with his declaration at the time, that he assumed of his accord, a nominal agency for the plaintiff, so as to act in his name for the purposes of a division, but taking possession of the share in severalty, to be held according to the right, as it should afterwards turn out. It is like the common case of one acting under an irrevocable letter of attorney coupled with an interest. He uses the principal's name necessarily; but as the purpose of it is seen by a reference to the authority, he is not estopped to deny that he used it for the benefit of the principal, but may show that it was for his own. Here, the defendant at the very time of the division and taking possession, asserted the title of Magness, but said that he was unable to produce the evidence of it; and therefore did not know whether the negroes belonged to the plaintiff or to himself as the administrator of Magness, and with that uncertainty hired them out, until the owner could be ascertained.

But upon the authority of *Yarborough v. Harris,* 14 N. C., 40, the principle must be held not to be applicable to a case of this kind, in which the defendant is acting *in auter droit* and justifies a conversion, which consists altogether in merely withholding the slaves, by showing that they are the property of

others and that it is a duty of an officer conferred on him by the law, so to withhold them.

PER CURIAM. Judgment affirmed.

Cited Saunders v. Gatling, 21 N. C., 94; *Fortescue v. Satterthwaite,* 23 N. C., 571; *Etheridge v. Bell,* 27 N. C., 88; *Howell v. Howell,* 38 N. C., 527; *Acheson v. McCombs, Ib.,* 555; *Weeks v. Weeks,* 40 N. C., 120; *Sain v. Gaither,* 72 N. C., 235; *Farmer v. Pickens,* 83 N. C., 552; *Pate v. Turner,* 94 N. C., 55; *McKoy v. Guirkin,* 102 N. C., 23.

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(86)

JOHN K. G. JONES, *qui tam,* etc., v. WYATT CANNADY.

In debt for usury, the declaration stated a loan to A, but the proof was a loan negotiated by A, as the avowed agent of B: *Held,* that the proof did not support the declaration.

This was an action of DEBT grounded upon the statute of 1741, to prevent excessive usury—tried at Fall Term of GRANVILLE, 1832, before *Martin, J.*

The declaration stated that the defendant received of one Samuel Spears, the sum of $90, "by way of corrupt bargain and loan for the defendant's forbearing, and giving and having forborne and given day of payment of, a certain sum of money, to-wit, the sum of $270, *lent and advanced by the defendant to the said Spears,* from, etc." On the trial, the plaintiff produced and gave in evidence, four notes made by himself and one Lewellen Jones, payable to Samuel Spears, and by him endorsed to the defendant, and then called Spears as a witness, who proved that the notes were discounted by the defendant, upon a usurious contract made by him with the defendant, the sums forborne, the time and the premium corresponding with the declaration; but Spears also proved that the notes had been made by the plaintiff for the purpose of being sold for as much as could be obtained for them, and were placed in the hands of Spears as the agent of the plaintiff, all which he communicated to the defendant at the time of discounting the notes, and received the money produced by them as the money of the plaintiff, Spears having no interest in the same, and the defendant knowing that he had not.

Upon this evidence, the defendant's counsel insisted that the usurious contract proved, was entirely different from that laid in

the declaration, and his Honor being of that opinion, directed the plaintiff to be called, and the plaintiff having, in submission to the Judge's opinion suffered a nonsuit, appealed to this Court.

Devereux for the plaintiff.
Badger and *W. H. Haywood* for the defendant.

RUFFIN, C. J. The defendant doubtless committed usury in discounting the bonds, as stated in the case. (87) But the question is, whether the contract as proved, is that set forth in the declaration. That alleges a loan of $270 to Spears. To whom was it made?

There was but one loan and but one penalty incurred. The loan cannot be laid at the election of the informer, to be made to either; for then the defendant would be exposed to a suit by another informer, for the penalty as upon a loan to the other. The declaration must therefore state the transaction according to the truth of it, and its legal effect. If it had set forth all the facts, that the bond was made to be discounted for the benefit of Jones, was endorsed by Spears, discounted by Cannady, and the money paid into the hands of Spears, and by him delivered to Jones, I will not say that it would not have been sufficient, although it did not expressly allege the loan to be to the one or to the other, because the law would adjudge that upon the facts. But when the party determines for himself, and states in pleading that the loan was made to a particular person, he must show a transaction which in fact and in law makes a loan to that person. Here the declaration is entirely silent as to the bonds and the endorsements. It sets forth barely a naked contract of loan of so much money from Cannady to Spears, without adverting to the securities. Upon the evidence the securities appear; and upon their face the contract of Cannady was *prima facie* with Spears, as his endorsement was the immediate antecedent of the advance of money. An endorsement of a note or receipt for money, is evidence upon a count for money lent, or had and received. Yet, the plaintiff cannot recover on those counts, if in fact the defendant did not receive the money, and was only a surety. (*Stratton v. Rastal,* 2 Term, 366.) It is the same, when the party has received the money, not as his own, but as the avowed agent of another, to whom he has paid it over. In the case before us, Cannady could not then recover this money from Spears, as money had and received by him; nor, as we think, as money lent to him. The evidence shows (88) that the apparent state of the case is not the true state of it.

In questions of usury, no form of contract or device is allowed to preclude evidence of the truth of the transaction; and this for all purposes, as well to enforce the penalty as to avoid the securities. If Jones were sued on the bond, it would be open to him to allege the purpose of making it, so as to show, that the usurious consideration infected the bond itself. *Ruffin v. Armstrong,* 9 N. C., 411. If it consisted only in taking the endorsement, that, being a subsequent and distinct contract, would be void, but the bond valid. In truth, however, each of the securities and the advance of the money forms but a portion of one transaction, and could be stated as such in pleading, by Jones, if sued on the bond. It is true that it would be equally usurious, whether the bond were made to be discounted for the benefit of Jones or Spears, and might be so alleged. The form of the security is, therefore, immaterial; the sole question is, by whom, and for whom, was the contract for the loan made, and to whom was the money to go? Whose money was it when Cannady delivered it to Spears? Could he have retained it as his money, or, could not Jones have maintained an action for money had and received for it, as being paid to Spears by Cannady for him? The case states that the money was applied for by Spears as the agent of Jones, that Cannady paid it to him as his agent, and that he received it as his agent. It was then Jones' money. But how was it his money? Only because it was lent to him by Cannady.

PER CURIAM. Judgment affirmed.

Cited: Jones v. Herndon, 29 N. C., 83.

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(89)

PETER CLAYWELL v. WILLIAM MCGIMPSEY.

A deed is evidence of its own existence, against all the world, and of course everything which necessarily results from its existence; but of the truth of the matters recited, acknowledged, or declared therein, it is evidence only against parties and their privies.

This was an action of DETINUE to recover a negro slave, tried before his Honor, Judge *Seawell,* in IREDELL.

The plaintiff and the defendant claimed title each under the same person—the plaintiff as a purchaser under a deed, professing on its face to be made for a valuable consideration paid by the plaintiff, and the defendant as a creditor under a purchase at sheriff's sale, upon an execution posterior in time to the deed to the plaintiff.

The plaintiff insisted on the trial, that the recital in his deed was evidence against the defendant of the payment of the consideration stated in it, but the presiding Judge ruled that it was not evidence thereof against the defendant, whereupon, the plaintiff submitted to a nonsuit and appealed.

Devereux for the plaintiff.
No counsel appeared for the defendant.

GASTON, J. The plaintiff in this case claimed title under a conveyance from the former owner, and the defendant set up title as purchaser under an execution against the plaintiff's vendor. It became material for the plaintiff to show that he was a purchaser for value, and he insisted that the acknowledgment in his vendor's deed of a valuable consideration actually received, was proof of the payment of such consideration. The Judge decided that such acknowledgement was not evidence for this purpose against the defendant; and in consequence of this decision, the plaintiff was nonsuited.

The Court consider the decision of the Judge perfectly correct. A deed is evidence against all the world to establish the the fact that such a deed was executed, and, of course, all the legal consequences necessarily resulting from that fact.
But when it is offered as evidence of the truth of the (90) matters recited, acknowledged, or declared in the deed it is then admissible only against parties and privies. When offered against others, it is opposed by one of the best established rules of law, founded on the principles of natural justice, that no one shall be prejudiced by *res inter alios acta*—by the acts, declarations or conduct of strangers.

PER CURIAM. Judgment affirmed.

Cited: Feimster v. McRorie, 34 N. C., 289; *Griffin v. Tripp,* 53 N. C., 66; *Tredwell v. Graham,* 88 N. C., 214; *Grandy v. Abbott,* 92 N. C., 36; *Gaylord v. Respass, Ib.,* 557; *Wallace v. Robeson,* 100 N. C., 211; *Faulcon v. Johnston,* 102 N. C., 268.

WILSON and CONNER v. EDMUND JENNINGS.

1. The expression, "liquidated accounts," used in the Act of 1826, c. 12, as explained by Laws 1829, c. 32, means "signed accounts"—and, therefore, where A and B were parties in trade, and A gave his own promissory note for a debt of the firm, and B wrote a letter to A stating that he would pay the debt to the creditor, it was *Held*, that the account was not thereby *liquidated* as against B so as to give exclusive jurisdiction of the demand to a single magistrate, although the note was given, letter written, and action brought before the Act of 1829.
2. Receiving the promissory note of one partner in *payment* of an open account against the firm, and delivering up the account in writing, does not of itself discharge the original demand.

This was an action of ASSUMPSIT, brought in 1827, for goods sold and delivered to the defendant, in which the plaintiff claimed the sum of eighty dollars and seventy-five cents, and was tried on the plea of *non assumpsit*, in MECKLENBURG, before his Honor, Judge *Donnel*.

The defendant and one Thompson were partners in trade, and became indebted as such to the plaintiff for goods sold and delivered. Subsequently to the sale, Thompson gave his own individual promissory note to the plaintiffs for the price, and on the trial the plaintiff gave in evidence a letter from the defendant to Thompson, complaining of the manner in which the business of the firm had been transacted, but stating that he would pay to the plaintiffs eighty dollars when certain moneys should be collected. It appeared that at the time Thompson's note was
(91) taken, he had been called on by an agent of the plaintiffs for a settlement of their account—the account was presented—its correctness admitted by Thompson, and his note given in payment thereof, and the account given up to him.

The presiding Judge being of opinion that the settling of the account by giving the note in payment, was a *liquidation thereof*, within the meaning of Laws 1826, ch. 12, dismissed the suit and the plaintiff appealed.

No counsel appeared for either party.

DANIEL, J., after stating the case as above, proceeded:

By the act of 1789, Rev., c. 314, a plaintiff may bring his action, either jointly or severally, on the assumptions of partners and others. It is not pretended, that the individual note of Thompson was agreed to be taken by the plaintiffs in discharge of the partnership debt; and a note given even by all the partners would not extinguish the original undertaking to pay

for the goods delivered, like a bond or judgment taken for the same. The plaintiffs still might maintain their action for goods sold and delivered, provided they produced and delivered up the note on the trial, or proved it was destroyed. (*Farr v. Price,* 1 East., 55, *Dangerfield v. Wilby,* 4 Esp. R. 159.) If the defendant had been bound on the note given by Thompson, then the plaintiff's account would have been liquidated, and the sum being under one hundred dollars, it would have been within the jurisdiction of a justice of the peace. But the individual note of Thompson did not liquidate the plaintiff's account *quoad* the defendant; it was still, as to him, an open account; and the letter which he wrote to his partner, did not have the effect of giving the note a more extended operation than it had before; nor did it liquidate the plaintiff's claim, even as it related to himself, so as to bring it within the meaning and operation of the act of Assembly, for the plaintiff must still prove on the trial, the delivery of the articles. Although Thompson's note was given and the defendant's letter was written before the act of 1828 was passed, bringing liquidated claims under one hundred dollars in amount, within the jurisdiction of a justice of the (92) peace, still a subsequent act was passed in the year 1829, declaring that the meaning of the words "liquidated accounts," mentioned in the first act, was to be confined to signed accounts. The defendant never signed the account, and Thompson's note still leaves the account open and unliquidated as to the defendant. The action should not have been dismissed.

PER CURIAM. Judgment reversed.

Cited: *Mauney v. Coit,* 86 N. C., 470; *Cotton Mills v. Cotton Mills,* 115 N. C., 487; *Bank v. Hollingsworth,* 135 N. C., 571; *Chemical Co. v. McNair,* 139 N. C., 334.

CORNELIUS DOWD v. HENRY FAUCETT.

In an action of covenant for uncertain damages, no set off or a claim in nature of a set off, can be allowed; and hence in an action against a lessee for breach of his covenant to build a mill within the term: *Held,* that he was not entitled to show in mitigation of damages the building of the mill after the term, more especially when he had held over, and put his lessor to bring ejectment against him, pending which the mill was built.

Action of COVENANT, tried before *Martin, J.,* at Spring Term, 1833, of MOORE.

The plaintiff by articles of agreement executed by himself and the defendant, demised to the defendant for one year certain lands, and the defendant covenanted to build a new mill house on the premises during the term, but failed entirely to perform his covenant, and after the expiration of the term refused to surrender the possession, and the plaintiff brought an action of ejectment against him, which was pending and undetermined, at the trial of this suit. The defendant offered to show in mitigation of damages, that since the expiration of the lease, and while he was holding adversely to the plaintiff, he had erected the mill; but the presiding judge rejected the evidence, and from the judgment in the court below the defendant appealed.

Winston for the defendant.
Haywood and *Mendenhall* for the plaintiff.

(93) RUFFIN, C. J. Although the action of covenant sounds in damages, yet they are not arbitrary and altogether in the discretion of the jury, as in cases of vindictive actions in *tort*. There is a rule which may be given, and a measure for the damages in the stipulations of the parties, and the value of the thing to be done by the covenantor, and which is not done by him, or so much of it as remains undone. It may be stated, too, as certain, that evidence of a set off, or of any claim in the nature of a set off, is not applicable to this action; because it would render the proceedings too complex, and the administration of justice between the parties too uncertain. Damages may be reduced by such things as have been done in execution or towards the performance of the covenant; but not by a matter distinct from it or altogether unauthorized by it. Here for instance, the covenant is to build a mill; the defendant could not show that he built a barn on the plaintiff's land, either as performance or part performance. The covenant is also to build the mill by a particular day; what the defendant did towards it before that day, might be an answer to the damages *pro tanto*. But the case states that nothing was done before the day, and the whole remained to be performed. When specific articles are to be delivered on a day certain, and are not delivered, the debtor cannot discharge himself by a subsequent tender, or diminish the damages by a subsequent fall in the price. The covenantee has a right to the value at the day, and to receive that value in money. So, this plaintiff was entitled by his contract to recover in money the value of the houses not then erected. Can the defendant compel him, against his will, to take work, or by his act, alter in

any manner the plaintiff's rights, without his concurrence? He may have changed his mind, and did not choose then to build a mill; or at all events, he chose that the defendant should not do the work. The plaintiff had then a right to the possession of the land; but the defendant refused to surrender it, and held over, and has since erected the mill. If the time had been extended by agreement, and Dowd had received the mill,
it would have been an answer to the action, as a satis- (94)
faction. But not so, when it is against his consent, even
in mitigation of damages, more than other work done on the land, which was not mentioned in the contract and which the plaintiff forbade. Both are equally without the sanction of an agreement. If the defendant could recover in his own action for such work, his demand could not be set off in this; and if not set off, strictly speaking, evidence ought not to be received which would virtually give it that character. But the defendant could not maintain *assumpsit* for work done on the plaintiff's land, not only without, but against his request. If so, I am at a loss for a legal ground, which is to prevent the plaintiff now from recovering all to which he was at any time entitled. It is said, his estate is improved, and therefore he receives the benefit. But one man has no right to improve another out of his estate or out of his debts. I should think, therefore, that the evidence was properly rejected, had the plaintiff already got into possession of the land, including the mill. But here the defendant is still holding over and defending an ejectment; and clearly it is not competent for him to ask compensation now, for work which the plaintiff has never accepted, nor been allowed to accept, out of the enjoyment of which he is kept by the defendant, and which may be destroyed before the plaintiff will be let into possession.

The counsel for the defendant cited *Wilson v. Forbes,* 13 N. C., 30. It is not applicable. There the plaintiff did not choose to treat his title derived from the covenantor as null, until by virtue of that very deed it became valid. The covenant was annexed to the principal contract, the conveyance; and as the latter was made available, so that the plaintiff kept the land, he ought not also to recover the whole purchase money. All that took place there, was under and in conformity to the deed. As to actions by an executor against an executor *de son tort,* where the latter had paid debts, or by a disseisee against a disseisor, who had paid rents in chief, in which those pay-
ments were allowed in mitigation of damages, they are (95)
actions of *trespass or trover,* and all idea of a contract is
out of the question; and there can be no possibility of doing

wrong to the plaintiffs by the deductions, because they are discharged from debts, for which they were bound at all events. But if by such allowances, the rightful executor would suffer loss, as by being deprived of his retainer, nobody would think of giving the wrongful executor this benefit of his payments, however innocently he might have made them. Similar to those cases will be the rights of the parties, when the present plaintiff shall bring his action for *mesne* profits. The jury can then make fair allowances out of the rents, and to their extent, for permanent improvements honestly made by the defendant, and actually enjoyed by the plaintiff, taking into consideration all the circumstances.

PER CURIAM. Judgment affirmed.

Cited: *Lindsay v. King,* 23 N. C., 403; *Merritt v. Scott,* 81 N. C., 389; *Scott v. Battle,* 85 N. C., 194; *Brown v. Davis,* 109 N. C., 28.

JOHN FINLEY v. WILLIAM D. SMITH.

1. Innovations upon the established forms of writs, especially of such as concern the personal freedom of the citizen, ought not to receive judicial sanction.
2. A writ commanding to take the body and safely keep, etc., *until the Sheriff make a sum of money, and to have that money in Court at the return day,* is not a *ca. sa.*, but a novelty unknown to our law.
3. Whether the Sheriff would be justifiable in obeying or punishable for refusing to obey it, Qu? but it is, at all events, not sufficient to charge bail.

SCIRE FACIAS against Smith as the bail of one Peter Newton. The memorandum of the pleadings on the transcript was in these words: *Plea*—"the capias was not directed to the sheriff of Buncombe, which was the proper county to which it should have been directed 'Special replication,' that the capias issued to the county of Lincoln, which was the domicile of the defendant Peter Newton, and therefore was the proper county to which it should have been issued; rejoinder and issue
(96) to the special replication." The verdict of the jury was, "that the replication of the plaintiff is true," and a judgment was rendered for the plaintiff according to the prayer of his *scire facias,* from which the defendant appealed.

By a case stated by *Seawell, J.,* who tried the case below, it appeared that on the trial a writ was produced and given in

evidence directed to the sheriff of Lincoln, commanding him to arrest the body of Peter Newton if to be found, etc., and him safely keep *until he should cause to be made the sum of sixty-one dollars and ninety-nine cents,* with interest, etc., and *that he should have the said moneys* besides, etc., *before the judge, etc., at the court to be holden, etc.* The defendant's counsel objected that this writ was not a *capias ad satisfaciendum,* but the Judge held it was, and the jury found a verdict accordingly.

No counsel appeared for either party.

GASTON, J. From the loose and imperfect statement of the pleading contained in this record, the court is unable to ascertain what was the issue of facts submitted to the jury. It appears that a *scire facias* was sued out against the defendant as bail for Peter Newton, against whom the plaintiff had recovered a judgment; that to this *scire facias,* the defendant pleaded "that the *capias ad satisfaciendum* was not directed to the sheriff of Buncombe, which was the proper county to which it should have been directed"; to which plea the plaintiff replied, that "the *capias* issued to the county of Lincoln, which was the domicile of Peter Newton (the principal), and therefore was the proper county to which it should have been directed," that the defendant rejoined to this replication and thereon issue was taken. With every disposition to make a liberal allowance for the practice which prevails of setting forth in the record the substance of the pleadings instead of inserting them in full, we must require that the *substance* shall appear. Our duty as prescribed by the Legislature, to inspect the whole record and to render thereon such judgment as the court below ought to have rendered, cannot otherwise be performed. (97) We cannot see upon this record what was the traverse taken by the rejoinder, nor what was the fact found by the verdict, and of course cannot decide what judgment the law requires to be rendered upon such finding.

It is stated, however, that upon the trial of this issue, whatever it might be, a question arose whether a writ issued to the county of Lincoln, and a copy whereof is made a part of the case, was in law a *capias ad satisfaciendum,* and that the Court directed the jury it was "in law a *capias ad satisfaciendum,*" that the jury found a verdict in favor of the plaintiff *accordingly;* and that the defendant moved for a new trial of the issue, because of this alleged misdirection. We must presume this question was a material one on the trial of the issue, and have therefore directed our attention to the decision made upon it.

Here again, we are met with a difficulty. The case does not point out, or in any manner intimate what are the objections to the supposed *capias,* and it being submitted without counsel on either side, we have no means of discovering the objections, but by examining the copy of the *capias* set forth. The writ purports to have issued from the Superior Court of Wilkes to the sheriff of Lincoln, and if the copy be *exact,* the writ is not under the seal of the Court. We should probably defer our judgment, if it were to rest upon this objection, and endeavor by some proper process to get the original writ before us, or otherwise become certain that this apparent defect actually existed, because it is *possible* that the clerk may have neglected in his copy, to show forth the seal. If in truth the writ to Lincoln be without seal, it is not in law a writ issued by the Superior Court of Wilkes. All writs issued by a Court in this State not under the seal of the Court, except when they are directed to the officers of the county in which the Court is held, are absolutely null. The common law requires that the seal of a Court of Record shall be affixed to all its writs, and our Legislature has dispensed with this essential form of authentication only in the cases where the writ is confined within
(98) the county from the Court of which it issues. Act 1797, Rev., c. 474. This point was conclusively settled in *Bank v. Seawell,* 14 N. C., 279. In all cases not coming under the exception, the seal of a Court is as indispensable to its writ, as the seal of a party is indispensable to his bond.

But there is another objection which cannot be removed. The writ of *capias ad satisfaciendum* is one, the forms of which have been settled from the time of the earliest annals of judicial history. It commands the officer to take the body of him against whom it is directed, and him safely keep, so as to have his body before the Court to satisfy the plaintiff, the debt recovered. The forms of a writ, the execution of which has so important an operation as to deprive a citizen of his liberty, are so many securities for the liberty of all the citizens. No writ ought to be considered as a *capias ad satisfaciendum* which plainly disregards them. The sheriff to whom a writ is directed, is a ministerial officer, whose duty it is to obey the requisitions of the mandate. It is necessary that this mandate should correspond with that which the law prescribes, for the sheriff *ordinarily* cannot look beyond it. If it proceed from a Court having juridiction, he is protected or punished, in general, accordingly as he obeys or disobeys it. When a writ issues in the settled form, there is no difficulty in knowing his duty, for that also has been perfectly settled by law. But when it

is expressed in terms unknown to the law, a conflict is presented between the language of the mandate on one side, and the requirements of the law on the other. Perhaps he might be protected in yielding obedience to the former, and probably the the Court would not punish him for showing greater respect to the latter. However this may be, and whatever might be the remedy of the citizen, if the sheriff obeyed the strange writ, the law will not sanction such a writ, because it is a strange writ, which it does not know. The writ which issued in this case commands the sheriff not to "take the body of Peter Newton, and him safely keep, *so that you may have his body before* our Superior Court of Wilkes, to be holden, etc., (99) then and there *to satisfy John Finley, etc.,*" but, "to arrest the body of Peter Newton, and him safely keep until you cause to be made the sum of sixty-one dollars, etc., which John Finley recovered, etc., and have you *the said moneys* before our Court, etc., etc." It is a singular species of *distringas,* against the body of Newton, by means of which the officer is, at all events, to *squeeze* the money out of him, and have that money forthcoming at the next Court. In our opinion, it is not our well known *capias ad satisfaciendum,* but a stranger to our laws.

This is not a case in which a *capias* has issued *irregularly,* as upon a dormant judgment, not revived by *scire facias,* which irregularity may be waived or not by the principal, and to which the bail cannot object, but it is one in which the writ given in evidence as a *capias,* is not in law a *capias,* and where the bail has a right to demand a proper *capias.*

The judgment of the Court below, is to be reversed, and the verdict set aside, and the cause remanded to the Superior Court of Wilkes for further proceedings. Should it again come before us, we hope that it will be presented in such a shape as to enable us to decide it finally, and according to law.

PER CURIAM. Judgment reversed.

Cited: *Freeman v. Lewis,* 27 N. C., 96; *Houston v. Walsh,* 79 N. C., 40; *Taylor v. Taylor,* 83 N. C., 118; *Perry v. Adams, Ib.,* 268; *Henderson v. Graham,* 84 N. C., 501.

THOMAS DOUGAN v. WHITLOCK ARNOLD.

1. A judgment by default on an attachment before a justice, levied on land and returned into the County Court for an order of sale, may, after execution issued, be set aside, and a new trial awarded in the Superior Court upon a writ of *certiorari*, founded on affidavit, showing merits, and denying notice of proceedings.
2. In such case the writ is properly directed to the County Court, and not to the justice granting the judgment, because that Court having possession of the proceedings, can alone answer the writ.

APPEAL from an interlocutory order made in RANDOLPH Superior Court, by his Honor Judge *Settle*.

Arnold sued out an attachment returnable before a justice of the peace, against Dougan, a resident of Indiana, (100) and caused a levy to be made upon a tract of land, on the return of which the justice ordered an advertisement for the appearance of Dougan, to be published for thirty days, and no appearance being entered, a judgment by default was rendered, and the proceedings filed in the county Court, where an order was given for the sale of the land, and a writ of *venditioni exponas* issued accordingly.

While this writ was in the sheriff's hands and before any sale, one Clark, as the agent of Dougan, applied to Judge Martin for writs of *certiorari* and *supersedeas*, and grounded the application upon an affidavit stating in substance, that his principal Dougan, had no knowledge of the proceedings against him until after the order of sale, and owed nothing to Arnold. The Judge may a *fiat* for the issuing of the writs, and on their return at last Spring Term, Arnold sent in counter-affidavits which did not however repel the affidavit on which the writ was granted, nor show any debt due him, but his counsel moved to dismiss the writs *quia improvide emanaverint*, which motion the presiding Judge refused to allow, but on the contrary, directed a new trial of the attachment cause to be had, and that it should be placed on the trial docket of the Court for that purpose.

From which order overruling the motion to dismiss and directing the new trial, Arnold prayed the Judge to allow an appeal, which his Honor allowed accordingly.

Winston for the plaintiff.

No counsel appeared for the defendant.

RUFFIN, C. J. The argument in favor of the motion to dismiss the *certiorari* as having been improvidently issued, is founded upon the use of that writ in the English law. It is

there used to bring an indictment from an inferior court into the King's Bench for trial; or to have a judgment of an inferior magistrate, not proceeding according to the course of the common law, reviewed. In neither instance does a second trial of the facts take place. In the latter, the judgment, if irregular or unsupported by the acts found by the magistrate and stated in the conviction to be found, is quashed (101) and the parties have to begin again.

In this State the writ may also be, and has been used as a writ of false judgment, merely to have the matter of law reviewed. But it has also in our laws, another important property, that of affording the means of re-trying the facts, which is unknown in England.

Here an appeal is matter of right, and on it there is a trial *de novo*. The *certiorari* is in proper cases, substituted for it, and if the party has been improperly deprived of his appeal, upon affidavit of the facts, it is granted if not of right as of course. So also if he has lost his appeal by accident, and makes *prima facie*, a case on the merits. If the merits in such a case be not answered by the affidavits on the other side, the jurisdiction is exercised of setting aside the first judgment, and ordering a new trial in the Superior Court on the former issues, if the first trial was on issues, or if the first judgment was by default and without *laches*, the party is permitted to plead in such manner as the Court may allow, so as to obtain a trial on the merits. Such has been the long established course in our Courts; and it seems to be a necessary consequence of the provision, that one trial shall not conclude the parties, but that each by appeal may have a new trial. The right of appeal is favored and is not to be defeated by accident.

This application of the writ is necessarily limited to the period during which the judgment remains unsatisfied. After execution and the levy of money by a sale, the interests of third persons forbid further interference, merely for the sake of another trial. The remedy then must be by writ of error, or of false judgment for error in law alone. But before satisfaction none but the parties can be affected, and there is no inconvenience to prevent a new trial by *certiorari*, upon a proper case, that is, one in which the applicant has merits, and accounts first for not pleading or not appealing, and secondly for the delay in applying for the writ, if delay there has been. (102)

Here the merits are palpable. The demand of the original plaintiff has upon his own affidavits, no foundation in conscience or law. The judgment is against a resi-

dent in Indiana, upon attachment before a justice of the peace out of court, advertised for thirty days in Randolph county, which conveyed no actual notice to the party, and of which he had in fact, no knowledge until after the order for the sale of the land levied on, had been made in the County Court, and the land advertised for sale under execution. His application immediately followed the notice to him.

It is also objected that this *certiorari* will not lie as being directed to the County Court, whereas it ought to have gone to the single magistrate by whom the judgment complained of was given. Without accurately inquiring into the nature of the judgment given by the County Court upon a levy on land by a constable, it is sufficient for the purposes of this case to say, that the writ must go to the County Court, because nobody else can give an answer to it. By the act of 1794 (Rev. c. 114, sec. 19), the constable is required to return the execution to the justice of the peace who issued it, who is to return it, the warrant and judgment, and all papers on which the judgment was rendered, to the next County Court, where an order of sale is to be made, and the whole recorded. The magistrate cannot afterwards withdraw the papers, or make up a record for the Superior Court. The whole is already a record of the County Court, and there the order is made which alone authorizes effectual execution, and consequently to that court ought to be addressed the writ, which is to operate as a *supersedeas* to the execution, and to the judgment either of that court, or of the justice of the peace there recorded.

The opinion of the Court therefore is, that there is no error in the decision of the Superior Court.

PER CURIAM. No error.

Cited: Kelsey v. Jervis, 30 N. C., 452; *Lassiter v. Harper,* 32 N. C., 395; *Lunceford v. McPherson,* 48 N. C., 177; *Barton, ex parte,* 70 N. C., 136.

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(103)

NATHAN CHAFFIN v. MICHAEL HANES and others.

A debt due an administrator by his intestate, is, in law, paid the instant assets applicable to it are received, and nothing *ex post facto* will set it up again; as where an administrator was the obligee of a bond executed by his intestate and another, it was held to be satisfied by the receipt of assets rightfully applicable to it, although the obligee was afterwards compelled to pay other bond debts of his intestate, to which he was surety.

CHAFFIN *v.* HANES.

DEBT upon a bond executed by one William W. Chaffin as principal and the defendants as sureties, payable to the plaintiff.

PLEAS—*non est factum.* Payment—and an accord and satisfaction.

On the trial before *Settle, J.*, at ROWAN, on the last Spring Circuit, the defense was that the principal debtor died in the year 1823, and that letters of administration upon his estate issued to the plaintiff, who received assets to an amount exceeding the debts of dignity superior to the one in suit, and of the bond debts for which he might retain. His Honor ruled this to be a satisfaction of the debt, as the presumption of law was that an administrator had applied the assets to his own debts as soon as he could do so in a legal course of administration. The plaintiff offered to prove that there were bond debts of the intestate to which he was surety, and which he had been compelled to pay, which with debts of a higher dignity, and the bond debts which he might retain, exceeded the amount of assets —but his Honor thinking that fact could not affect the defense, a verdict was returned for the defendants, and the plaintiff appealed.

Nash and *Badger* for the plaintiff.

No counsel appeared for the defendants.

RUFFIN, C. J. The effect simply of the administration of the creditor on the estate of one of the obligors, is not to be determined in this case, because the defendants have not pleaded that fact. The material pleas are payment and satisfaction; the defendants choosing to rely on the merits, (104) and fact of satisfaction, rather than on the ground that the creditor, by his own act of administering, had suspended and thereby extinguished his remedy.

On the trial upon these issues, it appeared in evidence that the plaintiff is the administrator of William W. Chaffin, a co-obligor with the defendants, and received assets more than sufficient to pay this, and all other bond debts of the intestate to himself. The Court held, that the debt was satisfied by the receipt of assets to a larger amount; and also rejected evidence offered by the plaintiff, that the intestate owed bond debts to other persons, in which the plaintiff was his surety, and which he had paid off to the amount of the assets received by him.

The first position is in conformity to *Muse v. Sawyer,* 4 N. C., 637, which is directly in point, where the plaintiff was the executor of the obligee instead of the obligee himself.

From that, the correctness of the second position seems to be

a necessary consequence. If the plaintiff were a creditor by several bonds, to a larger amount than all the assets that have come into his hands, in reason and justice, he ought to be at liberty to apply the assets to such of his bonds as he chose, and the law in case he had not actually applied them, would presume him to apply them to those debts for which the creditor had no other security but the single bond of the intestate. But if the administrator be a creditor by bond, and also by simple contract, the assets are first applicable to the former debt, and must be so applied. The doctrine of retainer is founded upon the idea that the debt is extinguished by the receipt of assets, whenever those assets can, in the course of administration, be legally applied to the debt. It does not appear in the record, whether the plaintiff paid the bonds in which he was surety, before or after he administered. But be it either way, the result is the same. If before, the debt to the plaintiff in respect of such payments, was a simple contract; and this, as a bond debt, is first to be paid. If after, the assets were before
(105) appropriated by law and at the instant they were received, to the bond debt to the plaintiff. The residue after deducting this debt, was the assets to which other bond creditors could resort. When the debt becomes extinct by reason of the receipt of assets, it is extinguished for all purposes and as to all persons, as well co-obligor, as the heirs of the deceased obligor; for, says Lord *Holt* in *Wankford v. Wankford*, Salk. 305, having assets amounts to *payment*, and another obligor in the bond cannot be sued. Being thus extinguished, it can never be revived by any subsequent acts of the administrator, such as the application of the assets to other debts of inferior dignity, or even of the same dignity falling due, or acquired by him, after the assets were legally applicable, and had been by the law applied to this bond.

This case having occurred prior to 1829, is not affected by the act of that year (ch. 22). Indeed, had it occurred afterwards, it is clear that it could not operate in favor of the plaintiff, if he paid off the bonds after he obtained letters of administration; because the statute only gives to demands, paid by the surety, the dignity, in his hands, which they had in those of the original creditor, and as bonds held by the original creditor they were postponed to the right of retainer in the plaintiff of the debt due to himself. For the same reason it is at least doubtful whether the law would not be the same, had the plaintiff paid the bonds before administration; though, possibly, in that case, he might be considered as then holding them as bonds

due to himself. But upon that question, the Court gives no opinion; as the facts to raise it are not found in the case.

PER CURIAM. Judgment affirmed.

Cited: Coltraine v. Spurgin, 31 N. C., 56; *Moore v. Miller,* 62 N. C., 362; *Ruffin v. Harrison,* 81 N. C., 214, 15.

(106)

JOHN C. CABINESS v. THOMAS MARTIN and JOHN HARDCASTLE.

1. Suing out a warrant "for taking a false oath" in a certain suit, "knowing it to be false," is a prosecution for perjury.
2. When a defendant gives evidence of a part of a transaction in his defense, he can not complain if the Court permits the plaintiff to show the whole, whether the transaction be strictly relevant or not.

THIS was an action on the case tried before *Norwood, J.*, at Fall Term, 1832, of RUTHERFORD.

The plaintiff declared against the defendants for maliciously prosecuting him for the crime of perjury; and on the trial he produced and gave in evidence a warrant, sued out by the defendant Martin—reciting that Martin had made oath before the Justice granting the warrant that he had just reasons to believe that the plaintiff "did take false oath in a suit in Rutherford Superior Court, at October Term, 1826, before Judge *Ruffin,* in a suit of *The State v. Thomas Martin and others* for a conspiracy, he (the plaintiff) knowing the same to be false and corrupt,"—and therefore commanding that the plaintiff should be arrested, etc., to be further dealt with according to law.

The plaintiff showed that the suit referred to in the warrant was a prosecution against the defendants Martin and Hardcastle, and one Botts, for a conspiracy to arrest one James Hord upon a pretended charge of larceny, and thereby to defraud him of his money in order to procure a compromise of the charge; and that the said Martin, Hardcastle and Botts, at the time of Martin's causing the above recited warrant to be issued, were in jail under a sentence of imprisonment for the said conspiracy—and they directed one Patterson, a son-in-law of Hardcastle, to deliver the warrant to an officer and have the plaintiff arrested and brought to trial without the knowledge of any of his friends. And the plaintiff further proved that he was accordingly arrested and brought before a Justice, (107) who after hearing the testimony adduced in support of the warrant, discharged him.

The defendants' counsel then objected that the warrant produced did not charge the plaintiff with the crime of perjury, and that therefore, the declaration was not supported by the proof, but the presiding Judge overruled the objection.

The defendants then proved, that on the trial of the indictment against them and Botts, the plaintiff was examined as a witness and deposed in substance as follows—that Hardcastle sued out a warrant against Hord for stealing the money of Hardcastle—which was served by Botts who was a constable, and returned before Martin who was a Justice—that Martin on the trial before him after hearing the evidence, told Hord he must give up a three dollar note seen in his possession, and execute his own bond to Hardcastle for the residue of the money lost, or he would send him to Court—that Hord refused to do what was demanded, upon which Martin had a private conversation with Hord's wife, and then declared that the matter could be accomodated, telling Hardcastle that if he would on the next day go to Hord's house, he could get the three dollar note and a bond for the residue of his money—that Hardcastle declining to go, Botts said he would do it, and include in the bond his own fees on the warrant, and thereupon, Hord was discharged. The defendant further proved that when Botts arrived at Hord's house, he found him sick and in bed—and when Hord, being informed of the business on which he came, refused to give up the note and execute his bond. Botts threatened to carry him again before a Justice, upon which Hord complied with his demand.

The plaintiff then offered to prove that Botts took the bond payable to himself, and being asked the reason why? said "it was for a blind," which was objected to by the defendants' counsel, but the evidence was received by the Judge. The plaintiff further offered to prove that a short time before the warrant against Hord, at a public gathering of people
(108) at his house, a three dollar note was brought to him by one of his servants, upon which he made proclamation of the fact and requested the owner to come forward and receive his money, but no claim was interposed, and that Hardcastle and Martin were present, to which evidence, also, the defendants objected, but it was nevertheless, received by the Judge.

A verdict was found for the plaintiff, and a new trial having been refused and judgment rendered upon the verdict, the defendants appealed.

Iredell and *Devereux* for the plaintiff.

No counsel appeared for the defendants.

DANIEL, J. The defendants caused to be issued against the plaintiff a State's warrant for perjury. The plaintiff was arrested and carried before a magistrate, who, after examination, discharged him. The plaintiff has brought an action on the case against the defendants, for a malicious prosecution. On the trial the defendants first objected, that the warrant, from the face of it, did not charge the plaintiff with a perjury, and it ought not to be read as evidence against them. The Court overruled this objection, and the warrant was read. The defendants then introduced testimony with a view to show that they had probable cause to issue the said warrant. They proved that themselves and one *Botts* had been indicted for a conspiracy, for having a man by the name of *Hord* improperly arrested on a State's warrant for larceny, and defrauding the said *Hord*, by the conspiracy aforesaid, of his property. They proved that the plaintiff was introduced as a witness for the State, on the said indictment against them; that he gave his evidence in the case, which they contend was different from the truth of the facts that actually occurred on the trial of the State's warrant against *Hord*, for the supposed larceny. The defendants introduced further testimony, showing how the transaction occurred for which they and *Botts* had been indicted. In this part of the examination, sufficient appeared to show that a conspiracy had taken place, and that *Botts* was one of the confederates. The plaintiff then proposed to continue the examination, and prove all that occurred relative to the conspiracy. This was objected to, but ad- (109) mitted by the Court. The plaintiff then proved what *Botts* did and said in the absence of the defendants, when he went to the house of *Hord* to get the money and note, as had been agreed upon by the conspirators the day before. There was a verdict for the plaintiff. The defendants moved for a new trial: First, because the Court erred in deciding that the State's warrant charged the plaintiff with the crime of perjury; secondly, because the Court admitted improper evidence to be introduced for the plaintiff. The motion was overruled, and judgment rendered for the plaintiff, from which the defendants appealed.

The State's warrant issued at the instance of the defendants against the plaintiff, states that he, Thomas Martin, has just cause to believe that J. E. Cabiness did take a false oath in Rutherford Superior Court at October Term, 1826, before the Judge, in a suit, the State against Thomas Martin and others for a conspiracy, the said Cabiness knowing the same to be false and corrupt. It appears to me that the warrant suffi-

ciently charges a perjury to have been committed; and I think the Court acted correctly in permitting it to be read as evidence in the cause. Secondly, the evidence that went to prove the facts which constituted a conspiracy by the defendants and Botts, was mainly brought before the Court by the defendants themselves. If this part of the evidence on this head, which was introduced by the plaintiffs, was irrelevant and immaterial, the defendants must recollect that they were principally instrumental in having the facts that constituted the conspiracy, brought out in evidence. They can not complain if the plaintiff introduced evidence afterwards to give a full development of that transaction. If the evidence of part of the facts which constituted the crime of a conspiracy by the defendants and Botts, could be considered proper evidence in the cause, either as introduced by the defendants to show palpable cause, or by the plaintiffs to show malice in the defendants, the adverse party would have the right to give in evidence all the
(110) facts that occurred which went to complete the conspiracy, or to show that it did not exist. The rule of law is, that after a confederation to do an illegal act has been established, then the acts of one of the confederates, in the absence of the others, in furtherance of the original illegal design, may be given in evidence against the others. (MacNally, 611, 612.) The case shows that Botts was a *particeps criminis* in the conspiracy; his acts in furtherance of the illegal design to get the property of Hord, was admissible in evidence against the defendants; and the declarations which Botts made use of when he took the money and note of Hord, were admissible as part of the *res gestæ;* they show the *quo animo* that actuated him, in receiving the money and taking the note. (1 Starkie, 49.) Upon reviewing the whole case, I think there is no ground for a new trial, and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: *Roberts v. Roberts,* 85 N. C., 11.

HINES DRAKE and others v. HENRY DRAKE and others.

Where a putative father of a bastard procured the passing of a private Act of Assembly, whereby the name of the latter was changed to that of the former, and he was declared "forever hereafter to be legitimated and made capable to possess, inherit and enjoy by descent, etc., any estate, real or personal, to all intents and purposes, as if he had been born in lawful wedlock": it was held that as the bastard was not made legitimate to any particular person, the only effect of the act was to change his name.

EJECTMENT tried on the Fall Circuit of 1830, before *Daniel, J.*, at EDGECOMBE.

By consent, a verdict was taken for the plaintiff subject to the opinion of his Honor on the following case:

William Drake being seized in fee of the premises in dispute, in February, 1827, duly made and published his last will and testament, and therein devised as follows: "I (111) give and bequeath to my beloved son Levi Drake, the son of Eleanor Edwards, deceased, all my estate both real and personal, to him and his heirs forever," and died in the same year without altering or revoking it. Levi Drake upon the death of the devisor entered upon the premises, and was seized thereof, and being so seized died in 1829, without issue, and without brother or sister, or the issue of such except so far as is hereinafter mentioned. Levi Drake was the bastard child of Eleanor Edwards, and originally bore the name of Levi Edwards.

At the session of the General Assembly, begun in November, 1802, the following act was passed:

AN ACT TO ALTER THE NAMES OF THE PERSONS THEREIN MENTIONED, AND TO LEGITIMATE THEM.

"*Be it enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by the authority of the same*, That from and after the passing of this act, the names of, etc. (mentioning a number). The name of *Levi Edwards*, of Edgecombe County, be altered to that of *Levi Drake*.

"*And be it further enacted*, That the aforesaid persons shall be called and known by the names as above altered, and by such names respectively shall be able to sue and be sued, plead and be impleaded in any Court of Law or Equity, and shall possess and enjoy the same privileges as if they had borne the names as above altered from their nativity.

"*And be it further enacted*, That the persons described in the first section of this act shall forever hereafter be legitimated and made capable to possess, inherit and enjoy, by descent or otherwise, any estate, real or personal, to all intents and purposes as if they had been born in lawful wedlock."

It was admitted that the name of Levi Edwards was inserted in that act at the instance of William Drake, the testator, but

this admission was subject to an objection as to the competency of parol evidence in any way to affect its construction. After the passing of the act, Levi Edwards bore the name of Levi Drake, and was recognized by the testator William as his son. Before the passing of the above recited act, Eleanor Edwards, the mother of Levi Drake mentioned therein, had borne three other children, also born out of wedlock; of these one was the wife of one of the defendants; another was the wife of
(112) the defendant Drake and was dead, leaving issue, and the third was dead without issue. Eleanor Edwards died before her son Levi, leaving no other issue except those above mentioned and without having ever been married. She left surviving her, brothers and sisters who are still alive.

William Drake, the testator, was never married. The lessors of the plaintiff were his brothers and sisters, and if Levi Drake had been born to William in wedlock, they would have been his nearest collateral relation on the part of his father.

If upon these facts his Honor should be of opinion that the lessors of the plaintiff were the heirs at law of Levi Drake, then the verdict was to stand and judgment to be entered accordingly, otherwise it was to be set aside and a nonsuit entered.

His Honor delivered his opinion as follows: "Levi Edwards before the Legislature passed the private act of 1802, could not have inherited from any of the legitimate brothers and sisters, which he might have had on his mother's side. It was possible for his mother to have been lawfully married and to have had issue by that marriage. Neither could he have inherited from any of the brothers or sisters of his mother, or from any of the more remote collateral relations of his mother, nor could the aforesaid collateral relations have inherited by any possibility, from him. The cases *supposed* are not within the act of Assembly of 1799. I think without any very forced construction, the private act of 1802, although badly penned, and the meaning imperfectly expressed, placed Levi Edwards (afterwards, Levi Drake) in the same situation of a child who had been born in lawful wedlock, so far as relates to the blood relations of his mother. But I cannot discover from the act of 1802, that if William Drake had died intestate, that Levi Drake would have been his heir at law; the Legislature must declare him such a person as could inherit the estate of Wm. Drake, by such words that the Court could so reasonably understand or infer it from the private act of 1802 itself, viz.: that he was made capable of succeeding to the estate of Wm. Drake by descent. Proof *aliunde*, from the act of Assembly itself, can-

not not be admitted to show what the Legislature meant. If Levi Drake was the only child and heir at law of Wm. Drake, he would take this land by descent; for it is a rule (113) of law founded upon feudal principles, I admit, but still it is a rule of law in this State, that when the same land and the same estate, if it would come to the devisees by descent, if no will had been made, then the making of a will devising the land, will not make the taker a purchaser of the estate; the law declares that he shall take by descent. The lessors of the plaintiff must recover by the strength of their own title, possession is sufficient for the defendants until the lessors can show a better title. If Levi Drake had have died seized and possessed of land, could Wm. Drake, if he had been alive, have succeeded to the land for life, as his, Levi's father, by the rule or canon in the act of 1808? To have ascertained or decided this question, we would be referred to the private act of 1802. In looking to that act, no reasonable inference could be drawn, that the Legislature intended to make Levi Drake the legitimate son and heir of Wm. Drake, therefore he would not have succeeded to the land of Levi Drake, had the latter died leaving Wm. Drake alive; neither can the lessors of the plaintiffs, because they claim by descent, and claim through and by the blood of Wm. Drake. I say nothing of the maternal relations of Levi Drake, they are not before the Court. At common law, he was *filius nullius*, and had no inheritable blood in him. By the act of 1799, he was, while illegitimate, capable of inheriting in a few express and enumerated cases; by the private act of 1802, the lessors of the plaintiff alleged that he was changed from a bastard to a legitimate person, having all the heritable blood of a person born in lawful wedlock. The question then is, "heritable blood" to whom? Look into the act, and you cannot discover it is for or to Wm. Drake, and his blood relations; this fact cannot be averred and proved by anything but the act of the Legislature itself; that does not prove it I think; and the lessors of the plaintiff who are brothers and (114) sisters of Wm. Drake deceased, are not the heirs at law of Levi Drake, they cannot recover. Let judgment of nonsuit be entered. It may be contended, that as the ascertainment of the fact that A is heir at law of B, depends upon such proof as satisfies the mind of a jury, so in this case the declarations of Wm. Drake, that Levi Drake was his son is sufficient to constitute the latter son and heir at law of him forever; and *e converso*, Wm. Drake the father, capable of taking a life estate in the land of Levi, had he died before William, without issue, or lawful brothers or sisters, or the issue of

such, and also to have enabled the lessors of the plaintiff to support their title in the present case as heirs at law, taking by descent the land which belong to Levi Drake. Here is the great question, could Wm. Drake, if he was alive, claiming the landed estate of Levi be permitted to come into Court, and prove *dehors* the act of 1802, that he was the father of the *quandam* bastard, Levi Edwards? I think he could not be heard to make such proof. And, as he could not, I think the lessors of the plaintiff who claim through him, cannot be permitted to do so; and if they could, the bare recognition of Levi by William, as his son, is not sufficient evidence of itself, to enable the lessors of the plaintiff to take the lands of Levi by descent.

Judgment being entered accordingly, the plaintiff appealed.

The *Attorney-General, Badger, Devereux* and *Mordecai,* for the plaintiff.

Winston, contra.

RUFFIN, C. J. The title of the lessors of the plaintiff depends upon the effect of the private act of 1802, which was given in evidence, and is set forth in the record. By it the names of several persons in no way connected with each other are changed. Among them, that of Levi Edwards is altered to Levi Drake. In the last section it is enacted, that the persons described in the first section shall be legitimated and (115) made capable to possess, inherit and enjoy by descent or otherwise, any estate, real or personal, to all intents as if they had been born in lawful wedlock.

It is contended, that Levi Drake was thereby legitimated as the son of William Drake, and became capable of taking lands by descent from him, and again of transmitting such lands by descent, as if he had been the heir of William by the general law; in which case the lessors of the plaintiff, as his heirs on the part of the father, will succeed to the premises in dispute.

What may be the operation of such laws as that under consideration, as far as they contain a clear expression of the legislative will, it will be time enough to determine, when an occasion shall arise which will render the decision necessary. This case calls only for a constructon of this act. The question here, is not whether the intention of the Legislature as ascertained, shall be effectual; but what was that intention?

Whether a statute be a public or a private one, if the terms in which it is couched be so vague as to convey no definite meaning to those whose duty it is to execute it, either ministerially or judicially, it is necessarily inoperative. The law

must remain as it was, unless that which professes to change it, be itself intelligible. But between the rules of construction applicable to statutes of a public and private character, there is a marked difference. It has been long established, and is founded on the soundest principles, and the legislative intention itself. A grievance which makes a new law of the former kind necessary, is a general one. The grievance, the old law, and the defect in it, are known to the Court, in common with the Legislature and other citizens; and furnish the means of discovering the intention of the Legislature, notwithstanding a defective expression of it. When discovered, it is the duty of the Court to suppress the evil, by advancing the remedy. But with private acts, it is entirely different. They do not relate to matters of common concern; and therefore do not receive that cautious deliberation of the members of Assembly which is bestowed on those touching the general welfare. Whatever may be the views of the agents who introduce such (116) bills and procure their passage, the Legislature generally must wish their intention to be adjudged of by their words; and that the grant to one citizen, and the restriction upon another, should be limited to the persons, the subjects and the extent therein plainly set down. No latitude of construction is admissible; none such would be tolerated by the Legislature itself. No discretion is entrusted to the judiciary, for there is nothing to aid or inform their discretion. The Court is ignorant of the evil to be remedied, further than that it is declared in the act itself; and alike ignorant of other motives to the enactment. The defeat of the purposes of the act, would be as likely, as their promotion and more so, by a departure from the letter of the instructions. A Court cannot therefore carry a private act by construction, beyond its words, or a necessary implication from them. On the contrary, there is an implication even against the most general words, in favor of the right of those who are not mentioned by name in the act. It is not intended that any others shall be concluded. Hence, strangers are not bound by a private act, although there be no saving clause (*Barrington's case* 8 Rep., 136; Bl. Com., 345), and it is regarded, both in its operation and construction, in the light of conveyances, deriving their effect from the common law.

In the act before us William Drake is not named; not even as the putative father of Levi, by way of recital. Much less is Levi declared in the enacting clause, to be *his* heir. It is enacted, that he shall be legitimated; but as the son of whom, the act is silent, that he shall be capable of inheriting, but from whom, does not appear. As far as this statute goes, it is as com-

petent for him to claim an inheritance from any other person, as from William Drake. There is nothing from which the remotest inference of such an intendment can be drawn.

Nor can any evidence out of the act aid the plaintiff. This is the question of the construction of a statute. When the operation of a law depends upon the consent of a person
(117) whose interests are affected by it; either by such consent being necessary constitutionally to its efficacy, or by being a condition precedent to its taking effect as collected from the act itself, it is necessarily competent to prove such assent. If the act prescribes the mode in which the parties to be bound by it, or to take benefit by it, shall signify their consent, the evidence must conform to the requisition of the statute. If it be silent, then any other evidence adequate to establish the fact will suffice. But evidence that a person procured the act to be passed, or gave a subsequent assent to it, will not make it an enactment of what it is not in itself. If William Drake wished Levi to be legitimated as his son, and to that end prevailed on the Legislature to pass this law; yet the law will not legitimate him as his son, because to that extent the Legislature has not yielded to his wishes. It may be said, that such laws must then be always void, however express the enactments, upon the ground that the assent of the parties is necessary, if extrinsic evidence be not admissible or sufficient; for the recital of it in the statute, as a fact would not bind them. I have no doubt that such a recital is not conclusive; for a private act even of the English Parliament, with its plenary powers, partakes so much of the nature of a conveyance between parties, that it has been relieved against upon the ground of false suggestion and fraud. But I have as little doubt, that as to facts purporting to be stated in the act as occurring in the Legislature, every court must receive the act as importing verity, to the same extent that the records of a court are evidence to the Legislature or another court, or the matters of fact transacted in the court, of which the record is the memorial. As to other recitals, it would seem but a decent respect, though they be not conclusive, to treat them as true, until the contrary appear. But unquestionably, no evidence as to the motives of the Legislature can be heard to give operation to, or to take it from their acts; nor can the construction of even a deed, much less a record, and still less a statute be controlled by the proof of collateral facts.

(118) I conclude therefore, that this act does in no degree alter the relation between Levi and William Drake, and that if the latter had died intestate, the former could not

have succeeded to his inheritances. But if he could, I do not perceive that the lessors of the plaintiff could have inherited from Levi. The act is altogether silent as to descents from him. It struck me at one time, that some meaning might be put on the act, by holding that it legitimated Levi as the son of his mother, being his known parent, and that it should be supported thus far, rather than make it altogether inoperative. Further reflection compels me to yield even that position. Such a construction would invest Levi with the rights of a legitimate child under the act of 1799 (Rev., c. 522), and might thus interfere essentially, with the wishes of the mother in respect to her own property, and necessarily with the interests of her other children. Such an interference is not to be presumed. The rules of construction already alluded to, forbid the imputation of it to the Legislature, if their words are not so plain a to make it unavoidable. If the son had been thus expressly legitimated to one or both of his parents and declared capable of inheriting from them, or either of them, the operation of the act, upon its construction, must stop there. The character of Levi, as to his capacity to take by descent from other persons, or to transmit by descent lands thus or otherwise acquired, is changed only so far as the act expresses it. In other respects and in reference to other persons, he remained a bastard. It is impossible to suppose that the Legislature meant to alter the course of collateral succession, or to interfere with the limitations in wills and settlements. Such a supposition is perfectly incredible, when we refer to the public act of 1829, for the legitimation of bastard children. In that, the effect, and all the effects of legitimation, are plainly expressed and precisely limited. With respect to successions to property, the legitimative child is entitled to a distributive share of the personal estate, and to inherit the real estate of his putative father, and to transmit the same lands in the course of descents, as if he had been born in wedlock. But, those claimed from him are not (119) within the act, except as to lands inherited from the father to whom he is legitimated. As to all other property, the rights of other persons are the same as if he had not been legitimated. Whilst the Legislature is thus careful in framing the provisions of a statute extending to the whole community, and limiting the effect of legitimation thus narrowly, it would be an outrage upon that body, to impute to them an intention by a private act, couched in general and ambiguous words, to change the course of succession in a particular family, further than is declared explicitly, or to bind members of that family who are not named.

I entertain the opinion therefore, that the act of 1802, is in itself altogether inoperative, except so far as it altered the names of the persons mentioned in it. Levi Drake took as a purchaser under William's will, and the lessors of the plaintiff are not his heirs.

PER CURIAM. Judgment affirmed.

Cited: Turnpike Co. v. Baxter, 23 N. C., 225; *Perry v. Newsom,* 36 N. C., 30; *Lee v. Shankle,* 51 N. C., 315; *Simonton v. Lanier,* 71 N. C., 505; *S. v. Partlow,* 91 N. C., 551, 3; *Coggins v. Flythe,* 113 N. C., 111.

MARGARET GILLESPIE v. ISAAC HYMANS, admr.

A widow when her husband dies intestate, must, under the Act of 1796 (Rev., c. 469), file her petition for a year's support at the term of the County Court, when letters of administration upon his estate are taken out.

This was a PETITION by the plaintiff for a year's support out of the estate of her husband, the intestate of the defendant. The intestate died in January, 1829; no application was made by the plaintiff for administration upon his estate, at the next County Court. The defendant took out letters of administration in February, 1831, and the petition was filed in February, 1833.

His Honor, Judge *Norwood,* at MECKLENBURG, on the last Circuit, dismissed the petition, because the plaintiff had not filed it at the term of the County Court, next succeeding (120) the grant of administration to the defendant. From this order, the plaintiff appealed.

Iredell and *Devereux* for the plaintiff.

No counsel appeared for the defendant.

GASTON, J. Before the passing of the act of 1796 (Rev., c. 469), a widow had no further claim upon the personal estate of her husband dying intestate than to a distributive share. That act authorized the widow to take into her posession all the personal estate of such intestate, and to use so much of the crop, stock and provisions, then on hand, as might be absolutely necessary for herself and family, until letters of administration

should be granted, and made it her duty to apply for administration at the first term of the County Court succeeding his death. This act further enacted that at the term when such administration was granted, it should be lawful for the widow by petition, in the mode therein pointed out, to obtain an allotment of such part of the crop, stock and provisions of her husband's estate, as might be necessary and adequate for the support of herself and family for one year. The act of 1813 (Rev., c. 858), provided that in case there was not on hand a crop, stock or provisions, out of which a sufficient provision could be made, the widow might have the value of a year's provision assessed to be paid by the administrator out of the assets of the intestate. By the act of 1824 (Rev., c. 1244), it is declared that the widow of an intestate husband shall be entitled in addition to the year's allowance, to one bed and furniture, and a wheel and one pair of cards, if such are to be found among the chattels of the deceased; and by an act of 1827 (c. 12), a widow dissenting from the will of her husband, is placed in the same situation with respect to the year's provision, as if her husband had died intestate. The last act on the subject, that of 1832 (c. 20), authorizes the widow to apply for this provision before an administrator is appointed, and permits it to be made by an allotment of specific articles of personal property (other than negroes), or of the debts due the intes- (121) tate.

It is stated in this case that James Gillespie died intestate, in January, 1829, that no application was made by the petitioner, his widow, for administration at the term next succeeding his death; that the defendant obtained letters of administration at February Term, 1831, and that the petitioner made her application for a year's allowance at February Term, 1833. Upon these facts, the Superior Court dismissed the petition, and we are of opinion that this dismission was right.

The first act on this subject expressly limits the application to the term at which administration is granted, and there is not a clause nor expression in any of the subsequent acts, from which can be collected an intention on the part of the Legislature to permit such application to be made afterwards, unless it may be in the case where the widow has dissented from her husband's will. In that case *perhaps,* for it is not necessary now to decide the point, she may be in time if she file her petition at the term at which she dissents, which by the law, must be within six months after the probate of the will. Where the words of the statute are so explicit, we should hesitate long in adopting a construction which departed from them. But in

fact, there are several strong reasons to recquire from the Court the interpretation which the words call for. The design of the Legislature was to secure the widow, if it could be done, the means of subsistence for herself and her family during the first year of her destitution. For this purpose, the first statute permitted these means of subsistence to be taken only out of the crop, stock and provisions on hand at her husband's death, which otherwise, it would be the duty of the administrator to sell. And although the subsequent statute, where the means of subsistence were not on hand, authorized an allowance to be made out of others, or out of the personal estate generally, those subsequent enactments were all in the spirit of the first act, to support the widow during the first year. The first act directs the allowance made, to be returned in the inventory by the administrator, and we know it is his duty to return this inventory at the first Court after he administers. All the acts con-
(122) template this allowance to have priority over debts of every description, and it is therefore indispensable that the administrator should know what is its amount before he can be compelled to plead to the suit of a creditor. No one can anticipate the confusion which might arise, or the injustice which might be done to the creditor, or the administrator, or the next of kin, if the widow might be permitted to defer her application for an indefinite period. Nor can there well be any hardship on the widow by adhering to the obvious meaning of the acts. She has a right to administer in preference to any other person. Administration cannot rightfully be taken out by another person without notice to her. If she administers, of course, it must be her own fault if she does not ask for this allowance. When she declines to administer, on being informed that another person will apply for letters, it is a matter of course if she desires it, to have the order made, and her personal attendance even is unnecessary.

PER CURIAM. Judgment affirmed.

Cited: Pettijohn v. Beasley, 18 N. C., 255; *Lyon v. Lyon,* 43 N. C., 207; *Rogers, ex parte,* 63 N. C. 112.

CHARLES HATCHER v. JOHN MCMORINE.

Promissory notes made out of this State, and payable where made, are within the Acts of 1762 and 1786 (Rev., chs. 70 and 248), rendering certain securities negotiable; and endorsers of them are charged under the Act of 1827, c. 2, as sureties, without notice of nonpayment by the maker.

ASSUMPSIT upon the endorsement of a single bill, or promissory note under seal, made by Asa and Isaiah Rogerson, in Virginia, payable at a bank in that State, to the defendant, and by him, in this State, endorsed to the plaintiff.

At the trial, at GATES, on the last Circuit, the only question was, whether the defendant was entitled to (123) notice of nonpayment by the obligors.

His Honor, Judge *Seawell,* held, that as the endorsement was made in North Carolina, it was to be governed by the laws of this State; and as by the act of 1827 (c. 2), the endorser was made a surety and liable as a coobligor, notice of nonpayment need not be given to him. A verdict was taken for the plaintiff, and the defendant appealed.

Kinney for the defendant.
Iredell, contra.

GASTON, J., after stating the case as above, proceeded:

The counsel for the appellant contends that the note having been executed in Virginia, for the payment of money *there,* the law of Virginia, and not that of North Carolina, furnishes the rule for ascertaining the liability of the makers; that the engagement of the endorser being subsidiary to, and dependent on that of the makers, the endorsement, although made in this State, must be interpreted also by the same law; and from these propositions, he infers as a necessary consequence, that the Judge erred in applying to this case, the enactments of our Statute of 1827. The first proposition is undeniable. The law of the place where a contract was made furnishes in general, the rule for its exposition. But when it appears from the nature of the contract that the parties had reference to the law of another State, the law thus referred to furnishes the rule for ascertaining their intent, and of course, for expounding the contract. The note having been made in Virginia, and promising the payment of money in Virginia, the law of Virginia, if different from that of North Carolina, must be regarded by us as determining the liability of the makers. But the Court

does not accede to the second proposition, in the sense in which it is understood and urged by the defendant's counsel. It is true that the engagement of an endorser is to a certain
(124) extent subsidiary to, and dependent on the engagement of the maker of a negotiable note. It binds the endorser to the performance of certain duties in the event of a failure of the maker to comply with his engagement. Whenever therefore, the question arises in an action against an endorser, whether there has been a default in the maker, the law which expounds the contract of the maker must be referred to, in order to determine this question. If the maker was bound by that law to pay on the day named in the note, a nonpayment on that day is a default. If he was entitled by that law to certain days of grace, there is no default until after the expiration of the time of grace. But the contract of an endorser according to the mercantile law, is a distinct contract from that of the maker. The engagement of the maker, like that of the acceptor of a bill of exchange, is an absolute promise to pay the sum named in the instrument, according to its legal meaning. The engagement of the endorser, like that of the drawer of a bill of exchange, is not a promise to pay the money at the time and place mentioned in the instrument, but an undertaking in case the money be not thus paid by him who has stipulated to pay it, to indemnify the endorser against this disappointment. When therefore, a note is endorsed in a different country from that in which it was made, or the money promised to be paid, the contract of the endorser referring to the law of no other country for its perfomance, must be interpreted by the law of the place where the endorsement was made—*that law* determines the nature and extent of *his* liability.

But it is further contended on the part of the appellant, that the Judge erred in applying to this case the enactments of the act of 1827, because that act does not embrace within its provisions endorsements made in our State, of notes executed without, and payable without the State. The act is in these words: "When any bill, bond or promissory note made negotiable by the act passed in 1762, entitled 'an act for the more easy recovery of money due upon promissory notes, and to render such notes negotiable,' and by the act passed in 1786, entitled,
(125) 'an act to make the securities therein named negotiable,' shall be endorsed, unless it be otherwise plainly expressed therein, shall render said endorser, or endorsers, liable as surety, or sureties, to any holder of such bill, bond or promissory note. Provided, that nothing herein contained shall in any respect apply to bills of exchange inland or foreign." The

act of 1762, here referred to, after reciting that "promissory notes are of great utility as well to merchants as to others," and that there is "no method of recovering money specified in such notes by any act of Assembly in force in the (then) province," for remedy thereof enacts, that upon *all* notes signed by any person promising the payment of money to any other person or order, the money mentioned in such note, shall be construed to be by virtue thereof due to such person to whom the same is made payable; that *such* note may be assignable over in like manner as inland bills of exchange are by custom of merchants in England; that the payee or payees may maintain an action for the same as they might upon such bill of exchange; and that the assignee of *such* note may maintain an action against the person or persons who shall have signed or have endorsed the same, as in cases of inland bills of exchange. The other act referred to, that of 1786, recites that "it would contribute to the convenience of merchants, traders and other inhabitants in the interchange of property which traffic makes necessary, that bills, bonds and notes, as well those without, as those with seal, should be made negotiable," and then enacts that "*all* bills, bonds and notes for money as well those with, as those without seal, those which are not expressed to be payable to order and for value received, as those which are so expressed, shall be held and deemed negotiable; and the interest and property therein shall be transferable by endorsement in the same manner, and under the same rules as promissory notes have been, and that the endorser may have his action thereon in his proper name, as suits have been maintained by endorsers of promissory notes." The question then is, whether notes made without the State, and not stipulating for (126) the payment of money within it, are rendered negotiable here, within the purview of these acts? It is highly important to the community, and especially to the mercantile part of it, that all doubts which may exist on this question should, if possible, be removed. The enacting words of these statutes are unquestionably comprehensive enough to embrace notes wherever made, or wherever payable. The first speaks of *all* notes signed by any person promising the payment of money to any other person, and the second of *all* bills, bonds and notes for the payment of money. There is no reason furnished by the preambles of the acts, or by any of their enactments, to induce a belief that these comprehensive words should receive a restricted interpretation. The preamble to the first recognizes the great utility of promissory notes to merchants and others, and the second declares the conviction of the Legis-

lature that the convenience of the country, and the extension of its traffic, required that bonds as well as notes should be rendered negotiable. The object of both acts is to promote the circulation of negotiable paper, by furnishing to the holders, remedies in their own names against all responsible upon it. To deny these remedies upon all paper not executed here, or not made payable here, would be to abridge, to cramp and to discourage this medium for the interchange of property, to the injury of the mercantile and trading part of the community. All acquainted with the history of bills of exchange and of promissory notes, know that there was a long struggle on the part of the merchants, to give the freest circulation to these instruments of mercantile credit, against the technical rules of law forbidding the assignment of choses in action, in which struggle they partially succeeded by the force of custom, and more fully by the help of positive legislative enactments. The acts now under consideration evince a strong desire in the Legislature to take part with the mercantile community against these technicalities, and those who expound the acts (127) would be bad interpreters of legislative action, if they narrowed the range of plain words to counteract this desire. The conclusion to which this reasoning conducts us, is, that the acts of 1762 and 1786 were intended to render negotiable here, all notes and bonds wherever made, or wherever payable. We are much strengthened in this conclusion by an adjudication made in England on the statute of 3 and 4 Anne, c. 9 (of which the act of 1762 is almost a verbal copy), and which is believed to be decisive on the construction of that statute. In *Milne v. Graham,* 8 Eng. C. L. 57, where an action was brought in England, by the endorsee, against the maker of a promissory note made in Scotland, it was objected that this action could not be maintained, because the note was not made in England, and it was insisted that this statute only contemplated inland promissory notes. The objection being overruled, and the plaintiff having obtained a verdict, a new trial was moved for, but refused by the Court of King's Bench. The Judge declared the case to be both within the words and the spirit of the statute of Anne. Within the words, for they comprehended "all notes," and within the spirit, for the act was made for the advancement of trade, and it was for the advantage of commerce that foreign as well as inland notes should be negotiable. We hold then, that the note given by the Rogersons to the defendant was negotiable here, under our acts of 1762 and 1786, and that our act of 1827 applies to every note so made negotiable.

We have doubted whether the case did not present another question for our consideration. The act of 1827 having declared that an endorser shall be liable as surety, dispenses with that notice which theretofore was necessary by the mercantile law, to charge him as endorser. But it may be asked whether he can be sued as though he had joined with the maker in the execution of the note, or must he not be sued upon an engagement as surety for another, to pay in the event of default of the principal debtor? If the latter course must be pursued, did not the Judge err in dispensing with all notice of the maker's default; for is not such notice an indispensable prerequisite to every action brought upon a conditional (128) and secondary promise, to be liable upon another's failure? But we shall not here enter upon this inquiry, for on examination of the case stated, we do not perceive, nor have we any reason to believe, that any such question was raised below. Indeed, the counsel for the appellant has very candidly admitted that it was not. The controversy clearly was, whether the note having been executed in Virginia for the payment of money there, the endorser was liable under our act of 1827. If the defendant had objected that a demand upon him, before the institution of the suit was necessary, this objection ought to have been distinctly stated; and we must understand the language of the Judge, as applicable to the matter then controverted.

PER CURIAM. Judgment affirmed.

Cited: Grace v. Hannah, 51 N. C., 96.

JOHN RICKS v. HENRY BLOUNT.

Where a judgment was obtained against an infant heir by *sci. fa.* under the Act of 1789 (Rev., c. 311), with a stay of execution for one year, during which another creditor commenced suit, and obtained judgment against the heir on a bond of his ancestor, and issued a *fi. fa.* before the expiration of the stay: it was held that a purchaser under it had a better title than one under a *fi. fa.* afterwards issued upon the first judgment.

EJECTMENT for two lots in the town of Nashville. On the Spring Circuit of 1830, at NASH, before *Norwood, J.*, a verdict was taken for the plaintiff subject to the opinion of the Court, upon the following facts:

Both parties claimed under Athelston Anderson, who died in August, 1826. The title of the plaintiff was as follows: One Asael Vick brought suit against the administrator of Anderson, returnable to the February Term, 1827, of Nash County Court, at the return term the administrator pleaded *plene administravit,* and the plaintiff in his replication, admitted the plea and prayed judgment for his debt, which was entered. Two writs of *scire facias* isued upon this judgment returnable to the ensuing term of the Court, one to Dolphin Anderson,
(129) a brother of Athelston, and the other to Thomas P. and Mary Anderson, children of a deceased brother, who were the heirs of Athelston. The last mentioned writ only was returned, and at May Term, 1827, final judgment was entered against all the heirs of A. A., with a stay of execution for twelve months, Thomas and Mary Anderson being infants. On 12 November, 1826, one John Alston sued out a warrant against the administrator of A. A. for whom the plea of *fully administered* was found, and on 26 December, 1826, an execution issued which was, on 12 January, 1827, levied upon the lots in dispute. This levy was returned into the County Court at the ensuing February Term, and upon it writs of *scire facias* issued, which were in all respects similar to those issued in Vick's and upon which similar judgments were entered at May Term, 1827. There was another judgment in all respects similar to the last, upon process commenced by the lessor of the plaintiff. Writs of *fi. fa.* upon these judgments, issued from May Term, 1828, under which the lots in dispute were sold by the sheriff, and purchased by the lessor of the plaintiff.

The defendant claimed title, 1st, to a moiety under a deed from Dolphin Anderson, the brother of Athelston, dated 19 September, 1826, before process had been sued out against him as heir.

2d. Under a deed from one Peyton R. Hammonds. It was stated in respect to this last deed, that Hammonds and A. A., being partners in trade and tavern keepers, in May, 1825, purchased the lots in dispute, and took a conveyance to them jointly in fee. The deed did not upon its face express that the conveyance was made to them as partners, neither was the existence of the partnership noticed in it. But the premises were held and used by them as partners, for the transaction of their partnership business. This deed was dated in May, 1827, and by it Hammonds, as urrviving partner, conveyed both the lots to the defendant.

3d. One David Ricks, on 7 March, 1827, sued out a writ in debt against Dolphin, Thomas and Mary Anderson, upon a bond

debt of their ancestor, Athelston, in which his heirs were bound, returnable to May Term, 1827, of Nash County Court— this writ was executed upon Dolphin, and an *alias* (130) awarded as to the other defendants, which was executed. Final judgment in this suit was rendered at November Term, 1827, upon which a *fi. fa* issued returnable to the ensuing February Term, under which the defendant purchased. Upon these facts his Honor set aside the verdict, and directed a nonsuit to be entered, and the plaintiff appealed.

The case was argued at two former terms, first by *Seawell* for the plaintiff; and *Gaston* and *Devereux* for the defendant; and afterwards by the *Attorney-General* for the plaintiff, and *Badger, contra.*

RUFFIN, C. J. The deed of Hammonds passed to the defendant, at the least, the title to one moiety of the premises in dispute. Whether under the act of 1784 (Rev., c. 204, s. 6), it passes the whole as contended by the counsel for the defendant; or whether the joint business of those persons, in such trade, commerce, work, or manufacture, as is within the act; or whether the purposes must appear in the deed, or articles of copartnership, or may be otherwise shown; are questions of such magnitude, as to prevent the Court from expressing an opinion on them, without full deliberation, and until it shall be called for, as indispensable to the decision of a cause.

The deed of Dolphin Anderson to the defendant, was made before process sued in any of the actions stated in the record, and is effectual to vest in the defendant one undivided half part of the other moiety; which, for the purpose of the present case, is supposed to have descended from Athelston Anderson.

The question is thus reduced to this: which of the parties has the better title to the remaining fourth part, which descended to the two infant heirs, the children of a deceased brother of the intestate?

His Honor then stated the facts as above and proceeded as follows:

The argument for the plaintiff is, that the plaintiff under whose execution his lessors purchased, had liens (131) prior to that created by Ricks' judgment and execution, and therefore that the sheriff's sale and deed to him, conveyed the title.

It is undoubtedly the principle of the doctrine of lien, that it gives a preferable right of satisfaction out of the thing bound by it, unless it be lost by the laches of the person entitled to it, or in itself is defective as against some other person, whose

rights and acts discharge the subject from it. If the lien be absolute, and extend to all persons, the property is bound by it conclusively, and into whose hands soever it may go, it is *cum onere*. Such is in England, the effect on lands, of a judgment on which an *elegit* can be issued. It binds the land against alienation by the defendant, and also adheres to it in preference to a subsequent lien created by a second judgment, on which execution had been executed; provided, the first judgment creditor be not guilty of laches. It is not there held to be laches, for the creditor in the first judgment to withhold his execution, until another creditor has extended the land. The lien is lost only by such delay as prevents the issuing of the *elegit* at all. When thus displaced, a second judgment creditor can safely proceed on his. But the lien on chattels is very different. The judgment creates none against anybody; and the execution forms a lien, differing in its original continuance, as against different persons. Against the debtor himself and his alienees, at common law, the *fi. fa.* operated from its test, so as to avoid an alienation; and this, not only in favor of the writ, of which the test was anterior to the alienation, but of those issued subsequently, provided they purported to be founded on the first, and to be in continuation of it. But between creditors, the first lost his lien, or rather, never acquired it, if he delayed suing execution until, as some suppose, another creditor had sued his, and delivered it to the officer; or, as others suppose, until the second had his executed; and even if the first sued execution, and delayed proceeding on it, his lien was dis-
(132) lodged in favor of the lien of a junior execution diligently acted on. These observations do not apply directly to the question we are considering; but they are nevertheless considered useful as tending to a clearer understanding of what is meant by the term *lien*, in reference to the rights of the general owner of the subject to which a lien attaches, and of the rights of several persons asserting distinct and conflicting liens on that subject.

It is here insisted, that the creditors under whose execution the lessor of the plaintiff purchased, had the prior liens; first, from suing the first process; and if not, then secondly, from obtaining the first judgments.

It is granted, that as against the heir, and a purchaser from him by the third section of the act of 1789 (Rev., c. 311), (which is in affirmance of the common law), the land is bound from the bringing of the action; and *a fortiori* by judgment rendered. But whether one judgment binds it in like manner, against another judgment and execution sued thereon, is a dif-

ferent question, and depends upon different principles. If enforced by *elegit,* the judgment is a lien on one half of the lands which the debtor had at the time it was rendered, by statute of Westminster 2 (c. 18), and a judgment against the heir on the bond of the ancestor, was at common law, against all the lands descended, of which the heir was seized at the time of action brought. (*Harbert's case,* 3 Co. Rep. 12.) But in all these instances, there was no sale of the land. The creditors themselves are put into possession, to hold until their debt shall be satisfied by the annual value assessed upon inquisition. If a creditor under a junior judgment have the first extent, he is not injured by yielding to the preferable lien of a prior judgment; that is, he does not lose his debt. His satisfaction is postponed; that is all. When he who has the preference is satisfied by perception of the profits, the other may enter again. Not so when the execution commands a sale out and out. The interest of third persons, purchasers, must then be considered. If dormant liens can be asserted against them, and enforced by sale, their purchase money is a total loss. Hence, while it was admitted in this State, that lands were bound by judgment, notwithstanding the statute, 5 Geo. II, c. 7. (133) gave the writ of *fi. fa.* against them, it was yet only held, "that it was in this wise only—it hinders the debtor from disposing of the land himself; but if a *fi. fa.* issue upon a subsequent judgment, and the sheriff sells the lands under it, the title of the vendee cannot ever afterwards be defeated—it is valid for every purpose." *Bell v. Hill,* 2 N. C., 72, 95. The question was most elaborately argued in that case, and the whole learning and law of the lien of a judgment and *elegit* pressed on the Court; and the question was between persons claiming as purchasers under an elder and a younger judgment, and decided in favor of the latter, upon the sole ground, that he was the first purchaser. Since that day, the rule then laid down has never been questioned, as far at least as respects the title of the purchaser. Upon the principle of that case, and the words used by the Court, such a purchase would be sustained, adthough a writ of *elegit* should afterwards issue on the prior judgment. The title, it is declared, passes to the first vendee, and cannot ever be defeated, but is valid for every purpose. If the necessity of supporting sales, upon the ground that otherwise none will buy under execution, as derived from the operation of executions on chattels, induce the Courts to apply the same rule to sales of land to one purpose, it might be expected to do so to every one. The interest of the first purchaser should be as much protected against the disturbance of

an *elegit,* as against eviction by a subsequent absolute sale, If this be true, it would seem to follow, that the statute of Geo. II altered the law, not only by giving a new writ of *fieri facias* against lands, but by abolishing the former execution by *elegit,* or at least impairing the ancient operation as against a junior judgment. The question has never arisen in the Courts of this State, for if the right of the *elegit* still exists here, it has very rarely been acted on. I have never known or heard of that writ being actually sued. In *Jones v. Edmonds,* 7 N. C., 43, it seems to be taken for granted that it may be resorted to; and if it be, that it binds the lands of which the defendant
(134) was seized at the time of the judgment. This observation was entirely incidental and not relevant to the point to be decided. It likewise leaves it as a question, against whom does it so bind? is it the party and a purchaser from him? or is it another judgment creditor and a purchaser under his *fieri facias?* The decision of those questions is not called for in this case; as neither of these parties claim under an *elegit.* The case of *Jones v. Edmonds* does, however, conclusively establish, that the judgment as such does not bind land, and if the plaintiff sues a *fieri facias,* the land is bound, as chattels, by the writ of execution, and by that alone; and this as against a purchaser from the debtor. Much more strong is the claim of the purchaser under another execution. There is another case in which the effect of a purchase at sheriff's sale, as displacing a previous lien there acknowledged to exist, is exhibited in a remarkable manner. In *Green v. Johnson,* 9 N. C., 309, the majority of the Court held, that a *fi. fa.* of older test, shall be satisfied before a younger one first delivered to the sheriff, contrary to what had before been generally understood to be the law. But it is unequivocally admitted by both of the Judges who made that decision, that the purchaser had at all events a good title to the land, and also that the creditor in the execution of the later test, should retain the money if paid over to him by the sheriff, although such payment and sale had been since the test of the elder writ, but before its delivery.

From this train of decisions, it is apparent, that the rule of the common law as to the lien on personal chattels by the *fieri facias* is completely incorporated into our law, regulating the lien upon lands, when proceeded against by the same writ. It is true that the creditor in the prior execution is frequently postponed, upon the ground of a fraudulent or negligent delay, to a creditor in a junior execution, who adopts the straight forward course of selling immediately. But that question is nec-

essarily confined to cases in which the officer has both the executions at the day of sale, and to a contest between the creditors, or with the sheriff for the money. As to the continuing lien of the judgment and execution on the property itself, after a sale upon another execution, the great and (135) moving consideration with the Courts is, the protection of the purchaser. This is not founded merely upon the rights of the creditor under whose execution he purchased, as being entitled to the first satisfaction, because he first delivered his writ. The rule was the same long before the statute, 29 Car. II; and rests upon public policy, that purchasers at sales under process of the law should be safe, because they get no covenants on which they can rely. It is so laid down by Lord *Holt* in *Smallcomb v. Buckingham,* 1 Ld. Raym., 251, and by Lord *Coke* in *Manning's case,* 8 Rep., 9.

Does a judgment and execution against an heir differ in this respect from those against persons for their own debts?

We do not now mean to extend our inquiry beyond the case, into the effect of such a judgment, on which an *elegit* has been sued, by both or one of the creditors. Both creditors here proceeded by *fieri facias.* The principle is as applicable to this, as to other cases. It is that the first purchaser shall be protected. It is said, however, that the writ of *fieri facias* against an heir, following the judgment, is express in its mandate to sell the land descended, which the heir had when the original was purchased; and that in our law, the whole process is strictly and exclusively *in rem*: whereas, this execution in other cases, has no reference to the judgment, nor the estate the debtor then had; but only to its own test—upon this ground a specific lien is asserted on the lands in the hands of the heir; which cannot be displaced otherwise than by satisfaction. It is true, there is the difference suggested between the process upon a judgment against the heir, and against one for his own debt. But the inference claimed does not follow. For the relation of the *fieri facias* is, in every case, to its test, and to that extent the lien is as conclusive as that of one against the heir can be on the estate held by him at the time of the judgment or suit against him. Yet we have seen that the lien of the *fi. fa.* has not vigor to stand against a sale, posterior to its test, under a junior execution executed. There is noth- (136) ing then in the terms of the judgment or execution; for they cannot be more effectual to this end than the *fi. fa.* is by operation of law, as far as that operation is retrospective. The question recurs in each case, what alienation is to be overreached by it? To me it seems that every reason upon which,

in any case, the law strips the lien of an execution from property sold under another execution, equally demands it in every case. Ordinarily, the creditor in the first judgment may obtain the first execution. If the right to the first satisfaction does not depend upon the commencement of the suits, it is the fault of him who gets the first judgment, and his fault only, that he does not get immediately, the fruit of his judgment by execution; and if he stands by, until another sells upon a judgment for a debt against his deceased debtor, he ought not to fare better than if the debtor were a living one.

In *Bank v. Stanley,* 13 N. C., 476, it was not intimated at the bar, nor surmised by the Court, that the creditors had liens referable to the date of their judgments, or the commencement of their suits. It was understood on all sides, that the preference depended upon the executions. Both judgments were there rendered at the same term, and it did not appear which creditor first took process against the heir. Consequently, if there had been a lien independent of that by execution, all the rules must have been discharged at once. But the rule on the clerk to issue the execution of the Bank was made absolute.

But it is urged here, that the creditors were not guilty of laches, for the execution was stayed by the law, and was sued out as soon as the party could.

It is assumed in that position, that the act of 1789 prohibits the issuing an execution against heirs, of whom one is an infant. The contrary was decided in *Bank v. Stanley, supra.* and as Dolphin Anderson was an adult, the plaintiff might, and therefore ought to have sued out his writ, and delivered it to the sheriff, which would have given notice to other creditors and purchasers of his prior lien. But as Dolphin Ander-
(137) son was not served with process, and for that reason the judgment may be considered a nullity as against him, it would remain to be inquired, whether the act of 1789 does direct a suspension of execution generally against infant heirs. In the case just cited, Chief Justice HENDERSON expressed the opinion, that the *proviso* in the last section was to be restrained to cases where a guardian had sold the estate of the infant, as provided for in the previous part of the section. The construction generally received, however, has been, that all cases of judgments on *scire facias* against infant heirs are embraced; and that it was intended to give the guardian an opportunity of selling his ward's estate after the *scire facias* sued, of which the guardian would have notice by service on himself. To this opinion upon consideration of the whole act, I confess my mind inclines; though I am by no means confident: For the act is so

badly framed, that any construction must be but conjectural, at best.

Yet this is certain: That it is not a general provision, extending to all suits against infant heirs, but only to those by *scire facias*. The words so limit it. There was no reason for the provision, in respect to the action of debt; for by the common law a larger and much more beneficial privilege is given to an heir within age, that of pleading his non-age, and praying the parol may demur.

The creditor by judgment on *scire facias* has no just cause of complaint against the law, if he lose a preference which he might have from mere priority of judgment, by the suspension of his execution by operation of law. If his debt be due by specialty in which the heir is bound, he has his choice of the remedies at the common law, and under the statute; and it is his own fault to elect that one, on which he cannot have immediate execution. If the debt be one which can only be recovered from the heir under the statute, he must take the remedy thereby given, with all its imperfections and inconveniences. The Legislature intended to give additional remedies against heirs, and not to take away those before existing; and it is not unreasonable that a creditor who is seen, from (138) the terms of his contract, to have looked originally to the heir, should have the benefit of his higher security. There is nothing to restrain such a creditor from selling; and if he does sell, the purchaser for the reasons already given, acquires a valid title.

But it is insisted, that the lien is to be carried even farther back than the judgment; to the commencement of a suit; under the third section of the act of 1789.

To this it may be answered, in the first place, that if this were true, it would not help the plaintiff. The case states that David Ricks commenced his action of debt on 7 March, 1827. The plaintiff, under whose execution the lessor of the plaintiff claims, issued writs of *scire facias* returnable to May Term of of the County Court, which, of course, bore test of the preceeding February term. But it does not appear when they actually issued. The words of the act are, "action brought, or process sued out against the heir or devisee," which certainly refer to the day of issuing, and not that of the test of the writ. Nor can the issuing of the execution by a justice of the peace be regarded as process either against the land or the heir, for this purpose—it is impossible to suppose that it was intended that purchasers from the heir were bound to take notice of all executions against the executor, for which the land might ulti-

mately be rendered liable in the hands of the heir. Such are executions generally, which are issued by justices of the peace for the debt of the ancestor; and those rendered in court, where the executor has failed to plead fully administered or has become insolvent. The suit which arrests the alienation of the lien, is one "against *him* or *her*," that is, the heir; and the process is intended to be such as calls in the heir personally, to defend the land; which description no other will answer but a writ in debt, or a *scire facias* against the heirs, either under the acts of 1784 or of 1794. (Rev. chs. 226 and 414.)

But if the process of that kind had been first issued and served in the suits, under which the title of the plaintiff is derived, it seems to us that it would have made no dif-
(139) ference. *Irwin v. Sloan,* 13 N. C., 349, is an authority to this point. That case has been questioned in the discussion of the present; and as it was a decision without argument, the Court has been asked to review it, and has done so, but without perceiving any error in it. It accords with the *Anonymous case* (1 Mod. 253), in which it was held even in England, that as between creditors, the first judgment, and not the first suit gave the preference. *Gree v. Oliver* (Carth. 245) lays down a contrary rule, and denies the previous case in terms. But the case itself did not call for, and therefore did not warrant the expression of such an opinion. The creditor who sued last there, but got his judgment first, took it generally against the heir, and sued execution as for the debt of the heir, against the half of all the lands of the heir. The other creditor, whose suit was prior and judgment subsequent, took his judgment against the lands descended. He ought not to be barred by the proceedings of the other creditor, more than if he had not been a creditor of the ancestor, but of the heir; and it is not denied that the lands descended must satisfy the debts of him from whom they descend, before a debt of the person to whom they descend can touch them, because the property of every man must answer his own debts, before they can be applied to any other purpose. Whatever then may be the law of England upon this question, the case of *Gree v. Oliver* is not one which establishes it. But it may be admitted to be good law there, without overruling *Irwin v. Sloan.* That case was decided upon what was then conceived, and is now thought to be the settled law in this State, that the first execution finally acted on, was effectual, both for the benefit of the purchaser under it, and the creditor in it. The execution in favor of which the Court decided, and under which the money was raised, was issued from May to August Term, and the sale made, before

Irwin obtained judgment, which was at August. He then claimed that the money should be applied to his judgment, rendered at that term, upon the ground that his execution created a lien. The Court held that it did not, because (140) it was not execution against the land. But the opinion went further, to say, that process against the heir creates a lien only as against the heir and purchasers from him, but not as against another creditor. It was thus stated, upon the effect which the adjudged cases had given to executions here; in obedience to which the money was awarded to that under which it was raised. For it would seem absurd to say, that a judgment is not binding upon a subject, but that the process, upon which that judgment is founded, is. For the reason why the land is bound from the commencement of the action (in cases when it is bound) is, that the judgment, in terms, is against the land of which the heir was seized at the time of process sued. This as a judgment, if a *fieri facias* be issued, does not overleap a sale under a junior judgment. *A fortiori* the period of commencing the suit, cannot impair the force of an execution on a prior judgment. The alienation meant in the act of 1789, is that by the heir, and not one by a sale under execution against the land in his hands as heir; for he is made liable personally for the value of the land aliened, as therein meant, and that cannot, therefore, be a sale under execution for his ancestor's debt. To the value of lands sold by him he is to be answerable for debts; and the creditors are in such case, to be preferred as in actions against executors. Whether this preference is to be determined by the dignity of the debts, or by the period of suing, is immaterial to the question now under consideration. If the former, it would strengthen the case of the defendant claiming under a judgment in debt, on the bond, against a judgment on *scire facias,* which may be for a simple contract debt. But supposing the latter to be the correct construction, it leaves in full force the principle of our decision; because it operates upon the heir personally and alone, for the money received by him, and no purchaser of the land is displaced.

Upon the whole therefore the Court is of opinion that there cannot be judgment for the plaintiff, without overruling many cases adjudged in this State, and disregarding the (141) reasons upon which they rest. We are aware that in several of the States, as New York and Maryland, for example, the statute of Geo. II has received a different construction, and it is held, that the judgment yet creates the lien, although the process of execution be by *fieri facias;* and consequently, that

the elder judgment shall be satisfied, although a sale has been made under a younger. But this consequence can only take place where the judgment does create a lien; and there have been too many decisions upon that point in this State, for us, at this day to consider it open. If the judgment be not a lien, our conclusion seems to follow necessarily. Consequently the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Marchant v. Sanderlin, 25 N. C., 503; *Smith v. Spencer, Ib.,* 267; *Parish v. Turner,* 27 N. C., 283; *Dobson v. Prather,* 41 N. C., 35; *Harding v. Spivey,* 30 N. C., 66; *McMillan v. Parsons,* 52 N. C., 166; *Isler v. Moore,* 67 N. C., 76; *Woodley v. Gilliam, Ib.,* 240; *Hooker v. Nichols,* 116 N. C., 159.

WILLIAM McFARLAND v. NATHAN NIXON and others.

An account offered upon the trial of a warrant, for a sum exceeding sixty dollars, stated to be "due by account," must be signed.

The plaintiff brought his action by warrant, returnable before a single justice, and in said warrant stated his claim to be for "debt due by account for the amount of seventy-six dollars." Having failed to sustain his demand before the magistrate, he appealed to the County Court, where a verdict was rendered against him, and he then appealed to the Superior Court.

On the trial before *Seawell, J.,* at GATES on the last Circuit, it was ruled by the Judge that the plaintiff could not give in evidence any account other than a signed account, and judgment of nonsuit was entered. The plaintiff moved to have the nonsuit set aside, and this motion being refused he appealed to this Court. Other points were made which it is unnecessary to state.

No counsel appeared for either party.

GASTON, J., after stating the case as above, proceeded:

We are of opinion that there was no error in the (142) decision of the Judge upon the admissibility of the evidence. By law, justices have jurisdiction of claims due by a signed account, if the amount does not exceed one hundred dollars; but their jurisdiction in regard to unsigned accounts is limited to sums not exceeding sixty dollars. The warrant does not indeed in express terms declare that the claim

is founded on a signed account, but it avers that it is for "a debt due by account for the amount of seventy-six dollars." It must be intended that the plaintiff alleges his claim to be one of which the justice had jurisdiction, and therefore it cannot be otherwise understood than for a debt due by signed account. The warrant being the plaintiff's declaration, no evidence could be rightfully received which did not sustain it.

As to what is stated in the case about the different motions to amend, of the refusal of the plaintiff to accept the permission to amend on the terms offered by the Judge—and of the Judge, after this rejection by the plaintiff, refusing to allow an amendment when prayed for a second time—it is enough for us to say that upon these and similar questions, the Judge below has a sound discretion which this Court has not the right to control.

The judgment of nonsuit is affirmed.

PER CURIAM. Judgment affirmed.

Cited: Turner v. Edwards, 19 N. C., 540; *Midgett v. Watson,* 29 N. C., 144.

WILLIAM S. BRANCH v. BRYAN BYRD.

In construing an informal deed conveying to A a negro woman and her issue, except two children, which were given to B, and continuing as follows: "I also give to my daughter (B) a negro man, named, etc., to her and her, etc., after my death, to hold all the said, etc., to them, the said A and B, their heirs, etc., from henceforth, as their property absolutely, without any manner of condition." It was held that the reservation of the life interest applied only to the negro man given to B, notwithstanding the addition of a clause that if A should die without issue, the property should revert to the donor.

TROVER for slaves. On the trial at DUPLIN, on the last Spring Circuit before *Donnell, J.,* the only question was as to the effect of the following deed: (143)

"To all people, etc., William Branch, of etc., do send greeting, know ye, that I, W. B., of, etc., for and in consideration of the love good will and affection which I have and do bear to my loving son, William Stanley Branch, have given and granted, and by these presents do hereby freely give and grant unto the said W. S. B., his heirs, executors or administrators, all and singular hereafter mentioned, viz.: consisting of different deeds, amounting to one negro woman named Lucy, and two

children, Dennis and Martin, and all the rest of her increase except Rigdon and the next, but the first child she have after now, to go to my daughter Visey Bradley. Also, I give to my daughter Visey Bradley, one negro man named Dave, to her and the heirs of her body forever, to have after my death, and to hold all the said articles above mentioned to them said W. S. B. and V. B., their heirs, executors or administrators, from henceforth, as their property, and proper goods and chattels absolutely, without any manner of condition. In witness, etc. But if the said W. S. B. shall die without an heir, the property comes back to my heirs." An after written clause was as follows: "I also wish J. B. and P. W. to act as guardian for William S. Branch."

The deed was dated in September, 1820, and was proved and ordered to be registered at the following January Term of Duplin County Court.

The plaintiff was the illegitimate child of the donor, and was, at the execution of the deed, an infant aged about two years.

It was contended for the defendant: 1st. That the instrument above set forth was testamentary in its character, and of consequence that the plaintiff could not recover as it had never been admitted to probate as a will. 2d. That by the true construction of it a life estate was reserved to the donor, and of course the plaintiff took nothing under it. His Honor being of opinion for the defendant upon the last point, the plaintiff was nonsuited and appealed.

(144) *W. C. Stanley* for the plaintiff.
Henry and *Mordecai* for the defendant.

GASTON, J. This case depends entirely on the construction and effect of a deed which is set forth literally in the transcript, and it presents two questions for our consideration. The first is, was the instrument testamentary in its character; and the second, does the deed reserve a life estate to the donor, in the negro Lucy? If either of these questions must be answered in the affirmative, the nonsuit was proper; but if both ought to be decided in the negative, then the nonsuit should be set aside and a new trial awarded.

The Court has no difficulty in pronouncing that the instrument must be regarded as a deed, and not as a testament or in the nature of a testament. It purports to be a deed of gift, and has the operative words, and the form of such a deed. It recites a consideration of "love, good will and affection," declares that the donor "hath given and granted, and thereby doth give and grant," is signed, sealed, and delivered as a deed,

and shortly after its execution is proved and registered as a deed. The clause added after its execution, nominating a guardian for one of the infant objects of the donor's bounty, is not inconsistent with its character as a deed, for by our law, the father has precisely the same power to dispose of the custody and tuition of his child by deed as by will, see act of 1762 (Rev. c. 69, sec. 2). The reservation, or supposed reservation of a life estate to the donor, cannot make the instrument testamentary. If *per se,* it could produce this effect, much of the difficulty could have been saved which the Courts have been obliged to encounter in determining on the effect of such a reservation in a deed.

The other question is acknowledged to be one of more difficulty. It is completely settled in this State by numerous decisions, that in every gift of a slave by deed, antecedently to our act of 1823, that the reservation of a life estate to the donor annuls every ulterior interest attempted to be conveyed to the donee. These decisions are founded on the principle that at common law, a limitation by deed of a re- (145) mainder in a chattel after an estate for life, was too remote. Whenever therefore a deed contained a reservation of such an estate to the donor, and also a limitation thereafter to the donee, the Courts considered that they must either adjudge the reservation void, and an absolute estate in *presenti* passed to the donee, or sustaining the reservation, pronounce the ulterior limitation void; that as they could strike neither the reservation nor the limitation out of the deed, the law must be allowed to produce its effect upon each; and that the objection of the law was not to the first estate, but to that attempted to be limited over in remainder. The only words in this instrument which purport to reserve a life estate in any of the property which it contains, are these, "to have after my death," and it is not to be dnied but that taken by themselves, these words do import that the property in relation to which they are used, is not intended to pass from the donor before his death. If, however, these words are to be understood as applying to all the property named in the deed, I am inclined to think that they are not sufficiently strong to overrule the positive and precise expressions in the deed, which declare a contrary intent, and that taking the whole of the instrument together there is no reservation to the donor of any estate in the subjects of the gift. Such a reservation ought not indeed to be considered as contradicted by the general words "I have given and granted," or "do hereby give and grant." The words "to have after my death" may very properly be regarded as qualifying and ex-

plaining these general terms, and as showing that the gift was intended to operate beneficially after the donor's death, and not before. But I am utterly unable to reconcile a supposed purpose to reserve an estate during life in all the articles given, with the peculiar language used in the subsequent parts of the deed—"to hold all the said articles above mentioned to them the said William Stanley Branch, and Visey Bradley, their heirs, executors and administrators, *from henceforth,* as
(146) their property, and proper goods and chattels, *absolutely* and without any manner of condition." The intention to pass these articles in absolute property to the donees, immediately upon the execution of the deed, seems to be as explicitly declared as it was possible for words to express. Nor do I think this intention much, if at all weakened, by the last provision in the deed, "but if the said William Stanley Branch shall die without an heir, the property to come back to my heirs." It may indeed be said that here at least, is one condition declared in relation to a gift which was before pronounced to be wholly without condition; but we cannot help perceiving that the instrument is most unskillfully written and it may well be supposed that the donor, or the writer of the deed, did not consider this provision as a condition qualifying the estate, but as a declaration how long it was to last. Though he purported to pass the property from *thenceforth,* absolutely and without condition, be contemplated an event, on the happening of which the estate so past should cease and determine. Certainly, I think, it must be admitted, that if the words "to have after my death," must be construed as intended to apply to all the subjects of the donation, we should have a case very different from those in which the decisions before referred to were made. This would not be a case of the reservation of a life estate, and a limitation over, both intended and both expressed by the donor, and in which the limitation intended cannot take effect because contrary to the rules of law, but the case of a deed declaring repugnant and irreconcilable intentions—an intention to give immediately, absolutely, and unconditionally, and an intention not to give either immediately, absolutely, or unconditionally. Instead of leaving the law to operate as its rules would permit on consistent intents plainly expressed, we should be obliged to pronounce which of two inconsistent intentions is most plainly expressed, so as to enable us to strike the one or the other set of expressions out of the instrument, as unmeaning and absurd.

If it be practicable without violence in the deed to affix to it an interpretation which prevents this clashing of repug-

nant intents, it is right to adopt such an interpretation. I think that there is a construction perfectly consistent with the language of the instrument which removes (147) almost if not entirely, a conflict between its different parts, and which there is besides, much reason to believe, gives the words "to have after my death," were intended to qualify, and by fair exposition, do qualify the gift to his daughter, of the negro Dave, and *that gift only;* and that the general words of limitation afterwards expressed, "to hold all the articles before mentioned to them, their heirs, etc., from henceforth, as their property absolutely and without condition," are to be understood as subject necessarily, to the special exception expressed in relation to one only of these enumerated articles. So interpreted, the deed would be like a will in which, as is not unfrequently the case, there are particular legacies to several individuals, and then a sweeping disposition of all the property of the testator to some other person. There has never been any difficulty in such a case, in understanding the particular legacies to be impliedly excepted out of the general bequest, and in thus confining the operation of the general words to the residue of the testator's property.

This deed begins with the disposition of a family of negroes between the two persons whom the donor recognizes as his children, and with the exception of the negro Dave, this family of negroes constitutes the entire subject matter of the instrument. In the first place, he allots a portion, and a greater portion of this family to his son, and then the other part of it to his daughter. So far, and in relation to this main subject of the deed, there is not the slightest intimation of a purpose to reserve any interest to himself. But the donor goes on to enlarge the provision for his daughter. In addition to the share which he has given her of Lucy's family, he brings in negro man Dave, and here, and here only, do we meet with words intimating a reservation. By a distinct sentence he says, "I also give to my daughter Visey Bradley, my negro named Dave, to her (148) and the heirs of her body, to have after my death." Here is a complete disposition in regard to this negro, a reservation of his services to the donor for life, and a limitation over afterwards to his daughter and his heirs, and in regard to Dave, there was no necessity for the subsequent words of limitation—"and to hold to them, their heirs, executors and administrators." But after having put into his daughter's portion this residuary estate in Dave, the donor then recurs to what he supposes to be the unfinished part of his settlement. With respect to Rigdon and the unborn child of Lucy, there had been no limitation

stating the interest or estate which he intended to pass in them, and according to his views, it was necessary that there should be; and it is in relation to these articles, and to the part previously given to his son, he employs these general words of limitation. It was not unnatural after naming some of the articles constituting his daughter's portion, to go on with what was wanted to complete it, and to this circumstance we owe the ambiguity occasioned by the insertion of the clause about Dave in this part of the deed. Take it out of the place where it is so awkwardly thrust in, and insert it immediately before the clause of attestation, and we are presented with a full exposition of the donor's intentions in respect to both his children, and to every article of the property. Let the deed be read thus and all repugnancy vanishes. It will then be, "I give to my son William Stanly Branch, his heirs, etc., negro woman Lucy and her two children Dennis and Martin, and all the rest of her increase, except Rigdon and the next child but one she may have, to go (*i. e.* which I give) to my daughter Visey, and to hold all the said articles to the said William and Visey, their heirs, etc., from henceforth as their absolute property; I also give to my daughter Visey a negro man named Dave, to her and her heirs to have after my death." But it is not necessary thus to transpose the sentence, let us but confine the words to "have after my death" the immediate subject of donation preceding them, and regard the sentence beginning with the words "also I
(149) give," and ending with the words "after my death," as an independent clause, which there is nothing in the language or structure of the instrument to forbid, and then the seeming contradictions of the deed are equally removed.

I am of opinion that a life estate was not reserved nor attempted to be reserved in Lucy, and that the nonsuit should be set aside and a new trial awarded.

PER CURIAM. Judgment reversed.

SAMUEL McD. TATE v. EPHRAIM M. GREENLEE.

A sale of lands by the sheriff under execution, is not within the Act of 1819 (Rev., c. 1016), making void parol contracts for the sale of lands and slaves.

ASSUMPSIT tried at the last Autumn Term of BURKE, before *Seawell, J.*

The plaintiff, as sheriff of the county of Burke, by virtue of a writ of *fieri facias* levied upon certain lands, and sold them at public auction to the defendant, as the highest bidder. The defendant refused to complete the purchase, and the plaintiff,

having returned upon the writ the levy and sale to the defendant, and having tendered a deed and demanded payment, brought this action to recover the purchase money.

On the trial, it was objected by the defendant's counsel that the action being brought upon a contract to sell land, was within the statute of 1819, avoiding parol contracts for the sale of lands and slaves, and therefore, that the plaintiff could not recover for want of a note or memorandum in writing of the contract, signed by the defendant, or some one by him authorized. But his Honor was of opinion that the statute did not apply to sales under execution, and that if it did, the return of the plaintiff upon the execution was a memorandum in writing within the statute, and so instructed the jury, who found a verdict for the plaintiff, and judgment being rendered thereupon, the defendant appealed.

Devereux for the plaintiff.

No counsel appeared for the defendant.

GASTON, J., after stating the case, proceeded:

The act in question is in these words, "that all con- (150) tracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them, or any slave or slaves, shall be void and of no effect, unless such contract, or some memorandum or note thereof, shall be put in writing, and signed by the party to be charged therewith, or some other person by him thereto lawfully authorized, except nevertheless contracts for leases not exceeding in duration the term of three years." The question whether this enactment applies to sales on execution, has we understand, occurred before on the circuit, and the decisions have been in conformity to that now under review. This, however, is the first time in which this Court has been called on to examine the question, and we have considered it with the attention due to its practical importance.

It must then be admitted that the words used in the beginning of the act, are sufficiently comprehensive to embrace every contract, by whomsoever it may be made. But there are expressions in the act by no means appropriate to the case of a judicial sale, and tending to show that such sales were not within the contemplation of the Legislature at the time of making this enactment. To give validity to the contract, it is required that the same, or some memorandum or note thereof, should be signed *by the party to be charged therewith,* or by his authorized agent. Now, in judicial sales, who is the party to be charged as vendor? Can the sheriff be regarded as such a

party? The sheriff is a public officer, acting in obedience to an execution commanding him, in the name of the State, to cause to be made of the property of a delinquent debtor, a sum of money judicially ascertained to be due to his creditor. A levy by the sheriff on the land of the debtor, divests neither the possession, nor the estate of the debtor. In making the sale, the sheriff acts as a minister of the law, in obedience to its mandate, and in execution of the authority which that mandate confers upon him over the property of the debtor. The State—or the law—sells by its agent, the sheriff. By a levy on
(151) slaves, he takes the possession, and acquires such an interest as will enable him to maintain an action of trover, detinue or trespass against a wrongdoer; but he takes this possession and special property as a bailee, in order to effect the requisitions of the law, and when he sells, the contract is not for the transfer of this special property, but for the transfer of the entire interest of the debtor, which the law orders to be converted into money, for the satisfaction of the judgment creditor. In all such sales, therefore, the law is the vendor, and so much of the enactment as requires that the contract shall be *signed* by the party to be charged therewith, cannot in such cases apply to the vendor. Nor without violence to the ordinary import of language, can the law be spoken of as *"the party to be charged* with the execution of a contract."

Upon a little reflection it cannot but be seen that great inconvenience must arise by regarding the sheriff, if he could be so regarded, as the party to be charged as the vendor. If it be so, then he may *lawfully* refuse to execute a deed to the purchaser, after the sale and receipt of the purchase money, nay, after its payment into Court, and the actual satisfaction of the judgment, unless the purchaser can exhibit written evidence of the contract signed by the sheriff, or by his lawfully authorized agent. And it is not easy to perceive how he can be made liable either civilly or criminally, for refusing to execute a contract which the law authorizes him to treat as void and of no effect. It is highly improbable that the Legislature intended that the sheriff should have an arbitrary discretion to make a title or not to make a title to execute to the purchaser—and if he be *the party to be charged* he must have this discretion, because he is not *bound* to avail himself of this legal objection, but may like every party sought to be charged, waive it if he pleases. Should he refuse to make title, it is plain that vast confusion must arise, although it may be difficult to pronounce what will be the precise effects of this confusion on the plaintiff and the defendant in the execution, on the purchaser, or on the property. No

apprehension of inconvenience will prevent this Court from giving full effect to every constitutional expression of the legislative will, but the argument from inconvenience (152) ought to have great weight in endeavoring to ascertain that will, when couched in general terms. Nor can I resist the conviction, that if the Legislature intended to vest the sheriff with so dangerous a power, it would have laid down some rule by which the consequences resulting from its exercise would be defined, instead of leaving them to be inferred by judicial conjecture.

These considerations lead me to the result that the sheriff cannot claim the protection of this act against a purchaser at an execution sale, paying the price of his purchase, and demanding a conveyance. He cannot, because such a sale is not within the meaning of the act. The converse of the proposition necessarily follows, neither can the purchaser set up this act, as a bar to the demand of the sheriff for the purchase money, the sheriff tendering the conveyance of the property. The object of the statute was to prevent frauds and perjuries, in cases where the value of the property might present strong temptations, and the variety and complexity of the contracts afford scope and facility for the commission of these crimes. Bargains between individuals, created solely by the convention of the parties, are susceptible of innumerable modifications, which may be indistinctly expressed, imperfectly understood, partially remembered, or willfully misrepresented. The thing bought and sold, and its price, do not constitute all or the greater part, and frequently even not the most important part of such contracts. Is there to be any warranty of title, and if so, to what extent? Does the vendor stipulate as to the qualities of the thing conveyed? Is he to deliver possession immediately, or at a future day, and then absolutely, or upon some condition? Is the price to be paid down, or before a title is made? If not to be paid down, when, and upon what installments is it to be paid, and what security is to be given to insure its payment? All who are conversant with judicial proceedings know that questions like these, to be decided on parol evidence, have been among the most perplexing that could be presented to a Court and jury, and upon which they have had the strongest reasons to mistrust the accuracy and the integrity of witnesses. But with respect to a judicial sale, the law settles *all* the modifications of the contract. Nothing remains to be ascertained by testimony but the thing sold, the price and the purchaser, and, as the transaction is in public and by a public competition among the bidders, there is

scarcely room left for a dispute about the facts. The Legislature intended to cure the sore and numerous evils which parol evidence necessarily produced in the ascertainment of individual contracts, but had no idea of applying this harsh remedy where no disease existed, and designed not to interfere with these public contracts between the law and individuals, conducted by a sworn and highly trusted officer.

Several decisions made by Courts of the highest re-
(153) spectability in the State of New York have been referred to by the counsel for the defendant as showing that a similar enactment in their statute of frauds has been construed to apply to judicial sales. But on examining these cases, it will be found that they do not establish this position. The enactment in their statute which is held, and unquestionably, rightly held, to apply to judicial as well as individual sales, is not to the same purpose with ours, nor analagous to it, nor indeed upon the same subject matter. The provision in the New York statute expounded in these cases declares "that no estates of freehold, or terms of years shall be granted but by deed or note in writing, or by act and operation of law," and the Courts have there holden that a purchaser of a freehold at a sheriff's sale cannot maintain an ejectment until he obtains a deed. This enactment does not affect, or pretend to affect a *contract for such a conveyance,* but prescribes the necessary formalities to be observed in the execution of such a contract. The contract may be obligatory, and the parties bound to carry it into execution; or responsible for the breach of it, although it want the forms which must be observed to make its execution effectual; but a deed or note in writing is an indispensable requisite to pass the estate, and unless this be observed, the estate remains untransferred. Long before our act of 1819, the necessary formalities for the transfer of an estate in lands and in slaves, had been prescribed by our Legislature; and our Courts, like those of New York, have invariably held that these were indispensable to the passing of such estate, by whomsoever the transfer might be made, or attempted to be made. No estate in lands could be transferred by a sheriff without a deed acknowledged by the sheriff, or proved by a witness and registered in the county where the land lies, because our act of 1715 makes these ceremonies requisite to the passing of such an estate. No sale of slaves by a sheriff could pass the title, without either a bill of sale proved and registered in the proper county, or a
(154) delivery of the slave to the purchaser, because our acts of 1784 and 1792 rendered such a bill of sale, or such a delivery, essential to a transfer of the title. Our act of 1819

operates upon the contract for a sale while it is executory, and no longer. It prescribes no ceremony in the execution of such a contract, and it has been judicially settled that it has no operation upon an executed contract. *Choate v. Wright,* 13 N. C., 289. It was enacted *diverso intuiti.* The only authorities which we have met with, bearing upon the construction of similar enactments to those in this statute, are in conformity to the exposition which we place upon it. In *Attorney-General v. Day,* 1 Ves. Sen., 221, Lord *Hardwicke* held, that judicial sales did not come within the purview of that section of the English statute of frauds, which declares that no agreement for the purchase of lands shall be good unless signed by the party to be bound thereby or some person authorized by him; and the same decision was made by Chancellor *Dessesaure,* in South Carolina, and affirmed an appeal in the Constitutional Court of that State in *Jenkins v. Hogg,* 2 Con. (S. C.), 821.

We concur, therefore, in so much of the instruction given by the Judge, as declares that the act of 1819, to make void parol contracts for the sale of lands and slaves, does not apply to purchasers at a sheriff's sale under an execution, and this renders it unnecessary to examine the residue of the instruction.

PER CURIAM. Judgment affirmed.

Cited: Tarkington v. Alexander, 19 N. C., 94; *Ingram v. Dowdle,* 30 N. C., 456; *Grier v. Yontz,* 50 N. C., 373; *McKee v. Lineberger,* 69 N. C., 239; *Skinner v. Warren,* 81 N. C., 376.

JOHN WILSON v. WILLIAM WILSON and others.

When lands have been overflown by a mill pond for forty years without any claim for damages by the owner, the jury may from the acquiescence, presume a grant of the easement.

This was a petition, filed in November, 1831, by the plaintiff, under the act of 1809 (Rev., c. 773), for damages by reason of the overflowing of his land, by the defendant's mill pond.

On the trial before *Seawell, J.,* at PERQUIMANS, on the last circuit, the case was—that the mill had been erected (155) under an order of Court, in the year 1784, and that for more than forty years preceding the filing of this petition, the land of the plaintiff had been covered by the pond; during all which period there had been an acquiescence by those under whom he claimed, without any suit or claim for damages. But

within that time, claims for compensation for the overflow of their lands, had been made by the owners of adjoining land, and within twenty years, grants or releases by those persons had been executed to the defendants.

His Honor instructed the jury that acquiescence for a great number of years, would in law, raise the presumption of a grant, but that such acquiescence must be for more than twenty years. But that this presumption might be repelled by testimony offered by the plaintiff, and his Honor left the jury to determine upon the effects of the grants and releases made to the defendants by the owners of adjacent land.

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

Mendenhall for the plaintiff.
Iredell, contra.

DANIEL, J., after stating the case, proceeded: I do not understand from the case, that the Court meant by using the word "grant" that a conveyance of the land was to be presumed. We understand the Court to mean a grant of an easement, or privilege of ponding the water on the defendant's lands. The Court instructed the jury that the presumption of a grant, arising from the use of an easement for more than twenty years and acquiescence by the owners of the land, might be repelled by other evidence, and if the presumption was not repelled, they ought to find for the defendants. We do not perceive any error in the charge of the Court, as we understand it from reading the whole of the charge. Mr. Starkie, in his book upon Evidence, makes the following remarks: "In considering the nature and effect of circumstantial evidence in question of title,
(156) the order which belongs to presumptive evidence in general naturally presents itself. Accordingly, it will be proper to consider, 1st, in what cases long continued and peaceable possession is conclusive as to the right. 2d. In what instances the law, although it does not conclusively infer a right, nevertheless gives to the evidence a technical force and operation, beyond its mere natural force and operation, as estimated by a jury. 3d. In what cases the law raises no technical presumption, but the jury are left to make their own inferences, according to the natural weight of the evidence. The inference of title from adverse, undisturbed enjoyment is conclusive, 1st, in cases of prescription, 2d, in the different instances which fall within the statute of limitation. Secondly, when the law makes no conclusive inference, but, nevertheless,

gives to the evidence a technical efficacy, beyond its simple and natural force and operation. Under this head are to be classed the presumptions of legal title by grant or otherwise, to incorporeal rights in the land of others, founded on adverse possession and enjoyment of such rights for the space of twenty years. The presumption of right in such cases is not conclusive: in other words, it is not an inference of *mere law* to be made by the Court, yet it is an inference which the Courts advise juries to make wherever the presumption stands unrebutted by contrary evidence; such evidence in theory, is mere presumptive evidence; in practice and effect it is a bar. The precise period of twenty years seems to have been adopted in analogy to the enactment of the statute of limitations, which makes an adverse enjoyment of twenty years a bar to an action of ejectment; for as an adverse possession of that duration will give a possessory title to the land itself, it seems to be also reasonable that it should afford a presumption of a right, to a minor interest out of the land. Thus an enjoyment of lights; of a right of way over the land of another; of a market in the neghborhood of another market belonging to a grantee, under the crown, affords *prima facie* evidence of a legal right by grant or otherwise which if unrebutted by opposite evidence, (157) ought to prevail." "The very ground of the presumption in such cases is the difficulty of accounting for the possession and enjoyment, without presuming a grant, or other lawful conveyance. Hence, notwithstanding a continuance of possession far exceeding twenty years, if the original possession can be accounted for consistently with a title existing in another, it will be competent to the latter to rebut the presumption arising from the continuance of the possession." (3 Starkie from page 1204 to 1217.) The case before the Court rests on the rules established under the second classification of presumptive evidence. The defendant attempted to rebut the presumption, by showing that the plaintiff had purchased out the title of others, whose lands were overflowed by his mill pond. The evidence was fairly laid before the jury, and the law correctly expounded by the Court. The jury found a verdict for the defendants, on which judgment was given; which judgment we think ought to be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Rogers v. Mabe, post, 190; *Pugh v. Wheeler,* 19 N. C., 59; *Gerenger v. Summers,* 24 N. C., 233; *Ingraham v. Hough,* 46 N. C., 42; *Geer v. Water Co.,* 127 N. C., 354.

(158)

Den ex dem. JOSEPH GREEN v. RICHARD HARMAN.

Where A has two conterminous grants and B another which covers a part of one of them and is the oldest, and a fence of A upon the tract to which he has title, runs very near the line of the two tracts and encloses a small portion of B's land which was also covered by A's grant, it was held B not being in possession:

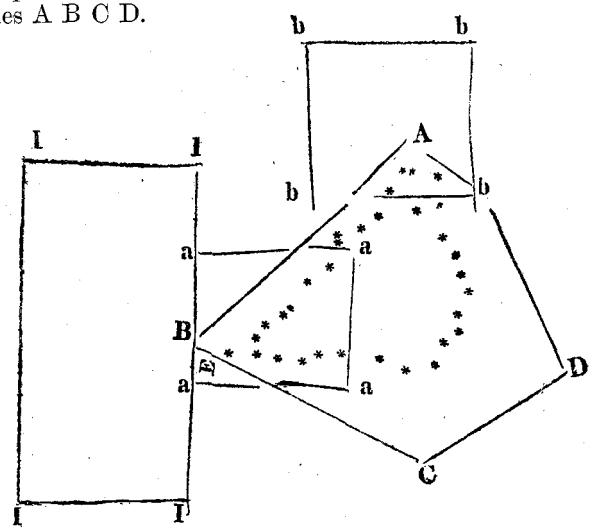
1. That a possession of seven years gave A a title to all the land within his enclosure.
2. That the enclosure being of a part so small, that B might reasonably conclude it was a mere mistake in running the fence, it was not, as to him, an entry upon the land to which he had title, and was not an ouster of him beyond the enclosure.
3. That although cutting timber and overflowing the land of B, by A were not in themselves ousters of B, so as to constitute an adverse possession by A, yet these facts taken in connection with the fence running upon his land were proper to be left to the jury as testimony, from which they might infer an ouster.

EJECTMENT tried on the last circuit of LINCOLN, before *Seawell, J.*

The lessor of the plaintiff was not in possession, and to locate his grant, the plaintiff offered declarations, of one Sloan who was dead, which were not objected to by the defendant, and were received by the Judge. The plaintiff did not claim under Sloan. The plaintiff having made out a *prima facie* case, the *defendant* offered to prove a possession under color of title for more than seven years.

The premises in dispute are represented in the diagram by the lines A B C D.

(159)



The defendant established title to the lands represented by the lines a a a a, and b b b b, but his grants were both younger than that of the lessor of the plaintiff. To make out his possession, he offered to prove that he had built a mill at E, the pond of which extended near to the point A (represented by the dots), that this mill had been in existence more than seven years; and that during all that time he had been in the habit of cutting timber within the lines of his grant. But it appearing that all the land on which the timber was alleged to have been cut was arable, his Honor refused to receive the evidence, holding that neither of the facts offered to be proved, constituted a possession which, under the act of limitation, would give a title.

The defendant then offered to prove that he was the owner of another tract of land, represented on the diagram by the lines I I I I, which was in cultivation, and the fence of which, running on the line I a B I, for eleven panels, included a few feet at B, of the tracts, A B C D, and a a a a, and that this occupation had continued for more than seven years before the commencement of the present action. (160)

His Honor informed the jury that every trespass which would sustain an action, would not, if continued for seven years, amount to a title. The possession must be obvious and visible, demonstrating unequivocally to the owner, that the wrongdoer intended a claim to the land; that if the fence in the present case made such an encroachment, as must necessarily show such an intent on the part of the defendant, the plaintiff would be barred by seven years acquiescence, but if it did not evince such an intent, then it did not constitute a defense to this action.

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

W. A. Graham for the defendant.
Devereux, contra.

RUFFIN, C. J. It is contended on the part of the defendant, that the evidence of the declarations of Sloan were incompetent; and upon that ground that the judgment ought to be reversed. The objection was not made in the Superior Court; and this Court has not the means of knowing under what circumstances the evidence was received. It might have been by consent. The Court is of opinion that it cannot be made here; and for that reason overrules it, without deciding on the validity of the reasons urged in support of it.

The Court likewise concurs in the opinion of the Judge who tried the cause, that the overflowing the land by the mill pond, and the cutting of timber on it, do not singly or together, and by themselves, constitute a possession, on which the statute of limitations can operate.

The overflowing of land by an act not done on it, but by stopping a water course below, on one's own land, is not an ouster of the owner from the land overflowed. There is no entry, which is necessary to make a disseisin. The remedy for the injury is not trespass, but an action on the case for the consequential damages. (*Howard v. Banks,* 2 Bur., 1113.)

Hence, however long it may continue, it affords, of it-
(161) self, only a presumption of a grant of the easement, and not of the conveyance of the land.

The other question is not entirely clear of difficulty. The case does not state the extent to which the timber was cut. But the Court rejected all evidence of it; which must be taken, to have been upon the principle, that if carried to the utmost length, it would be insufficient. There is much land in the State, of which nearly the whole value consists in the timber; its fertility not being sufficient to induce a prudent proprietor to erect habitations or clear a plantation on it. In such instances, the timber is frequently all taken off; and it would not seem easy to give more positive evidence of asserted ownership and of enjoyment. On the other hand, any rule that could be laid down would be so wanting in precision as to the extent to which the trespass should be carried, to constitute an ouster, as to leave the whole subject in uncertainty. It is safest to require an actual occupation, such as residence or cultivation; something to make it emphatically the party's close; which is in conformity to the ancient rule of the common law, and also to the application of it to our situation, as early made in this State, in the cases of *Andrews v. Mulford,* 2 N. C., 320; and *Grant v. Winborne,* 13 N. C., 56. *Simpson v. Blount,* 14 N. C., 34, has been relied on as an authority to the contrary. But that is an exception founded on necessity, and was so considered at the time. The land was swamp, of which no other use could be made in its natural state, but by taking off the timber; which was likened to cutting rushes annually in a marsh. There may be two other exceptions, founded on other grounds. An instance may be, the making of turpentine as practiced in the lower part of the State; which is an operation partaking perhaps, of the nature of cultivation. It cannot be pursued secretly, and does not consist of single acts of trespass, like cutting down trees, and carrying them away, but requires a con-

tinued attendance on the land for a considerable portion of the year, and from year to year, as the same trees are worked for several years in succession. But even that has not yet been judicially pronounced sufficient, as far as I am (162) informed. In the case before the Court the land is of the character and quality presented by the general face of the country; and as to that we think the rule established.

His Honor here stated the facts and charge above set forth, as to the possession of the defendant near the point B, and proceeded as follows:

It is objected by the appellant, first: That this instruction is in itself erroneous; and secondly, that if the intention of the defendant is not to be unequivocally inferred from the possession proved of the small piece, it might be from his other possession, and from the other acts of cutting timber, and overflowing the land; and therefore that the evidence to those points ought not to have been absolutely rejected.

It seems to us that the rule is stated by the Judge too strongly, at least, as applied to this case. The operation of the statute of limitations depends upon two things. The one is possession continued for seven years; and the other the character of that possession—that it should be adverse. It has never been held, that the owner should actually know of the fact of possession; nor have actual knowledge of the nature or extent of the possessor's claim. It is presumed indeed that he will acquire the knowledge, and it is intended that he should. Hence nothing will bar him short of occupation, which is a thing notorious in its very nature, and that must be continued seven years, in order to afford him, not that time to bring suit, for redress of a known injury, but full opportunity to discover the wrong. To the extent of the occupation there is, *prima facie,* no hardship in holding that it is on a claim of title and adverse, and that the owner knew of it. Every man must be considered cognizant of his own title, the boundaries of his land, and of all possessions on it either by himself or others. Ordinarily, possession taken by one of another's land, is of a part sufficient in quantity or value to show to the jury that the possession was taken adversely, and also to afford unequivocal evidence to the other claimant of that intention. And as far as the (163) actual occupation goes, it seems to furnish such evidence, in almost all cases. If indeed, two persons own adjoining lands, and one runs a fence so near the line as to induce the jury to believe that any slight encroachments were inadvertently made, and that it was the design to run on the line, the possession constituted by the enclosure, might be regarded as permissive,

and could not be treated as adverse, even for the land within the fence, except as it furnished evidence of the line in a case of disputed boundary. The line being admitted, it would not make a title, where a naked adverse possession will have that effect, because there was no intention to go beyond his deed, but an intention to keep within it; which by a mere mistake he has happened not to do. But in this case, the defendant is really the owner of the land on both sides of his fence for a considerable distance, and for the residue of it claims the land on both sides under the same title, and (if that would make a difference), does not appear to have had any knowledge of the title of the lessor of the plaintiff. Can it be doubted that he intended to assert a title to all the land within his fence? He had distinct deeds for separate parts of the land, it is true. But he had other actual possessions of parts of both tracts lying on each side of the line, which had become one tract to him; and he must have intended to assert a right to the whole of the adjoining land covered by both deeds, and by his possession, to put out all others. The fact of entry into the land being admitted, and the intention thereby to usurp the exclusive possession, being thus established, an ordinary case is made within the statute. The property of so holding will not be denied, while the possession thus gained, is confined to the actual occupancy; for if that be diminutive, the loss of the true owner is equally so. He loses only because he is negligent, and in proportion to his negligence. But in this case the defendant insisted that his possession was not to be limited to his occupancy, but was coextensive with his deeds. The principle is (164) certainly well known and clearly established, that while the possession of a mere wrong-doer is bounded by his close, that of one who enters under title, though it be defective, shall be taken according to his title, and to be an ouster of the true owner to the extent of the boundaries of the deed. It was in reference to this pretension that the instructions complained of, were, as I understand them, given; and I am far from thinking that some modification of the rule such as this case suggested to the Judge, is not necessary; though that laid down by him may not be precisely correct. There are already exceptions, as well ascertained as the rule itself. Thus, if there be two patentees, the entry of the younger on his own land, does not oust the other unless it be on that part of the land which is covered by both titles; and if it be on that part, the possession is confined to the actual occupation; if the elder be also in possession of any part of the same land which is included in both. The question is, whether a further qualification shall

be admitted, that when the portion into which the actual entry is made, and possession taken, is very minute, so that an owner of reasonable diligence and ordinary vigilance, might remain ignorant that it included his land, or might fairly mistake the character of the possession, the disseisin shall extend beyond the occupancy? The difficulty upon this subject is analogous to that already mentioned, of saying how much cutting of timber short of all would amount to an ouster. The rule heretofore adopted has been generally delivered in this language, that possession of part is possession of the whole, without saying how much, or what part. But I think it may be properly declared, that it must be of as much as will reasonably denote, both to the other proprietor and to the jury, that the party intended to usurp a possession beyond those boundaries to which his title is acknowledged by all parties. If the defendant had not a good title to adjoining land, his entry on the land of the lessor of the plaintiff would be distinct notice, and could not be deceptive. But when his possession for the most part is rightful, and admitted to be so, and only wrongful to a very inconsiderable extent, it seems to me that he cannot have (165) the benefit of it beyond its actual bounds, unless from that and other circumstances, the jury may reasonably infer, that he intended to make open claim under his deeds to the land covered by both. I should therefore concur in the opinion given by the Judge in the Superior Court, if he had not also said, that the intention of the defendant must be inferred from the possession of that small piece alone, and that the inference of the intention from that must be a necessary one. Although it is the object and the presumption of the law, that the owner will have notice of the possession of an adverse claimant, and of the extent of his claim, and hence the possession of a part is made the possession of the whole againt him; yet the possession is never evidence, which of necessity shows the extent of the claim, unless the actual possession be of the whole. When it is of part, it is deemed sufficient and reasonable evidence, and puts the owner to ascertain the extent of the deed, or be bound by it. I think, therefore, the jury should not have been instructed to find for the defendant, unless they thought the encroachment of the fence necessarily showed the owner that the defendant intended to claim the land; but ought to have been instructed, that although the defendant might not have taken possession by mistake, supposing the land not to belong to the lessor of the plaintiff, but to be within his tract I I I I, but did take it under claim of title in himself under his patent for a a a a, yet, as he actually occupied so small a parcel, the

plaintiff was entitled to recover the residue, unless all the circumstances of that possession, and other acts of the defendant, furnished reasonable notice to the owner, of the defendant's claim to the tract of a a a a.

In this point of view, the evidence rejected became important. Although cutting of timber and overflowing the land, do not amount of themselves, to an ouster, yet being done without the leave of the owner, they give a character to the entry into another part, and also furnish evidence of it to the owner. The jury might fairly infer from it, not only that the de-
(166) fendant did claim the land, but that the lessor of the plaintiff knew he claimed it and was not a mere wrongdoer without color of title. I think that in such a case as this there ought to be some evidence of the owner's knowledge of the claim, besides the mere possession of so small a parcel. This might have been shown by an express declaration of the defendant to him, and upon the same principle may be inferred from any other circumstances, which, though in themselves, not amounting to a disseisin, would denote the *quo animo,* with which the possession of the small part was taken.

PER CURIAM. Judgment reversed.

Cited: Dobbins v. Stephens, 18 N. C., 7; *Carson v. Burnett, Ib.,* 553; *Bynum v. Carter,* 26 N. C., 313; *Williams v. Miller,* 29 N. C., 188; *Gilchrist v. McLaughlin, Ib.,* 315; *Lenoir v. South,* 32 N. C., 240; *Loftin v. Cobb,* 46 N. C., 411; *Morris v. Hayes,* 47 N. C., 96; *Everett v. Dockery,* 52 N. C., 392; *King v. Wells,* 94 N. C., 352; *McLean v. Smith,* 106 N. C., 176, 9, 181; *S. v. Boyd,* 109 N. C., 758.

OVERTON HARRIS v. WILLIAM YARBOROUGH, admr. of John Harris the elder.

1. Where a notice specifies that a deposition will be taken between certain hours of the day—the deposition can not be read unless it appears to have been taken between the hours specified.
2. A parol gift of slaves is in law void against creditors and purchasers.

This was an action of COVENANT brought on a warranty of title in a bill of sale of certain slaves, tried before *Donnell, J.,* in GRANVILLE.

In order to show a disturbance by better title, the plaintiff proved that the defendant's intestate before the year 1806, and

before the execution of the bill of sale, had by parol, given the slaves to one John Harris the younger, who had sued the plaintiff, and effected a recovery, and obtained possession.

The defendant insisted that the parol gift was in law void as against the plaintiff,. and therefore that the recovery effected against him was not by title, and prayed that the plaintiff should be nonsuited, which matter the Judge, with the assent of the parties, reserved and permitted the cause to proceed. The defendant then offered in evidence a deposition, and proved a notice to the plaintiff, that the de- (167) position would be taken on a certain day, "between the hours of ten in the morning and four in the afternoon." But the return of the commission, though it showed the deposition to have been taken at the place and on the day mentioned in the notice, did not show that it was taken between the specified hours of that day, and thereupon the plaintiff's counsel objected to the reading thereof, but the presiding Judge nevertheless received the deposition, holding that where the hours spcified in a notice included the whole portion of the day usually devoted to such business the presumption was that the commission was executed within the hours, although not expressly stated by the commissioners.

A verdict was found for the defendant, and a motion was made for a new trial, because the Judge had received the deposition, but his Honor being against the plaintiff upon the point reserved refusal to disturb the verdict, and therefore the plaintiff appealed to this Court.

Nash for the plaintiff.
Badger for the defendant.

GASTON, J. The Court is of opinion that the Judge erred in permitting the deposition to be read. It holds that when the notice for taking a deposition, names the hours of the day within which it is appointed to be taken, it is not enough that the deposition shall appear to have been taken on that day, but that it must also appear to have been taken within the prescribed hours. Such the Court believes to have been the general practice, and this practice it holds to be most consistent with principle. It is necessary that the time and place of taking the deposition, shall conform to the time and place when and where the opposite party is notified to attend. Depositions are often taken *ex parte,* and it is dangerous to relax any of those rules which have been provided for taking them fairly. But notwithstanding this error, the Court is of opinion that

the judgment below must be affirmed. *McCree v. Houston* 7 N. C., 429, and *Watford v. Pitt, Ib.,* 468, have con-
(168) clusively established that under the act of 1784 (Rev. c. 225), parol gifts of slaves are void as against creditors and purchasers.

PER CURIAM. Judgment affirmed.

SAMUEL PRATT v. PLEASANT W. KITTERELL.

The Act of 1777 (Rev., c. 115, §58), authorizing appeals in questions concerning grants of administration, applies only when by the Act of 1715 (Rev., c. 10), the applicant has a vested right to the administration.—Where the County Court has a discretion in making the grant, as in administrations, *pendente lite*, its judgments are necessarily final and can not be reviewed on appeal.

On the last circuit at ANSON, the plaintiff filed an affidavit, stating that at the July term of the County Court, a supposed will of one Benjamin Pratt had been offered for probate and contested by the plaintiff and others—that thereupon the plaintiff moved that letters of administration *pendente lite* might issue to him, which motion was refused, and the letters were granted to the defendant—upon which the plaintiff prayed an appeal to the Supreme Couprt, which was also refused.

Upon this affidavit his Honor Judge *Strange* awarded a writ of *certiorari,* from which order the defendant appealed.

Mendenhall and *Winston* for the defendant.

No counsel appeared for the plaintiff.

RUFFIN, C. J. The application for a *certiorari,* is not grounded on any unfitness of the person nominated by the County Court as administrator *pendente lite,* or any impropriety of that court, except the refusal to allow an appeal from the order of appointment. It assumes therefore the right of appeal in such case, to be an absolute right of the applicant, as one of the next of kin. Whether it be so, is the sole question in the case.

The act of 1715 (Rev. c. 10) gives the right of ad-
(169) ministration to the next of kin; and directs what Courts shall take probate of wills and grant letters of administration.

The act of 1777 (Rev. c. 115, sec. 57), vests that power in the County Court, and by the 58th section provides, "that any

person who shall claim a right to administer, and shall think himself injured" may appeal, and the Superior Court shall "determine the same, and proceed to grant the letters to the persons entitled to the same." The question depends upon the fair construction of these enactments; for I conceive the general words of the subsequent section (75th) by which an appeal is given from every sentence, judgment, or decree, can have no application to this subject, since it was fully provided for by the previous clauses relating specifically to it.

It is obvious that the right of appeal from an order committing administration, is not given to every person who may officiously intervene. Strangers to the order and persons having no interest, recognized by the law, which could be affected by it, ought not, on principle to be allowed to oppose it. The Legislature did not intend to depart from this principle; and if the words of the act were ambiguous, they ought to receive such an interpretation as would be consistent with it. But the terms of this act are in accordance with it. The right of appeal is correlative to the right of administration. It is only allowed to those who claim a right to administer, and in a case in which the Superior Court may, upon the appeal, grant upon the score of that right, the administration to the appellant. This intelligibly refers to the previous law, by which the right to administration is determined; and must necessarily be restricted to the cases provided for by those laws. It cannot, for instance, be construed to give an appeal to any but the widow, next of kin, or a creditor; for the words "any person who shall claim a right to administer," must mean such person as may, according to law, claim it. In like manner, it must be held that the right of appeal is given to those persons in those cases only, in which the administration granted and made the subject of the appeal, is an administration of that kind, to which the law gives a right. If an administration be (170) granted, to which none have a legal right, and which the Court of probate may, in its discretion grant to any person, that is not a case, in which by the words of the act, an appeal can be taken.

The inquiry then occurs, whether an administration *pendente lite* is one of that kind intended to be secured to the next of kin, by the act of 1715? That act is much in terms, and precisely in substance the same with the statute 21 Hen. VIII, on the subject of administrations. The construction of the English statute has been settled from a very early period after its passage; and it is established that it extends to general administrations only—those under which distribution of the estate is

made. (Toller's Exrs., 105. Williams' Exrs., 298.) In reference to them the statute gives a right to certain persons, which the Courts of common law are obliged to recognize and enforce. But no writ of prohibition or mandamus ever issues from Westminster Hall, to restrain the grant, or command the revocation of a limited administration. The statute does not extend to them, and therefore the discretion remains with the ecclesiastical Court according to their own course. Whether an appeal be by those Courts allowed, or if so, what its effect is, it is unnecessary to inquire, since the appeal here must be regulated by our own legislation upon the subject. The construction, however, of the act of 1715, must be the same as that of Hen. VIII, in reference to the species of administrations intended in them. They are in *pari materia,* and the reasons upon which a particular interpretation is put upon the one are equally applicable to that to be put on the other, especially when our own was passed after the other had been so long expounded. If then none can "claim a right" to administration *pendente lite,* no one can appeal from the grant of it to another, within the words of the act.

The inconveniences of extending the act to such administrations are so great and obvious, as of themselves to furnish strong grounds for a contrary exposition. An administration *pendente lite* is temporary. The object of it is not to administer (171) the estate, but to preserve it, until it can be judicially determined who has the right to administer it. Such a power must exist somewhere, and would seem naturally to attach to the jurisdiction where the principal litigation is pending. Wherever it is, its efficiency depends upon its exercise being above the reach of opposition, in the sense of annulling the order, which is the effect of an appeal in one law. It is vain to possess the power if the mere will of another can entirely defeat its operation, and leave the property exposed to destruction and creditors to be delayed. For if one order can be appealed from, and the Court, in consequence proceed to make a second, that again becomes the subject of appeal; and so on *ad infinitum* thus making it impossible to secure the property and rendering the power of committing such an administration futile. In such a case, the suspension of the authority is its destruction.

It will be observed, that the Court does not go beyond the case, which raises the naked question, whether the unqualified right of appeal exists. It is not intended to say, that the County Court has a discretion altogether uncontrollable. Doubtless a Court of Equity might in a proper case appoint a receiver even after an administration *pendente lite.* And it may

also be, that the Superior Court of Law, in virtue of general superintending powers, might correct a flagrant abuse, as if the administration be granted to one notoriously insolvent, without our security, or to one interested to protract the litigation, and with that view. But redress cannot be had by appeal which vacates the grant; nor by *certiorari,* claimed on the *sole* ground that an appeal was refused.

Since this is so, it may be useful to mention a few plain principles for the wholesome regulation of the discretion, which have the sanction of long experience. If the litigants cannot agree upon a person, it is manifestly proper to appoint one who stands indifferent between them and will be acceptable to the creditors. But if one of the contending parties be already in possession of the estate, and does not desire the special letters for the sake of spinning out the contest, it would (172) be vexatious to grant the letters to another, merely for the sake of changing the possession. It is a different thing to put one of the litigants unnecessarily into possession. Williams's Exrs., 312.

PER CURIAM. Judgment reversed.

Cited: Commissioners v. Kane, 47 N. C., 291.

DAVID GILLIS v. ALEXANDER McKAY.

Slaves held by a trustee, in trust to be divided among the children of A who may now be living, and those who represent any deceased child, in the proportion, and after the same manner as if they were claiming the said slaves as next of kin of their father, are not liable to attachment or execution at the instance of a creditor of one of the *cestui que trusts.* Neither has the husband of a female *cestui que trust* a right to recover the interest of his wife without joining her.

Pherebee Williams, by deed, bearing date 20 November, 1827, reciting that she had in consideration of natural love, by deed executed in 1788, conveyed to her three brothers, Isaac, Samuel and Joel, certain slaves therein mentioned, and that doubts were entertained of the validity of that deed, and that all her said brothers were dead, and that she wished to confirm the title to their children, and give greater validity to the first deed of gift, in consideration of the premises, conveyed the said slaves before mentioned, and others, their increase, to the num-

ber of fifty-nine in the whole, to her nephew, Joel Williams, "to hold the same in trust to be divided into three equal parts; one part to be divided among the children of her brother Isaac deceased, who may now be living, and those who represent any deceased child or children, in the proportion, and after the same manner as if they were claiming the said slaves, as next of kin, or distributees under the statute of intestacy, of their father's estate." One other part was given in the same words to the descendants of her brother Samuel; and their remaining third part, in the same words, to the descendants
(173) of Joel. Then was added: "And also, upon the further trust to appropriate the hire and profits derived from said slaves, to and among the children aforesaid, and grandchildren, in the same proportion that they share in the slaves, after deducting the reasonable charges and disbursements for managing this trust."

In June 1828, this suit was commenced by original attachment which was returned by the sheriff levied on several of the slaves by name, that were mentioned in the deed; but he did not take them into possession, and left them with the persons who had hired them as hereafter stated. In 1829, Joel Williams, the trustee, was summoned as garnishee; and in his garnishment he stated, that immediately after the execution of the deed, he took the negroes into possession, and hired them out for 1828, and took bonds for the hire, which he still held; and again for 1829; that a daughter of the donor's brother Samuel (who had three other children, all living when the deed was executed), married the defendant, McKay; that no division of the slaves had been made, and that he did not know all the persons who were entitled, as the families were numerous, and there were conflicting claims, under assignments from some of the children of one of the donor's brothers; that he had never paid to the defendant anything on account of his wfe's share, or done any act to recognize his right to that share; but that he held the whole property for the purpose of having it properly and effectually divided according to the trusts. And he submitted, whether the interest of the wife was subject to attachment for the debt of the husband.

His Honor, Judge *Norwood,* at Cumberland, on the Spring Circuit of 1832, refused to condemn either the notes or slaves, to the satisfaction of the plaintiff's debt, upon which he appealed.

Henry and *W. H. Haywood,* for the plaintiff.
Badger, contra.

RUFFIN, C. J., after stating the case as above, proceeded as follows:

The words of the act of 1777 (Rev., c. 115, sec. 25) (174) are "estate and effects." But from the nature of the jurisdiction of courts of law, they have been understood in a modified sense. In relation to specific property, attachment is analogous to execution; and in respect to *choses,* not in possession, it is substantially an action at law by the defendant in attachment. (*Peace v. Jones,* 7 N. C., 256; *Elliott v. Newby,* 9 N. C., 22.) As a general description of the uses of this process, this seems to be a just one; nor do more than two instances occur to me of exceptions. One is a debt not due, which by express enactment may be attached, the other is a debt *in auter droit,* or plainly due to one person for the benefit of another.

Such an interest as a *cestui que trust* has under this deed, if a legal one, would certainly be subject to execution; for the law makes all rights to property in possession, which are known to it, liable to creditors, however detrimental to the debtor it may be to have it sold in that State, or however inconvenient to joint owners. It is a question in this case, whether the act of 1812 (Rev. c. 830) brings within the same rule, equitable interests held in conjunction with a great many other persons, entitled to unequal shares, and liable to account with each other, in respect of the property, and the profits? In *Brown v. Graves,* 11 N. C., 342, and *Harrison v. Battle,* 16 N. C., 537, it was determined that only a pure and unmixed trust was within the act; a trust, in which the only duty of the trustee is to scure the estate for the *cestui que trust,* and permit him to enjoy it, and convey the legal estate according to his directions. If others have an interest as well as the debtor (I do not now mean an interest as equitable joint tenants of the whole trust fund, but an equity on the debtor's particular share), the act does not operate on the case; because in the cases to which the act applies, the legal estate is transferred to the trust. The principle is, that the legal estate is not to be transferred or divested out of the trustee, unless that may be done without affecting any rightful purpose for which that estate was created, or exists. It has been applied heretofore to conveyances on trusts to pay debts, with a resulting trust to the (175) grantor. But it seems equally applicable to all other cases, in which the *cestui que trust* has not the unqualified right to call for the legal estate, and to call for it immediately. If the nature of the trust requires it to remain in the trustee, who by the terms of the deed, is to do acts from time to time; the case is not provided for in the statute; for that would be not

only to divest the legal estate, but to change the nature or extent of the equitable right also. As if the trustee is to receive and apply the profits annually to the maintenance of another during life; or if the profits are to accumulate to a particular period. It would not in those cases be an execution of the trusts, but a breach of them, if the trustee were to convey the legal estate to the person beneficially interested; and therefore execution sued against that person, cannot be done of the estate out of which the trust arises. A material question is, whether when there is an equitable joint tenancy, or tenancy in common of a trust, that is so pure and unmixed a trust for each, as to make the share of each liable to execution for his separate debt. Such an interest may be reached in equity, without doubt; and might before the act. However strong the reasons *ab inconvenienti,* against proceeding at law, may be, they cannot weigh against plain words in a statute. But they may properly be brought in aid of an interpretation of a statute couched in doubtful terms; and still more when the words lead to the belief that the inconveniences were perceived by the Legislature, and that the enactments were made in reference to them. This act says, that execution may be done of all such lands or goods, "as any other person or persons be in any manner seized or possessed in trust *for him, her or them, against whom execution shall be sued,* as ought to be done if the said party or parties against whom execution is sued, were seized or possessed of such lands or goods, of such estate as they be seized or possessed of in trust for him, her or them, at the time of the execution sued." These words do not embrace any case but that of a trust for the defendant or defendants in execu-
(176) tion. If the trust be for him or them and another, it is not within the letter of the statute. Is the Court at liberty to carry it beyond the letter? If creditors were without remedy, we might and probably would be bound to do so. At law the estate of a joint owner may be taken in execution for his separate debt; for the law has no other means of dealing with it. But equity frequently interposes to prevent the sale of such an interest, although undoubtedly legal, until the rights of all the persons jointly concerned can be adjusted, either as to proportions, or by assigning to each his particular share in severalty, so that no person should be disturbed by the execution but the debtor; and that his interest may be exposed under circumstances to make it bring a fair price, and not deceptive to bidders. The object of the Legislature was to give the creditor a speedy and direct remedy, and save him from the necessity of going into a court of equity. But it is not a fair construc-

tion to say, that this was meant to be at the expense of having the property sold at a disadvantage to bidders, or the debtor, or to the injury of the joint owners. Nor to say that it was intended to expedite the creditor in those cases in which the debtor, or joint owners with him, would be obliged on their part, to seek protection from a court of equity. That would be in one breath, to dispense with the necessity of applying to equity; and in the next, to create the same necessity; the difference being only, in the party who should make the application. Whether it is better that it should be done before a sale than after, and even before the expense of a seizure, and the inconvenience of it to those claiming the joint interest, it is not difficult to judge. The act imports too, that in every case within it, the whole legal estate should be divested, and not so much of it as would suffice to feed the particular trust for the debtor. A contrary construction might be admissible in relation to land, were the act confined to that; as that is permanent, a sale disturbs no possession, and partition is readily made, and may be compelled at law. But where there are several *cestui que trusts,* and the subjects of the trust are numerous, and distinct personal chattels, it may be doubted whether it be not to the advantage of even the creditor, and it certainly is (177) of all the other parties, that a court of equity, whose powers are competent to clear all incumbrances, and do exact justice between them, shall not alone deal with the interest of any one of the *cestui que trusts.* For to say nothing of the danger of a sacrifice of the debtor's interests, and of the exceeding inconvenience to the other owners, there is great difficulty in the way of the creditor, in seizing the several articles, and in selling the part of his debtor in each, or his part in the whole mass. The difficulty too, would not terminate with the sale; for the remedies at law of joint owners of personal chattels against each other, are subject to many restrictions, and until recently, there was no method of compelling partition. My inference from these considerations is, that it was not designed that the act should embrace such cases; and that the mischief of such an interpretation prevents its being adopted, when it cannot be done without an implication beyond the words of the Legislature.

But this case does not directly require the Court to say that a trust for two or more is in every case out of the act. The point therefore may be left undecided, though I cannot but say, that I have a strong impression as to the proper construction. This deed conveys the slaves in trust to be divided among the descendants of the donor's three deceased brothers, in the

proportions and after the manner, as if her brothers had died intestate, and the negroes had been of their estates respectively, and in the meantime to be hired out by the trustee, and the profits to be appropriated in like manner. Admit that ordinarily a *cestui que trust* having a joint interest with others, may call for a conveyance of so much of the legal estate, as is commensurate with the trust for him, so as to make him tenant in common with the trustee; yet the purposes of this trust forbid that. The legal estate would have been conveyed at once to the present *cestui que trust,* if it had been intended that they should have it undivided. The trust was created to prevent that. The property is in trust, to be divided. (178) Division then is the object, and that could not be effected at law, especially as there may be deaths and infancy in the case, which would prevent a division by contract. Besides that, the very inconveniences we have been considering were in the way; for if legal interests had been given to these numerous donees, the share of each might be seized for his or her debt, whatever detriment it caused to the others. The nature of the trust then requires that the trustee should not convey the undivided legal estate to any one or all of the *cestuis que trust,* but should after a division, made either by agreement or by decree, convey to each in severalty, the particular slaves allotted to them respectively. This is especially to be inferred from the manner in which the interests are given; not in any certain proportions expressed in the deed, but according to the statute of distributions, as if the slaves had come by succession from the brothers. This provision would probably make it necessary to take accounts of the estates of the brothers, and of advancements by them to their children, and almost render it impossible for the trustee to convey to each an undivided share of the legal title precisely corresponding with their portion of the trust. There could be no object in creating the trust but to keep the legal estate in one person, until a division could be made. Before a division the enjoyment of the *cestuis que trust* was not to be the ordinary one of having the possesssion, but that is to remain with the trustee, who is required to hire out the slaves. If the *cestui que trust* is not to have the possession of the thing by the express terms of the trust, it is conclusive that he cannot ask for the legal title from this trustee, because that would enable him to get the possession in spite of the others teeth. Until the division, one of the parties then cannot call for a conveyance; and by consequence, a purchaser at execution sale cannot divest the title of the trustee according to the statute.

I am also of opinion that the defendant has not, as husband, such an interest as can be taken in execution, or as could be recovered by him by suit. He has not reduced any part of the property into possession, so as to defeat the wife's (179) right of survivorship. It is not necessary to say how, for he has power over this interest, to dispose of it by contract. The inquiry is, what estate has he in it in the present state of the case, without any act done by him? It is not like the case of guardian and ward, where both the legal and equitable estate is in the female infant, and the guardian does not to any purpose hold against the ward, but is merely curator and holds for her. Here the trustee not only has the legal estate, but is bound to use it and does for the present use it, both against the husband and the wife. But if he did so against the husband alone, it would have the same effect in the case before us. The right of the wife is but an equitable chose in action, which the husband cannot recover without joining the wife, and which upon his death before recovery, would survive to her. The case does not indeed state whether the deed was made before or during coverture. If that make a difference, it must be taken against the plaintiff, who must show affirmatively every fact necessary to subject the property, because without that the defendant is not in Court. But I do not think the time material, because however it may be at law with respect to rights purely legal, this must be treated, even at law, as a court of equity treats the same subject as between the husband and wife, and the modern decisions conclusively establish, that the husband cannot recover an equitable interest of the wife, without uniting her with himself in the suit. This is the stronger here, if she be not entitled to a provision out of her equities; for that should make us more careful to preserve for her the right ofsurvivorship. As the husband could not alone sue for this interest, it cannot be attached for his debt; and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

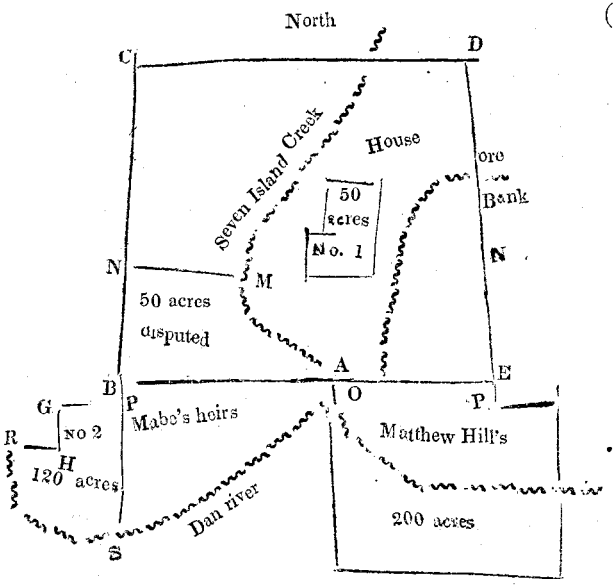
Cited: McKay v. Williams, 21 N. C., 406; *Gowing v. Rich,* 23 N. C., 557; *Coffield v. Collins,* 26 N. C., 492; *McGee v. Hussey,* 27 N. C., 257; *Battle v. Pettway, Ib.,* 579; *Patton v. Smith,* 29 N. C., 441; *Gaither v. Ballew,* 49 N. C., 490.

(180)

Den ex dem. SAMUEL ROGERS and others v. WILLIAM MABE.

1. From long and uninterrupted possession of land as owner, a grant will be presumed. This presumption is founded mainly upon the known inadequacy of human tribunals to ascertain the real truth of remote transactions, and does not depend upon a supposed correspondence between the fact and the presumption in each particular case, and its character is determined by its origin. It is not merely a presumption of fact which a jury *may* make, nor is it a presumption of law which can not be rebutted; but it is a presumption which the law requires, and the Court should direct the jury to make, unless proof is offered which shows the fact to be otherwise.
2. To raise this presumption between individuals twenty years is sufficient, and (in cases not within the Act of 1826, c. 28), less than twenty years is not: as against the State, the precise period is not determined, but forty years is certainly enough.
3. This presumption extends not only to grants and deeds, but to everything necessary to support the title of the possessor.
4. When, however, one enters originally not as owner, but under the title of another, even a very long possession will not raise this species of presumption; there, time however long, has only its usual and natural effect, as the foundation for an inference of fact which the jury may draw or not, as they may, or may not believe the fact in the particular case to compare with inference.
5. A call in a grant from a pond or a river, "*west up* the river to a *stake*," is in law equivalent to "*with* the river," and the line must pursue the course of the stream; this sense of the words might *possibly* be controlled by a call for a line of marked trees, or a visible and permanent marked corner, and a meaning thereby given to them equivalent to "*up*" not "*with* the river," but by no call less certain can they be controlled.
6. Where A purchases under an execution against B, takes a deed and on the same day conveys to B, though the purchase and conveyance be at the request of B, and merely to give him a color of title, without any money paid or received—the conveyance to B is a sufficient colorable title within the statute of limitations.
7. *It seems*, that a sheriff's deed gives by relation, color of title from the sale.
8. One tenant in common can not in an action against his co-tenant, be examined as a witness to defend the possession.

This was an action of EJECTMENT, tried in Stokes Superior Court, before his Honor Judge *Norwood*, in which the plaintiff claimed, and sought to recover possession of the tract marked on the diagram "50 acres No. 1," also of the tract marked "50 acres disputed," and of the land lying south of the last named tract, and included between the lines S B, B O and the river, of which the defendant was in the possession. The declaration stated a joint demise, and contained but one count. An order appeared on the record, allowing the plaintiffs to amend the



declaration, but no amendment appeared on the transcript to have been actually made. On the trial the plaintiff produced and gave in evidence a grant from the State to Thomas Rogers, as assignee of Alexander Martin, dated 5 November, 1795, for a tract of land, beginning "on the north bank of Dan River, a small distance below the mouth of Seven Island Creek, at Hill's northwest corner, running west, *up the river,* (182) two hundred and twenty poles to a stake, north two hundred and ninety poles to a black oak, east three hundred and seventy poles to a stake, south two hundred and ninety poles to a stake in Hill's line, then west to the beginning."

The beginning of the grant was shown to be at A; the course and distance of the final line, terminated at B, of the second line at C, where an old black oak corner was found, but no marked trees appeared between A and B, or between B and C, or the river bank. The lines B C and B E exactly corresponded in length with the calls of the grant, but the line C D was six poles too long, and D E six poles too short. The grantee Thomas Rogers, was the father of the lessors of the plaintiff, who were his only children and heirs at law. It was insisted on the part of the plaintiff that the true construction of those grants in law, was, that disregarding the course and distance, the river from A to S was the boundary, and thence the lines

S C D E, it being alleged that the call *"up the river"* was in law, exactly equivalent to "with the various courses of the river," and the jury were bound so to locate it.

The defendant gave in evidence a grant from the State to Robert Mabe, his ancestor, date 16 July, 1795, and covering the tract of 50 acres, No. 1; and proved that Robert Mabe was in 1794 living in a house situate on the 50 acre tract, B N M O, and that his plantation then covered part of that tract of land, extended nearly to the river, and had the appearance of a very old settlement, and that he and the defendant, as his heir at law, had continued the possession ever since; that there were old marks from R to H, and an old marked beach tree at M. The defendant further proved that Robert Mabe came to that neighborhood sixty-eight or sixty-nine years before the time of the trial, and settled on the river, that he some time after removed to the ore bank, and then to the river again, and that he and his descendants have ever since continued in possession of the plantation on the river. The defendant then showed by a record of the County Court, that Robert Mabe on 25 June, 1778, made an entry of 150 acres, including
(183) his improvements, to which a *caveat* was put in by Alexander Martin, and at May Session 1779, withdrawn. And the defendant showed that at March Session, 1807, a judgment was recovered against Robert Mabe, an execution issued thereupon, and that under this execution the sheriff sold the land bounded by the lines R, H, G, P, B, O, and the river, to one Gibson, who on the same day on which he received the sheriff's deed, being 2 June, 1810, conveyed the land to Robert Mabe. It appeared in evidence, that Gibson bought the land at the request of the sheriff and Mabe, and that no money was paid or received by Gibson. Thomas Rogers, the father of the lessors of the plaintiffs, died in 1809, and at the commencement of this suit, in 1826, one of the said lessors was of the age of 32 years, another of the age of 30, another of the age 38, and the other under the age of 21; and it also appeared that Thomas Rogers, in his life, and the lessors of the plaintiff since his death, have been in possssion, on a part of the land granted to him, but not within the boundaries of the tracts claimed by the defendant. The plaintiffs proved that Alexander Martin died in 1810, and before his death in a conversation with Robert Mabe, told him that he should not be interrupted in his possession during his life, and that afterwards Robert Mabe in a conversation with one James Martin, inquired of him, if he remembered the promise of Alexander Martin, stating as a reason for the inquiry, that Rogers threatened to sue him for the land.

Amongst other witnesses offered by the defendant, in proving his case was one Shelton, who had intermarried with one of the daughters of Robert Mabe, but was not a party to this suit. The examination of this witness was objected to by the plaintiff's counsel on the ground of interest, but the objection was overruled by the Judge, and the witness was examined.

Amongst other grounds taken by the plaintiff's counsel it was insisted that the conveyance from Gibson to Mabe was fraudulent and inoperative, because Mabe pretended (184) to hold under Martin, and so holding, obtained the deed solely to give himself a colorable title, within the statute of limitations.

The Judge instructed the jury that it was their duty to ascertain where the lines were, which were made by the surveyor, and intended to be described in the grant; that in ascertaining these boundaries there were several rules relied on as guides to assist them, but those rules were not fixed principles of law conclusive of them, but if there was another guide equally certain, or more certain, they might found their judgment on it. That when a grant called for natural boundaries, these should govern notwithstanding any variance from the course and distance—and so of marked lines and corners made at the time of the survey; but that where neither natural objects nor marked trees were called for, the grant should be located by the course and distance specified. That in this case, as the river made a curve between O and R, the description *"west up the river, to a stake,* and then north," was uncertain, and it was for the jury to ascertain whether the first corner was at B, or on the line opposite to B at S, and that in determining this they were at liberty to take into consideration the distances as proved, and their accordance with the calls of the grant.

The Judge further intimated to the jury that if Robert Mabe and his heirs had been forty or fifty years in quiet and peaceable possession of the land in dispute, claiming and using it as their own, and his entry covered it, the jury might if they thought proper, presume that a grant had issued on the entry, and if they found it had issued before 5 November, 1795, they should find for the defendant; that in connection, with the length of possession they might take into consideration the preferable right of Robert Mabe, to make an entry including his improvements; that he had made such entry, prosecuted his right till in 1799, all obstruction to his obtaining a grant was removed.

The Judge further instructed the jury that there was no color of title until the deed from Gibson to Robert Mabe which

was a sufficient color of title although the jury should believe from the evidence that it was obtained for that very purpose.

That in order to make the possession held under the
(185) deed operate to bar the title of the lessors of the plaintiff, it must be a possession as owner and adverse to the right of Rogers, and hence that if Mabe entered as the tenant of Rogers and held over, his subsequent possession would not become adverse until he did some act to change its character.

The jury under these instructions found a general verdict for the defendant, and the plaintiff appealed.

Hogg for plaintiff.
Winston for the defendant.

RUFFIN, C. J. The point principally argued in this case, is made upon the instruction of the Judge who tried the cause, that the jury might presume a grant to the defendant's ancestor.

The case upon which the instruction was given appears in the record to be this. Robert Mabe about 1763, settled on the land in dispute, which was then vacant and wild. He built houses, and opened a considerable plantation on it. After some time he removed to another place in the immediate neighborhood; and then back to his former habitation; since which time, he or his children, have continually occupied this land. The precise periods of those respective removals are not stated, which is to be regretted, as it is embarrassing to decide a question of this kind, upon general allegations. But it was certainly anterior to 1794, that Mabe went back, and probably several years before; because there is no evidence that anybody else ever occupied, and at that time the plantation which he had in cultivation was an old one, and appeared to have been cultivated many years. Indeed it is to be inferred from other parts of the case, that he had returned, and was in actual possession in 1778, and had been for seven years. In 1778 he made an entry of the land, to which Alexander Martin put in a caveat; which he withdrew in May 1779. A grant to Rogers issued in 1795, which covers part of the land claimed by
(186) Mabe, and purports to be founded on an entry made by A. Martin, and assigned to Rogers. The date of Martin's entry, or of the assignment of it is not given; nor are the grounds of his caveat stated.

On the part of the plaintiff there was evidence, that prior to 1810 (but when does not appear), *Martin* promised *Mabe*, that he should not be disturbed during his life; and that sub-

sequently *Mabe* asked a witness, whether he remembered it, assigning as a reason for wishing to know, that one of the lessors of the plaintiff threatened to sue him for the land.

The Court instructed the jury, that if *Mabe* and his heirs had been 40 or 50 years in peaceable possession, claiming and using the land as their own, the jury might, if they thought proper, presume a grant to have issued on the entry made by *Mabe;* and that if they found it to have issued before 5 November, 1795 (the date of the grant to *Rogers*), they ought to find for the defendant.

It is contended for the plaintiff, that the judge erred in thus leaving the case to the jury; first, because there was not sufficient in the evidence to authorize the presumption, that a grant had in fact issued; secondly, that the judge did not qualify his instruction by any reference to the transactions with *Alexander Martin;* and thirdly, that the jury should have been told, that they could not act on the presumption of a grant, unless they were satisfied, that it was in fact made.

The objection has been argued as if the Court had directed the jury, that they ought to make the presumption. But that is neither the tenor nor the meaning of the direction. Upon its face, it leaves the question, as being purely one of fact, to the jury. They were informed, that they might presume the grant, if they thought proper; which is an instruction, to find according to their belief of the truth of the case. The Court did not state the effect of the circumstances, if found by the jury to exist, as grounds of presumption; but left those circumstances themselves, if established to their satisfaction, as evidence to the jury, upon which they were to make their own inferences of fact, according to the intrinsic weight, to which, as circumstantial proof, they might, in their (187) judgment be entitled. Substantially the Court only said, that if the jury presumed, from the possession of the kind supposed, a grant to *Mabe*, they might find for the defendant, although the grant was not produced on the trial, nor the loss of it accounted for. Upon the charge, the verdict must therefore be considered as finding the very fact. If that be upon insufficient evidence, this Court cannot correct it; for that was the fault, not of the Judge, but of the jury, unless there was no evidence upon which the presumption of the fact could arise. That has not been, and could not be contended. The evidence certainly tended to establish the fact.

If the Court did not give a wrong construction in point of law, the omission in the summing up, to draw the attention of the jury specially to a particular circumstance, as a part

of the evidence, is not an error for which the judgment can be reversed. If a more particular notice of it was material to the party, he ought to have prayed it. But the Judge did substantially comply with the requisitions of the plaintiff. He stated to the jury, that the possession, to be a ground of presumption with them, must be found by them, to be quiet and peaceable, and on a claim and use of the land as the party's own; which directly presented the inquiry, whether the possession was adverse or was derived under *Martin's* title, as an antecedent one. In this view of the case, there is no ground of complaint by the plaintiff; because the improper inferences of the jury are not the subjects of review here; and also because the Judge left the case to the jury, much less favorably for the defendant, than it seems to us, he might have done.

It would perhaps be sufficient if the Court were upon this point to leave the case here. But as there is to be a new trial upon another ground, and the jury might not draw again the same conclusion of fact, it is deemed proper to terminate this litigation, as far as the expression of our opinion upon the nature and effect of the presumption upon this evi-
(188) dence, will have that effect.

We think that this is not a case in which the jury should have been told, that they might presume a grant as founded upon their belief that it issued; but should have been told, that they ought to presume it, unless from the other evidence they were satisfied that a grant did not issue.

In this State, time does not as yet constitute a title, which can be stated in pleading, to be such by prescription, unless it be of that peculiar kind created by statutes limiting actions or rights. In all other cases it is evidence. But its weight is different according to circumstances. Long possession is naturally evidence *per se,* that it is adverse to the rest of the world, and on a claim of right, and by consequence is pregnant proof of the right. A right thus shown is prescriptive in its nature. But as the common law recognizes but one manner of prescription, and within that no case falls unless the right has been enjoyed beyond the memory of man, it has, since that idea of prescription was adopted, been found necessary, and absolutely necessary, to allow to long possession, though within memory, a force and effect *proprio vigore,* by which certain inferences of fact are considered to be established upon a general principle, without waiting for those who ordinarily try facts, to announce that they really make that deduction of fact, from the possession as evidence of it. The rule has been so long acted on that is now settled. The Court does

not act upon the presumption as conclusive, but as being the next to it. The jury is directed that they ought to consider the fact that may be presumed, as existing unless the contrary be proved. The rule is founded partly upon the supposition that one man will not usurp the rights of another; and if he should, that the other will become cognizant of it, and seek to resume them, and ought to do so before the usurper has expended his substance, and employed his life in improving an estate which is to be taken from him. But it chiefly rests upon the consciousness of all human tribunals, of the imperfections and inadequacy of their capacity for the investigation of remote transactions; touching which satisfactory conclusions can seldom be arrived at, as being the real truth. Of the (189) proofs, many even of those in writing, will in the ordinary course of events be lost. Of the witnesses, most must be dead; and of the survivors the relation is not received with confidence; for it has not the ordinary claim to credence. It is given, when from the decay of the faculties, the most upright man may deceive himself as to his recollection; and one without integrity may safely deceive others, because there is none to contradict him. Public policy forbids all inquiry into such transactions; if upon the inquiry, rights are to be adjudged only as they are shown by affirmative proof to exist. Hence the necessity for presumption; and to derive utility from it, anything and everything is presumed in favor of him who has had a long possession and exclusive enjoyment, and against him who seeks to disturb it; and this as a matter of right, reason and moral certainty.

In *Reed v. Brookman* (3 Term 159), Mr. Justice *Buller* said, that for two hundred years past it had been considered that grants, letters patent, and even records should be presumed from mere length of time. An instance of presumption from time is familiar to every student, upon the issue of payment at or after the day, in debt on a bond. There are many cases, and the more numerous as we come down to our own times, in which the doctrine has been discussed and applied to the rights of property, both incorporeal and corporeal, at law and in equity. Examples are the bars of twenty years in suits for foreclosure or redemption of mortgages; which, to be sure, is said to be in analogy to the statute of limitations. But the period is not fixed by law; and in all cases, as was said in *Richard v. Williams* (7 Wheat. 109), the period deemed sufficient to raise the presumption in cases to which the statute does not apply is that fixed by the statute in cases of the like kind to which it does apply. It is manifest that the rule is nugatory,

unless the necessity which calls for it, authorizes the Courts, in proper cases, to lay it down, and the jury to respect
(190) it as a rule of the law. In the cases just adverted to, it has been so adopted. It is applied as a professional presumption to an existing controversy, as one of a class of cases, rather than given in as circumstantial evidence to the jury of the actual fact in each case. In *Elbridge v. Knott*, (Cowp. 215), Lord *Mansfield* not only said that a grant might be presumed from great length of possession, but that in many cases the Court had told the jury, they should presume it, or any thing, to support a long possession; and this not upon the idea that the jury believes, or that the Court thinks that they ought in the particular case to believe, that the grant had been made; but the fact is presumed from the principle of quieting possessions. And in a case before Lord *Erskine*, in which he treats on the effect of time, he declared that he did not act on it as raising a direct presumption of the fact from it, as evidence of the fact; but took the presumption, that might be made, for the fact, not because it proved the fact, but because the fact could not be proved. The weight of evidence is estimated then, not by its influence over the minds of the jury, but by a rule which has become a part of the law of evidence.

It is well established in England. In this country it is not so familiar, and especially in this State. Our origin is so recent, that there has been seldom an occasion calling for the application of the doctrine, more especially as the sales of land here are so frequent, that almost every possession is clothed with a deed, which renders a possession of seven years a conclusive bar against individuals, or one of twenty-one, against the State. But we are not without cases upon this subject. Several were cited at the bar from the courts of New York, and that of *Richard v. Williams* (7 Wheat. 59); *Pipkin v. Wynns*, 13 N. C., 402, recognizes it in this State, and adopts the rule as that of the law. At this term in *Wilson v. Wilson*, *ante* 154, this Court approved of a direction from the Court to the jury to presume a grant of an easement from a possession of twenty years or more. The act of 1826 (c. 28), is a legislative authority, that these are legal presumptions, and to be
(191) regarded with favor. That act treats some of the established presumptions from time as rules, and proper rules of law; and, without rendering them more conclusive in their nature, strengthens their operation by shortening the time necessary to raise them. I do not perceive a difference between corporeal and incorporeal things in this respect. But it has never been considered here, that the short period prescribed by

our statute of limitations, was sufficient *per se,* to raise the presumption; for there can seldom be a difficulty in giving evidence, either direct or bearing with ordinary certainty, on events occurring within seven or eight years. Twenty years seems to be a reasonable time, and as short as should be taken as the basis of the presumption against individuals; but I think that ought to be sufficient, and without saying what period exceeding twenty-one years, not accompanied by color of title, might raise it against the State, certainly the length of possession in this case must be sufficient if any be. Upon the instruction given, it must be assumed that the apparent chasms in the occupation were satisfactorily filled up to the jury, and the periods of the removal of Mabe so explained, as to leave a clear and continued occupation of upwards of forty years, and plain and consistent proof relating to so remote a transaction is not to be expected. But from the dates given, it seems to have been for sixty-three years, with the exception of the one interval of his removal. In such a case the presumption ought to stand unless it be clearly rebutted. The Court leans to the presumtion, and requires the evidence offered to repel it, to show the fact to be otherwise. There is much to strengthen it in the other facts. The land was vacant when *Mabe* settled on it. He entered it and the purchase money was then payable to the entry-taker. Apparently then he was entitled to a grant, and entitled to it not only as against the State, but also in preference to all other persons. None contested it but *Martin,* and the ground of his *caveat* does not appear. But to take it most strongly for the plaintiff, it must be supposed, as no actual possession is shown in *Martin,* that it was founded (192) in a former entry in Lord *Granville's* office, or a prior one in the State's office, under the provisions of the entry law of 1777; which did not determine which amongst these several classes of claimants should be preferred. But the act of 1779, which passed in January of that year, provided that the preference should be given to the settler, who had been in possession for seven years, of land within the entry of another. The retracting of the *caveat* immediately after the passage of the act is evidence of the recognition by *Martin,* of the superior right of *Mabe,* as founded on a prior and adequate possession. *Mabe* then entered under the State and not under *Martin,* held not merely by the acquiescence of *Martin,* but against him, and against his will.

If indeed Mabe's entry had been upon Martin's title, or upon a right in himself consistent with the title of Martin, as an antecedent one, and that now asserted by the plaintiff adversely

to Mabe be the title of Martin, there would be nothing in the case on which the Court could say there was a presumption of a conveyance from Martin or Rogers to Mabe. In a case of that kind an actual conveyance must be shown, or presumed by the jury; and there ought to be evidence that at some time the possession became adverse, and was thereafter so long continued, as to induce the actual belief that there was a subsequent deed. Such was the case of *Fenwick v. Reed,* 7 E. C. L., 79, cited for the plaintiff. The defendant claimed by assignment from a creditor of the former owner, who entered into possession under an agreement with the debtor, that he should hold the land until his debt was paid. The title deeds were retained by the former owner, and the agreement proved and the family of the debtor had, upwards of thirty years after the agreement, paid ecclesiastical dues which exonerated from tithes the land in the hands of the occupier. The origin of the possession was unequivocally upon the title then vested in the plaintiff, and for a particular estate, and that possession could not be set up as a presumption that a conveyance had been subsequently made in fee, without showing some fact that
(193) would make it adverse a great while before, and also a continuance of it, after that, for such a length of time as would induce the jury to believe that a conveyance had been actually made, which belief was the more difficult in that case, because the necessary conveyance to pass the fee was a fine, of which every memorial was not likely to be lost.

But in this case the origin of the possession was entirely different—not connected at all with Martin's title and held against it. In such a case, even if the transaction with Martin was before his assignment to Rogers, it would be difficult to allow any operation to it, unless it was proved in such terms as would clearly give it the character of an attornment, which seems altogether incredible as being entirely inconsistent with the contest on the *caveat,* and the result of that proceeding. It would rather seem that what is called the promise of Martin was the vaunt of a vanquished man, who did not like to acknowledge the victory of his adversary, than the acknowledgment of Mabe that his title was inferior to his adversary's. If however the period of the transaction had been fixed and the jury could infer from it, notwithstanding the evidence of record, that Mabe clearly recognized Martin's title and therefore took no steps to complete his own, then it would have been a question of fact for the jury, whether a grant had subsequently actually issued to Mabe, or whether Martin or Rogers had conveyed to him. But the plaintiff in the case made by him could not ask benefit from

that principle, because it does not appear that the promise of Martin was made prior to his assignment, or had any connection with the title now vested in the lessor of the plaintiff. For the want of that there was nothing to repel the presumption, and it ought to have been laid down to the jury unqualifiedly as producing a legal inference, that a grant had issued to Mabe on his entry made in 1778, or on some other. It is the opinion of the Court therefore, that in the instruction given, there was no error as against the plaintiff.

This opinion would render it unnecessary to consider (194) the exception to the charge of the Judge upon the question of boundary; because the jury did not find their verdict upon that part of the case, as appears from the verdict being generally for the defendant, although the patent to Rogers, under any construction of it, covers a part of the land claimed by the defendant. But as there is to be a new trial upon another point, it may be our duty to decide this point also, for the purpose of narrowing the controversy upon the next trial.

We have no difficulty upon the construction of the patent, and must say that our opinion does not concur with that of the Judge of the Superior Court. If the call of the grant be for the river, it is a settled rule that the river is the boundary. The words are "thence west up the river 220 poles to a stake," which the Judge considered uncertain, and therefore left it to the jury to presume that a line was actually run according to the course; and in substance, instructed them that such line, if found by them to have been run, was the boundary. There was nothing shown here as marked trees on the line, or at the corner, to control the calls of the deed, nothing but a stake being called for. The course and distance therefore, upon legal principles must govern, if there be no call for another object, and so the jury should have been instructed. But if there be a call for the river, upon the like principle, the instruction should have been that the deed extended to the river. The Court considers it settled upon authority, that "up the river" is the same as "along the river," unless there be something else besides course and distance to control it. In *Hartsfield v. Westbrook*, 2 N. C., 258, "thence down the swamp," was held to mean "along the swamp." In that case no course was given, and for that reason the argument was that a direct line from the corners called for in the deed was the boundary, but it was held otherwise. But to *Smith v. Auldridge*, 3 N. C., 382, the description was "thence, south 50 degrees east down the creek to a white oak," and the question was whether the creek or a straight line from the white oak to the preceding corner was the boundary, and it was held the former. We believe that these

cases have since governed many others. These words might possibly be controlled *by a call* in the grant for a line of
(195) marked trees, or a visible and permanent marked corner, as a stone or a tree, found and identified, and not standing on the river; as that might show that they were used only to denote the general direction of the line, subject to the restriction rendered necessary by the specific call for other permanent *termini* found to be *up*, but not *on* the river. Upon the face of the deed, and state of the evidence, the river is the boundary by the judicial exposition; and the Superior Court erred, as we think, in not giving it to the jury.

A further exception is taken to the opinion of the Court upon the operation of the deeds from the sheriff to Gibson, and from the latter to Mabe. It is contended that they do not constitute color of title; because there was no change of possession, and because they were taken in fraud of Martin, under whom Mabe held.

Those deeds it is true, could not change the character of the possession, as betwen landlord and tenant. But that is a very different question from the present, which is whether they exhibit a colorable title, so that if the possession was adverse, they would denote that the possessor had some estate on which his possession was grounded and not a mere naked possession. If one in possession take a deed in fee, from another who has no right, that is a colorable title, which apparently authorizes the subsequent possession. If indeed he was the tenant of another, the deed would not *per se*, as between them, operate as an ouster of the landlord, or make the possession of the tenant adverse. Still there would be a color of right. But this is not a mere continuance to get a proper title; at least the Court is not at liberty to consider it so upon the facts stated. It may be argued, that as no money was paid by Gibson, the debt for which the sale was made was not a true one. But that is not stated to be the fact; and it may well be that it was and that Gibson purchased as the friend of Mabe to give him
(196) time to raise the money, and that he did raise it himself and satisfy the creditor. That would rebut every imputation of fraud, and the deed would then be a plain declaration to the world that he claimed the fee. The Superior Court held that the sheriff's sale was color of title only from the execution of the deed. To that extent at least we think it must be carried. Whether the deed when made, did not by relation constitute color from the sale, as it constitutes title from that time so as to overreach an assignment of dower subsequent to the sale, is a question upon the affirmative of which much might be said. Connecting the deed, the execution, sale and

return of the sheriff together, they would seem at least as plausible documents of title, as those enumerated in the first section of the act of 1715, and that of 1791, from which we get our ideas of color. But the case does not call for a decision of the question, and therefore it is left to be further considered.

We think the deeds are color of title. It results from this opinion, that all the lessors of the plaintiff, except the infant, are barred by the statute of limitations; and upon the authority of *Hoyle v. Stowe,* 13 N. C., 318, as there is but one count, upon a joint demise, the plaintiff could not have judgment for even the infant's share. It appears, however, in the record, that the plaintiff obtained leave to amend the declaration upon payment of costs, and we presume it was in this respect; which prevents the Court from affirming the judgment on this ground.

The only remaining exception is to the admission of the witness Shelton. The point to which he was examined is not stated, and therefore there must be a new trial if he was incompetent for any purpose. We think he was incompetent. He married a co-heiress with the defendant, who claims the land, and is in possession as heir of their father. There has been no partition, and the wife is not stated to be dead, and is therefore taken to be living. The witness and the defendant are then tenants in common, and the latter is the tenant in possession, and the plaintiff claims the whole land against both. The ground upon which the Judge admitted the witness is, that he was not a party to the suit. But there are many cases in which persons not parties in ejectment, are not com- (197) petent witnesses. He who is bound in a warranty to one of the parties cannot be a witness in support of the title he is to make good. Nor can a landlord testify for his tenant. Nor we think, one tenant in common for another. They are all interested in the event of the suit, and not barely in the question. The possession of the defendant is *prima facie* that of the witness, and the recovery in the action would change the possession, and put out the person upon whom the witness has a right to call for an account as his bailiff. For this reason and for this alone, we think the judgment must be reversed and a new trial granted.

PER CURIAM. Judgment reversed.

Cited: Reed v. Earnhart, 32 N. C., 528; *Kron v. Hinson,* 53 N. C., 348; *McConnell v. McConnell,* 64 N. C., 344; *Benbow v. Robbins,* 71 N. C., 339; *Davis v. McArther,* 78 N. C., 359; *Logan v. Fitzgerald,* 87 N. C., 313; *Baxter v. Wilson,* 95 N. C., 144; *Avent v. Arrington,* 105 N. C., 393; *Henning v. Warner,* 109 N. C., 410; *Hawkins v. Cedar Works,* 122 N. C., 90.

Doe on dem. JOHN O'DANIEL v. JOHN CRAWFORD.

1. Indebtedness at the time of making a voluntary conveyance of part only of the grantor's property is, in respect to *subsequent* creditors seeking satisfaction of the property conveyed, only evidence of fraud, the consideration of which belongs to the jury; but in respect to prior creditors whose debts can be otherwise satisfied, it constitutes fraud in law, to be declared by the Court.
2. A voluntary conveyance will never be upheld to defeat a *prior* creditor, whatever be the amount of his demand; although the grantor reserve property amply sufficient to satisfy the debt, and the necessity of resorting to that conveyed, arise from the wasting of that reserved, many years after the conveyance.
3. Nor is there any exception from these principles in favor of dispositions made by parents in advancement of children; the principle is universal in its application, that the voluntary conveyance yields to the *prior* debt so far as is necessary to its satisfaction.
4. The functions of the Court and jury in questions of fraud considered and distinguished, and the cases of *Morgan v. McClelland*, 14 N. C., 83; *Mordecai v. Parker*, *Ib.*, 427, and the cases in which this Court held the retaining of possession by a vendor, but evidence to be left to the jury, and not a fact *per se*, establishing fraud in law, referred to and affirmed.

EJECTMENT tried in Orange Superior Court, at Autumn Term 1832, before *Martin, J.*

Both parties claimed title to the premises in dispute, (198) under one Henry O'Daniel, and on the trial, the plaintiff produced a deed made 11 April, 1809, by which Henry O'Daniel, in consideration of love and affection, and of five shillings recited to have been paid, granted, bargained and sold the premises to several of his children (of whom the lessor of the plaintiff was one), in the usual form as far as the *habendum*, which was in these words: "to have and hold the said land with the appurtenances, unto him, the said Henry O'Daniel, his heirs and assigns forever, to the only proper use, benefit and behoof of them, the said John, etc. (naming the grantees), their heirs and assignees, from"—then followed a covenant of general warranty, after which was this clause: "with making this reserve, that is to say, the land is to remain mine till my death, and if I should marry, be her who she may, I leave her my small house, that stands over the cellar, with an acre lot of ground, with the privilege of water and wood to support it, and firewood for her, and the fifth part of the orchard during her life or widowhood, and at her death or marriage, the whole is to return to my son."

The defendant showed sundry judgments and executions against Henry O'Daniel, a levy by the sheriff, a sale at which

the defendant became the purchaser, and a deed from the sheriff. One of these judgments was rendered in 1822, for the sum of three dollars principal, and twelve dollars interest, being the balance due upon a bond executed by Henry O'Daniel in May, 1808, for £12 10. This was the only debt shown to have been due before the execution of the conveyance under which the plaintiff claimed; the other judgments being founded upon debts contracted in 1822.

To encounter the defendant's case, the plaintiff proved that previously to the execution of the conveyance, Henry O'Daniel had declared that he intended to convey the land to his children after his death, because they had assisted him in paying for it, and also proved that they by their labor, had contributed towards such payment.

The plaintiff also proved that at the time of the conveyance, and for several years thereafter, H. O'Dan- (199) iel was in possession of personal property of the value of $500, all of which however had been sold, consumed or wasted, before the sale by the sheriff.

The presiding Judge after remarking to the jury, that the question had been raised in argument, how far a person indebted was permitted to dispose of his property by voluntary conveyance—stated, that it was a general principle that a man should be *just* before he was permitted to be *generous*. If he was indebted, and voluntarily conveyed such a portion of his estate as left an insufficiency for the payment of his debts, that such conveyance was inoperative as to the debts which he then owed. If he was indebted and disposed of a part of his property by voluntary conveyances, leaving enough to satisfy the claims of his creditors, but by some casualty or accident the property reserved should be destroyed, when there had not been any delay in the creditors in endeavoring to obtain their debts, and no improper indulgence given by them, that a voluntary conveyance under such circumstances would be invalid to defeat such debts.

The plaintiff's counsel then moved the Court to instruct the jury, that a voluntary conveyance was valid against creditors, unless the conveyor was insolvent at the time, or in failing circumstances, which instruction the Judge declined to give, but did instruct the jury that where a debtor making a voluntary conveyance of a part of his estate, reserved to himself a sufficient property to pay his debts, such conveyance was effectual against those who were his creditors at the time of the conveyance. And that in the case before them, if the conveyance was *bona fide*, and the grantor reserved to himself at the time,

property sufficient to pay his debts, his life estate reserved being liable therefor, then the deed under which the plaintiff claimed, was effectual to pass the remainder in the premises, notwithstanding the small debt proven to have been due at the time.

Under these instructions the jury found for the defendant, and judgment being rendered upon the verdict, the plaintiff appealed to this Court, where the cause was twice argued,
(200) once at June term last, and once during the present term, by *Winston* for the plaintiff; *Nash, contra.*

The Court being divided in opinion, the Judges delivered their judgments *seriatim,* as follows:

GASTON, J. This was an action of ejectment, and upon the trial the plaintiff endeavored to show a title in his lessor by a deed from Henry O'Daniel to his children, and the defendant set up a title under a sale and conveyance from the sheriff upon executions issued against Henry O'Daniel subsequent to the delivery of this deed. The controversy turned mainly upon the question whether O'Daniel's deed was fraudulent and void as against the creditors in these executions. The jury found a verdict for the defendant, and judgment having been rendered accordingly, the plaintiff appealed to this Court.

We have not the right to decide, nor the means of knowing whether the verdict of the jury was correct or incorrect. The facts testified are brought before us so far only as to enable us to see the application of the charge of the Judge, and to ascertain whether in the instructions given, or in the instructions refused, any error has been committed which might have led the jury to an improper conclusion. The appellant excepts to a part of the charge as erroneous in law, and also complains that the Judge refused to give certain instructions which were prayed for by him, and which in law ought to have been given.

The part of the charge excepted to is in these words: "That the question had been raised in the argument how far a person indebted, was permitted to dispose of his property by a voluntary conveyance—that it was a general principle that a man should be just before he was generous. If he was indebted and voluntarily conveyed such a portion of his estate as left an insufficiency for the payment of his debts, that such conveyance was inoperative as to the debts which he then owed. If he was indebted and disposed of a part of his property by volun-
(201) tary conveyances, leaving enough to satisfy the claims of his creditors, but by some casualty or accident the property reserved should be destroyed, when there had not been any

delay in the creditors endeavoring to obtain their debts, and no improper indulgence given by them, that a voluntary conveyance under such circumstances would be invalid to defeat such debts." In a subsequent part of the charge after declining to give the instructions asked for by the plaintiff, the Judge laid down the above rule in a form more favorable to the voluntary donee. I do not however deem it necessary to examine the effect of this subsequent modification, because upon deliberate reflection, I am satisfied that the plaintiff has no cause of complaint against the part of the charge excepted to, and that no rule more favorable to voluntary conveyances than the rule there stated can be tolerated, without violence to morality, public policy and long established law.

That the obligations of justice are superior to the claims of affection, and that no man can rightfully bestow a favor at the expense of his creditor, is not questioned in the ingenious and able argument which has been urged on the part of the appellant. But it is asked may not these obligations and claims be reconciled—may not justice and generosity be both consulted—and is not this harmonious discharge of both classes of duty provided for, when the donor takes care, while giving away a part of his property, to reserve what will probably be sufficient to answer the demands of his creditors? To the morality of such an arrangement, it seems to me there are obvious and unanswerable objections. It does not provide for the discharge of duties of different grades in their relative order. It does not even place the demands of right on a footing with the claims for bounty, but inverts the order for moral preference. It secures the latter—confessedly of inferior and imperfect obligation—beyond the correction of mistake and the reach of casualty, while it exposes the former—those of superior and perfect obligation—to all the dangers arising from error of judgment and the contingencies of time and mischance.

If, contrary to probability, enough has not in fact been (202) reserved for the creditor, and either he must lose the debt or the donee be disappointed of the gift, can it be a question of morals on whom the loss should fall? In the estimate of conscience no man owns more than what remains after the satisfaction of the just dues to others, and every donation which he makes is of the property of his creditor if by such gift they are defeated. The duty of the debtor is to *pay* his creditor if he have the ability to do so. The donee ought not to hold, and honestly can not hold the property given, if it be needed for the payment of a creditor of the donor prior to the gift. Public policy is in this respect, as it always ought to be, con-

sistent with the injunctions of morality and will not admit of the adoption of a rule less strict or precise. That credit which is indispensable for the commerce of life, can scarcely be commanded in any country, where a debtor has the power to jeopard an existing debt by the gratuitous alienation of his effects. It would be strange if the common law, which has been termed the perfection of reason, had not recognized these dictates of justice and maxims of policy. In the progress of society, when with the refinements of life the artifices of deceit had greatly multiplied, it might well have been deemed expedient by the legislative authority to interfere with positive enactments, the more explicitly to denounce, and the more effectually to embarrass and defeat contrivances at unfair alienation, which threatened injury to creditors and purchasers. The well-known statutes of the 13 Elizabeth, almost expressly re-enacted by our Act of 1715, and of 27 Elizabeth, were enacted for this end. But Lord *Coke* calls on the student to notice with respect to *the first* of these statutes, that it uses the words "declared, ordained and enacted," and remarks "by force of which word *declared* it appeareth what the law was before the making of the statute." Co. Lit., 76 *a*, 290 *b*. Lord *Mansfield* observes in the case of *Cadogan v. Kennett,* Cowper, 434, "that the principles and rules of the common law as now universally known and understood, are so strong against fraud in every shape that the common law was calculated to attain every end proposed by
(203) these statutes." Whether the observation of this great Judge be correct or not in its full extent, particularly in reference to the statute of 27 Elizabeth, there can be little doubt, and so it has been declared by this Court in *Morgan v. McClelland,* 14 N. C., 83, to be perfectly correct with respect to alienations attempted against existing rights. Certainly ever since the statute of 13 Elizabeth either upon common law principles or by construction of that statute, a voluntary disposition of property has always been held void against a prior creditor thereby attempted to be defeated.

But it has been here insisted, and the Judge below was required by the plaintiff so to instruct the jury, that this doctrine was subject to a very important modification overlooked and disregarded indeed in many decisions and elementary treatises, but unequivocally declared in certain late adjudications of English Chancellors. It is said that these adjudications clearly recognize the principle, that a gift to a child or any other disposition founded on a consideration of blood or affection may be permitted to disappoint a prior creditor, if at the time of the gift the donor or settler was not insolvent or largely

indebted. In my judgment no such principle is asserted or implied in any of these adjudications. Before we enter upon the examination of these cases, it may not be amiss to state that although a Court of Equity generally claims and exercises jurisdiction in matters of fraud, it is not every case of a conveyance which is fraudulent as against creditors or purchasers, which is a fit subject for the relief of that Court. According to the distinction taken by Lord *Hardwicke,* in *Burnett v. Musgrove* (2 Vesey, 51), where a voluntary conveyance is made without *actual* fraud, a Court of Equity will say to him who complains of it, take your remedy at law; but whenever the conveyance is attended with actual fraud, though the possession may be recovered by ejectment, a Court of Equity will entertain a bill to set aside a conveyance—which is, as he expresses it, "a distinction between actual fraud and fraud presumed only from the conveyance being voluntary." The case of *Nash v. Wilkinson,* and the others relied upon by the (204) appellant's counsel were on bills brought by subsequent creditors to have conveyances set aside as fraudulent, and the property applied to the satisfaction of the debts of the settler or donor. In such bills the complainants usually charge that the person making the conveyance was indebted at the time of the voluntary conveyance, and must allege that the conveyance was made with intent to defeat, hinder or delay creditors. If they succeed in showing this fraudulent purpose, the settlement is avoided, the property becomes assets and all the creditors are permitted to come in upon this property for the satisfaction of their demands. The *intent* to hinder and delay a creditor is sufficient, and it is not necessary to show that such intent was prosecuted with success. If in truth there be prior creditors yet unsatisfied, and who have no means of satisfaction except out of the property attempted to be given away, and it is asked what is then the rule of a Court of Equity, in any case fit for the exercise of its jurisdiction, I answer in the language of Lord *Hardwicke* (*Townsend v. Windham,* 2 Ves., 10), "I knew of no case on 13 Elizabeth where a man indebted at the time makes a voluntary conveyance to a child and dies indebted, but that it shall be considered a part of his estate for the benefit of his creditors." But if such prior creditors have been actually paid off, the complainants may nevertheless insist that the conveyance was made with an actual intent to defeat them, or that it was made with an intent to defeat subsequent creditors or some of them. To establish or repel either of these allegations, the degree of indebtedness of the settler, and his pecuniary ability, at the time of the conveyance, circumstances

attending the transaction itself, and furnishing an indication of the motives which induced it, become very interesting matters of inquiry. Some of the Chancellors will not draw an inference of fraudulent intent in such a case from an embarrassment short of what is tantamount to insolvency, while others consider a large or a considerable indebtedness as furnishing
(205) sufficient evidence of this intent. But it is believed that no adjudication of an English Chancellor, no *dictum* of a Judge in an English Court of Equity, can be found, which warrants the idea that a voluntary conveyance to a child will be upheld to defeat a prior creditor whatever may be the amount of his demand.

The decisions in courts of law, in relation to conveyances, alleged to be in fraud of creditors, are in precise conformity with those asserted in equity. The law annuls not voluntary conveyances as such, but fraudulent conveyances. Conveyances are not necessarily fraudulent because they are voluntary, nor are they necessarily fair because made on valuable consideration; but a voluntary conveyance is necessary and in law fraudulent when opposed to the claim of a prior creditor. Where the creditors who allege an intent to defraud, are subsequent to the gratuitous alienation, there the language of Lord *Mansfield* is pertinent and applicable. "A voluntary conveyance may be good against creditors notwithstanding its being voluntary. The circumstance of a man being indebted at the time, is an *argument* of fraud, but the question is whether the act done, is a *bona fide* transaction, or a trick and contrivance to defeat creditors." (Cowper, 434.) But where the controversy is between a prior creditor and a voluntary donee, where such prior creditor must lose his debt if the gift be held valid, the language of the Judges in *Nunn v. Wilsmore,* 8 Term, 521, proclaims the established rule, "if the deed be voluntary *the law* says it is fraudulent." A gift as against such a creditor seems to me as fraudulent and void at common law, as an alienation for value after the *teste* of an execution against a judgment creditor. The tribunal which ascertains facts, is not needed to pass on the question of actual intent in the one case more than in the other. The fact itself, that the creditor is thereby hindered in the language of this Court, in *Mordecai v. Parker,* 13 N. C., 427, "establishes the intent and nothing can be heard against it." A proper construction of the statute brings me to the same result. Every gift of a part of a debtor's
(206) property by lessening the fund on which his then existing creditors rely for payment, has a necessary tendency to hinder and delay them in the collection of their just dues and

demands. The law regards every act of a rational being as done with intent to accomplish an effect which it has a tendency to produce, when that effect is actually produced by it. A gift therefore of a debtor's property, set up to defeat a creditor in the collection of his demand, comes within the enacting words of the statute, and although it may not have been for a positively dishonest purpose, it cannot be brought within the proviso, for that protects such only as are made *bona fide* and for a consideration of value.

The rule thus asserted seems to be regarded on the part of the appellant as harsh and unfeeling. If however it be the rule of law, it must, however rigorous, be inflexibly maintained. But in truth, is it as a general rule, rigorous? And if so, against whom? It establishes no more than that he who would give away property, and he who would hold what is attempted to be given, when the transaction endangers existing rights, must at their peril take care to secure these rights from injury. If the alienation permitted to stand will defeat such rights, an honest donor cannot complain that the law will not permit such a result, but deny efficacy to his heedless act. Has the donee a right to complain? If the debt were large, it seems to be admitted that the rule would operate no injustice; and if it be small, can it be any great hardship on him who has received a bounty to relieve the property from the trifling incumbrance with which it was burthened? Thus may justice and liberality be properly reconciled, and the claims of affection receive regard without violence to rights of higher obligation.

It has not been denied by the counsel for the appellant, if a voluntary settlement is necessarily fraudulent as against a prior creditor, the Judge was right in laying down this position as a principle of law. It may not be amiss, however, to state that where certain acts are regarded only (207) as badges of fraud, the conclusion becomes then a question of actual intent which cannot be passed upon except through the intervention of the jury. So this Court has ultimately decided on the much vexed controversy, whether a possession of the vendor or donor, inconsistent with the terms of the conveyance, be a fraud in law, or only evidence of a fraudulent design. There is no disposition to arraign or to question that determination. The right of the jury to pass on every question of fact, has been and ever will be guarded in this Court with jealous care. But the law which arises upon facts the institutions of our country have wisely confided to another tribunal, and this Court is bound by the most sacred obligations to take

care that the duty of administering that law shall be exercised by the appropriate tribunal. There is no other mode by which we can rationally hope to preserve the law of the land, what it ought to be, a permanent, uniform and universal rule of action. Any error of this tribunal may be deliberately and solemnly reviewed and corrected, and thus in a great degree, and to most practical purposes, may be stayed those fluctuations from which no human establishments can be absolutely exempt. If by a series of decisions in this country, and in that of our ancestors, for more than two centuries, it has been invariably held, as I fully believe it has, that a debtor shall not be permitted to defeat an existing creditor by a gratuitous disposition of his effects, then surely this doctrine has become a rule of property which must govern all such dispositions, and is part of the established law of the land. Every alienation after the *teste* of an execution endangers the rights of a judgment creditor, and therefore by the common law, was regarded and is still regarded with us as unavailing against such rights. Every gratuitious alienation endangers the rights of existing creditors, and therefore shall not impede the assertion of these rights. The law will not permit such alienation to postpone those whom it orders to be preferred. The attempt to oppose these *acts* to those *rights,* the law prohibits as a fraud, and it would
(208) be faithless to itself, if it did not enforce this prohibition by denying all efficacy to the forbidden act.

I am of opinion that the plaintiff has not sustained his exceptions to the charge of the Judge, and that the judgment appealed from ought to be affirmed.

RUFFIN, C. J. As I concur in the opinion delivered by my brother GASTON, I should be satisfied with merely saying that were the question one of less consequence than it is. But upon a subject of such universal interest, involving the rights and security of creditors, I think it useful that the opinions of all the Judges should be fully known; and therefore that it is proper for me to say, that I entirely concur both in his reasons and in the conclusions to which they have led him.

I wish also to state, that for the judgment the Court is now giving we have the authority of the clear opinion of Chief Justice HENDERSON; who heard the arguments of this case at the last term and expressed himself strongly that no construction could be put on the statute but one which absolutely avoids, as against prior creditors, conveyances not founded on a valuable consideration, without rendering the rights of creditors precarious—a danger which it is the sole object of the statute to obviate.

I will add a few observations upon the arguments at the bar for the plaintiff. It was admitted that if a donor be insolvent or in embarrassed circumstances, his gift is void and must be so pronounced by the Court; upon the ground, that the circumstances attending the transaction itself, incontestably prove the intent. But it is said that no intent to defraud can be, or rather is necessarily to be collected, when the donor is not embarrassed and his insolvency takes place long after the gift, because that circumstance occurring subsequently might never have happened and was not foreseen nor contemplated by the parties, and therefore is not evidence that the covinous purpose existed at time of the conveyance, and it is to the intent then and then only we are to look.

I agree that the fraudulent intent must move the parties to make the conveyance or exist in their minds at the time of its creation. But I cannot assent to the con- (203) clusion, that such an intent did not exist or may not have existed, if the donor reserved property more than adequate to pay all the debts he then owed. On the contrary it seems to me that what I consider the fraudulent intent is exhibited equally in both cases. What is a fraudulent intent, as described in the statute and by what acts is it to be manifested? It is, to make a conveyance which may delay or hinder a creditor and to delay or hinder him. Now this is the necessary effect of every conveyance of a debtor's property, and therefore, necessarily, the intent is that it should have that effect. The end in view must be to make the thing conveyed cease to be the property of him who conveys and become the property of him to whom it is conveyed, consequently to withdraw it from the creditor. There cannot be a conveyance, even one for value, into which this intent does not enter. Hence the statute after enacting that all conveyances made with such intent shall be void, by the proviso, excepts from the operation of that enactment conveyances made *bona fide* and upon good, that is, valuable consideration. In such case the price is substituted for the thing conveyed; and the intent to withdraw the particular property although actually existing is not *prima facie* injurious to the creditor. But if there be *mala fides* that is, the further and distinct intention that the price, though an adequate one, shall not efficiently, for the purposes of the creditor, be a substitute for the property, but shall be so disposed of as to be beyond his reach; then a conveyance for value is also avoided by the first broad words of the statute, and is not saved by falling within the proviso. Such must be the case with every conveyance not made upon valuable consideration. It must be founded upon a design to

exempt the estate from the claim of the creditor, for the act of making the conveyance can arise from no other intent, and inasmuch as no other fund replaces the property so intended to be exempted, that intent is injurious to the unsatisfied creditor and amounts to covin within the statute. To set up the deed against the creditor, if it be effectual, hinders and (210) defeats him. To make title under it in the donee and to set it up against all the world was the very purpose of the deed. We cannot say that the parties intended to make the deed more than that it should be used in that way. Then if it was intended to constitute title in the donee and that title would defeat the creditor, the intention of making the deed must be to defeat him, which intention can be negatived only by the donee's paying the debt. I grant that there is a difference between conveyances by insolvent and solvent donors; but it does not consist in any difference of the intention of the parties as to the use to be made of the deed as a hindrance to the creditor. It consists only in the time when that use will be made of it. In both cases the purpose is to allege it against the creditor, though he thereby lose his debt, which is the fraudulent intent. In the former it is in contemplation to make that use of it immediately and absolutely to defeat the creditor, and this consequence follows so directly that it is taken to be the sole object of the conveyance. Hence that was *the* intent of it. In the latter case, it is obvious that such was not the sole purpose, because the debtor has other means of paying. But it is *a* purpose of it. The intention is to set up the deed against the creditor, whatever loss it may produce to him. It is not supposed, it is true, that it will be immediately injurious to the creditor; for if he receive his debt from the donor or raise it out of his other property, which the parties expect, it will not prove injurious. But should that turn out otherwise, do not the parties mean that the donee shall, nevertheless, *then* insist on his deed and oppose it to the creditor? And is not that necessarily the intention at the making of the deed and on which it was made? It results in this: that the parties do not contemplate a use of the deed, which will presently work a loss to the creditor, but only such a one as will, in certain events have that operation. The intent of the deed is certain; the injurious effect contingent. The solvency or insolvency of the donor is not therefore the test of the intention; whether it be to hinder the creditors or not. It is only evidence of the (211) expectations of the parties as to the period when they would be under the necessity of giving that effect, practically to the deed. An express intent, different from that I

have described cannot be required; for that would be to make a gift by an insolvent valid, if the donee was ignorant of the donor's debt.

It will be observed, that I consider in reference to an existing debt, the intent to be inseparable from the act; and therefore I conceive the law so pronounces it through the Court. For it is not clearer that the parties intended that the conveyance should pass the property to the donee, than that it should bar the right of the creditor to satisfaction out of that property, which is an intention that he should be barred altogether, should it so happen that the debtor has not or shall not have other property, and such an intention in reference to either of those states of facts satisfies the statute.

As to subsequent creditors I cannot express myself more to my own satisfaction than Judge GASTON has already done.

DANIEL, J. The defendant in this case resists the granting a new trial on two grounds. First, because the paper under which the lessor of the plaintiff sets up title to the land, is not a deed, but a testamentary writing, and should have been proven, as wills which pass real estate are required by law to be proven. Secondly, that if the Court should consider it a deed; it was fraudulent as to the persons who were creditors of Henry O'Daniel at the time of its execution, and being declared fraudulent as to them, the law will make it fraudulent and void, as to subsequent creditors, and those who claim under them. I do not think the paper can be considered testamentary. I admit the form of the instrument is an immaterial circumstance, if the Court can collect from the writing that the maker intended it should be testamentary. (I Phil. 1.) But I am unable to discover such an intention in the maker of the instrument. The maker has reserved to himself a life-estate in the land—a circumstance which strongly repels any- (212) thing like an intention to make the instrument operate as a will. No executor is appointed, there is in it a consideration mentioned, and the maker in person acknowledged the instrument in open court to be his deed. I am of the opinion that the instrument is not a will, but a deed; a covenant to stand seized, which will pass the land to the remaindermen, under and by the statute of uses, if it is not a fraudulent transaction.

The second point to be discussed, is whether the deed was fraudulent as to the creditors of the grantor. H. O'Daniel had two creditors at the time the deed was by him executed, the sum due to one of them was £12 10; the sum due to the other is not known.

Fraud is a compound question of law and fact—the judgment of law on facts and intents. If the conveyance was made with an intent, and for the purpose to delay, hinder or defraud debts and accounts, then the law declares the conveyance fraudulent and void (Laws 1715, c. 38). This act is nearly a copy of the statute of 13 Elizabeth. Whether a conveyance was made with the intent to hinder, delay or defraud creditors is a question of fact, and in a court of law is to be determined by the jury. If the jury find the intent of the maker to have been fraudulent, the deed then becomes void in law. It is not an irresistible inference or conclusion of law, that the indebtedness of the donor or grantor, at the time of executing the conveyance, makes it fraudulent and void; no, not even for the debts then in being; but it is only a badge or argument of fraud which may be repelled by other evidence. Let us inquire how the law stands upon this subject as to creditors at the time of conveyance. First, in the courts of law where the jury find the fact of intent or purpose, and the Court pronounces the law upon the fact so found by the jury. Secondly, in a Court of Equity, where the Chancellor pronounces both upon the fact, and the law. I think it will be found that the decisions in both Courts have been substantially the same. If there is any difference of opinion, it arises from the manner the cases have
(213) been reported. In Twyne's case (3 Coke, Rep. 80) the Court said, "when a man being greatly indebted to sundry persons, makes a gift to his son, or any of his blood, without consideration," that would be fraudulent. *Cadogan v. Kennet* (Cowp. 432), Lord *Mansfield* says, that a man being indebted at the time of a voluntary conveyance, is an argument of fraud. In *Doe v. Routledge,* Cowp. 711, Lord *Mansfield* says again, "one great circumstance which should always be attended to in these transactions is, whether the person was indebted at the time he made the settlement, if he was, it is a strong badge of fraud." His Lordship does not pretend to say it is *per se* fraudulent. In the same case, page 708, he remarks that the statute does not say a voluntary settlement shall be void. To be sure it is very difficult against fair, honest creditors to support a voluntary settlement. It is laid down in a case by Hale, that a voluntary settlement may be good. In *Salmon v. Bennet,* 1 Day, 527, the Supreme Court of Errors of Connecticut, declare the rule, that mere indebtedness at the time will not in all cases render a voluntary conveyance void as to creditors. That an actual or express intent to defraud, need not be proven, for this would be impracticable in many instances, when the conveyance ought not to be established, and it

may be collected from the circumstances of the case. In this case a voluntary conveyance to a child was held valid against existing creditors; the grantor having left at the time ample funds, unincumbered for the payment of his debts. But if the grantor be considerably indebted and embarrassed, or if the gift be unreasonably disproportioned to his property, and leaving scanty provision for his debts, the conveyance would be void. In the Courts of Equity where the Chancellor finds the facts and applies the law, it has nearly become an invariable rule to consider a man actually indebted and conveying voluntarily, always means to defraud existing creditors. Lord *Hardwicke* expressed himself to that effect in the case in *Townsend v. Windham,* 2 Ves. 1. The rule seems to have been strictly followed until the case of *Lush v. Wilkison,* 5 (214) Ves. 384. This was a fishing bill filed by a subsequent creditor against the executor and widow of —— Cawood, praying an account of the personal estate, debts, etc., and that the deed of settlement made by Cawood for the benefit of his wife, might be declared fraudulent and void, as against creditors being voluntary. The bill charged that the deed of settlement was subsequent to the marriage, and that Cawood was then in insolvent circumstances, or was then indebted to several persons. The widow by her answer, stated that the deed was openly and *bona fide executed.* She denied her husband was insolvent at the time of executing it, or at any other time; she stated, that beside two debts (which the property included in the deed, sought to be set aside was mortgaged to pay), that her husband did not owe above a hundred pounds, and that his personal property considerably exceeded what he owed. No evidence was produced by the plaintiff. Lord *Alvanly,* Master of the Rolls, said he had great doubt whether the plaintiff had a right to come without proving any antecedent debt, (he then reflects and recollects the widow admitting in her answer, he owed debts to the amount of £100). He then says a single debt will not do. Every man must be indebted for the common bills of his house, though he pay them every week. It must depend upon this, whether he was in insolvent circumstances at the time. The bill was dismissed. In *Montague v. Lord Sandwich,* 12 Vesey 136, younger children brought the bill, and not creditors. Lord *Roslyn* declared that post-nuptial settlements were void, as to those who were creditors prior to the date of the deed. He directed an inquiry whether the maker was indebted previously to the making of the deed, and to what amount. In *Kidney v. Cousmaker,* 12 Vesey 155, the question arose whether a voluntary settlement after marriage,

was fraudulent as to creditors. Sir *William Grant,* Master of the Rolls, said, "though there had been much controversy, and a variety of decisions upon the question whether such a settlement is fraudulent as to any creditors except such as (215) were creditors at the time, I am disposed to follow the latest decision, that of *Montague v. Lord Sandwich,* which is that the settlement is fraudulent only as against such creditors at the time." The Master of the Rolls did not reflect that if the deed was fraudulent and void under the statute of 13 Elizabeth, it necessarily must be so altogether; for if a part be void by virtue of the statute, the rule is that the whole is void; neither did he remark that the bill in the case that governed him, was not filed by creditors. In *Reade v. Livingston,* 3 ch. (N. Y.) 481, the Chancellor of New ork has collected and remarked on all the cases, both at law and in equity, up to the time of that decision. He brought his mind to the conclusion that a voluntary conveyance made by a man indebted at the time, was in law, fraudulent as to those who were creditors at the time, but only presumptive evidence of an intent to defraud as to subsequent credits. He says, that as to prior creditors, "the presumption of law in this case, does not depend upon the amount of the debts, or the extent of the property in settlement, or the circumstances of the party." I think Chancellor Kent stands alone upon the aforesaid doctrine. My opinion is the same as that given by the Master of the Rolls, in the case of *Richardson v. Smallwood,* 1 Jacobs, 552. He there says being indebted is only *one circumstance from which evidence of the fraudulent intention may be drawn.*

The question is whether the Court is satisfied that the deed was within the purview of the statute, that it was made to hinder and delay his creditors by placing the property out of their reach; if it was, then the deed is void by the statute. The Master of the Rolls goes on then further to remark, "and if it be once shown that it is a deed which as against any of the creditors cannot stand, then the property becomes assets and is applicable to the payment of debts generally; all the creditors come in at whatever times their debts may have arisen; that," he says, "is decided." *Ibid.,* 558. The foregoing (216) decision was made in the year 1822, and is the last on the subject I have seen in the Chancery Reports. To make void a voluntary conveyance it must appear to have been executed for the purpose of defrauding creditors. *Wrixon v. Cotter,* (1 Chitty's Digest, 300, who quotes Ridgw. P. C. 295.) The principles contained in the case of *Richardson v. Smallwood,* are in accordance with those delivered by Lord *Mansfield*

in *Cadogan v. Kennett.* These rules are approved of by Lord *Manners* in *Grogan v. Cooke,* 2 Ball and B. 234. This opinion will not run in conflict with that of *Doe v. Manning,* 9 East., 59. That was the case of a purchaser, and the decision was not under the statute of the 13th of Eliz., but under the 27th Eliz. Even in that case Lord *Ellenborough* said that nothing but the decisions that had been previously made governed him, for if it was *res integra* he probably would have come to very different conclusions. This opinion does not clash with *McCree v. Houston,* 7 N. C., 429, for that was a decision upon our act of 1784, (Rev., c. 225.) I understand the Judge who tried the case now before us, to have charged the jury, that a voluntary deed which would be good against existing creditors, might become void as to the same creditors if the property reserved by the donor should happen to be destroyed by casualty or accident; when there had not been any delay in the creditors in endeavoring to obtain their debt. I think he erred in this part of his charge, for if the deed was not fraudulent and void as to the creditors, at its execution, no subsequent casualty or accident could make it void. In *Doe v. Routledge,* Cowp. 710, Lord *Mansfield* says, "a custom has prevailed and leant extremely to construe voluntary settlements fraudulent against creditors." But if the circumstances of the transaction show it was not fraudulent at the time, it is not within the meaning of the statute though no money was paid. O'Daniel was possessed of personal property of the value of five or six hundred dollars at the date of the conveyance and he reserved to himself a life estate in the land; he owed two small debts—and must we say from these facts that he made the conveyance for the intent and purpose "to hinder and delay" (217) these two creditors? Policy may call for such a decision, but I cannot bring my mind to believe it is within the meaning of the Legislature which passed the statutes. My associates think otherwise and the law upon this point may now be considered as settled. I think a new trial should be granted.

PER CURIAM. Judgment affirmed.

Cited: Jones v. Young, 18 N. C., 354; *Arnett v. Wanett,* 28 N. C., 42; *Smith v. Reavis,* 29 N. C., 343; *Houston v. Bogle,* 32 N. C., 505; *Kissam v. Edmundson,* 36 N. C., 182; *Thacker v. Saunders,* 45 N. C., 146; *Pullen v. Hutchins,* 67 N. C., 432; *Clement v. Cozart,* 109 N. C., 180.

Overruled: Worthy v. Brady, 91 N. C., 267.

JOHN HICKS v. WILLIAM H. GILLIAM.

1. In an action against two who join their pleas and against whom after a joint trial, a joint judgment is rendered, an appeal can not be allowed at the instance of one defendant only—and if allowed by the County Court the Superior Court acquires no jurisdiction to try the cause, but is bound on the motion of the appellee to dismiss the appeal and award a *procedendo*.
2. Costs in the Supreme Court are in the discretion of the court. The appellant is not entitled to recover them as of right, upon a reversal of the judgment below—but may be adjudged even to pay them under circumstances.

The plaintiff brought a suit by warrant against Gilliam and one Hays. In the County Court they joined their pleas, and upon the trial, a verdict was found for the plaintiff, against them both and a joint judgment rendered thereupon, from which Gilliam alone prayed and was allowed an appeal to the Superior Court. In that Court the plaintiff's counsel moved to dismiss the appeal, but the presiding Judge, *Martin,* overruled the motion and proceeded to try the cause, and the plaintiff obtained a verdict and judgment, from which the defendant appealed to this Court. Several points arising on the trial in the Court below were presented, by the case, but the question on which the cause was here decided, renders any statement of them unnecessary.

No counsel appeared for either party.

DANIEL, J. There are several questions or points of law submitted for our determination; but I do not deem it necessary to decide but one of them—Can one defendant appeal from a judgment which has been jointly rendered against (218) the two? I am of the opinion he cannot. *Sharp v. Jones,* 7 N. C., 306, is not a case in point for the defendant. In that case, the defendants severed in their pleas, and there were several judgments; one in favor of Jones the executor, that he go without day; the other against Winborne for the debt ascertained by the verdict. It was determined, that Winborne might appeal, because the judgment against him was single and not joint against him and Jones. It is a well settled rule that when a judgment is jointly rendered against two, they must both join in a writ of error, otherwise the Court will quash it. (2 Term, 736; 3 Bur., 1789; 1 Wilson, 88; Archb. P. K. B., 232.) If after error brought by one of several plaintiffs or defendants, in the names of all, the

others refused to come in and join with him in the assignment of errors, they who refuse must be summoned and severed, after which he may proceed in the writ of error alone (Cro. Eliz., 891; Cro. Jac., 94; 1 Archb. B. K. B., 232), and the Court will give him time to assign errors, until the others can be summoned and severed; (2 Stra., 783), nor can he that is summoned and severed release the errors. (Archb., 256.) But if in trespass against three there be judgment against two of them by default, and the third justifies, and it is found for him, the two against whom judgment was given, can alone join in a writ of error, for the other cannot say that the judgment was to his prejudice (1 Achb., 233); and the same if two had been found guilty by verdict, and the other acquitted. (Cowp. 425.) We see that one defendant or plaintiff may bring a writ of error in the name of the whole, but he cannot assign error without authority from the whole, or by obtaining an order of summons and severance. The judgment in the meantime stands good and remains good until a judgment of reversal on the hearing of the cause, on the writ of error. But in the case of an appeal under our acts of Assembly, passed in *1777 (2 Less. c. 2), the granting of the appeal after bond given, vacates the judgment, and a trial *de novo* upon the law and the facts, takes place in the Superior Court. Therefore, if one defendant or plaintiff is permitted to appeal without the consent of the others, it would vacate the judgment which might be most prejudicial to the others. The act of 1777 declares that "when any person or persons, either plaintiff or defendant," are dissatisfied with any judgment, sentence or decree of a County Court, they may appeal to the Superior Court. The construction which I put on these words in the act is, that when there is but one "person," either plaintiff or defendant, and he is dissatisfied with the judgment, he shall have the right of appeal: and where there are several persons, who have joined or been joined as plaintiffs or defendants, and they are dissatisfied with the judgment, they may appeal.—But I do not collect from the wording of the act, that the Legislature intended that any one of those several persons composing the plaintiff or defendant in a cause, might appeal at his solitary discretion. Generally when an appeal is taken, it is presumed to be an appeal as to all the parties. In this case, it is expressly stated that Gilliam alone appealed and that Hays did not. We think the judgment of the Superior Court is erroneous, that it should be reversed, and the appeal which was taken from the County Court should be dismissed with costs—and it is directed

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*24 State Records, 48.

that a *procedendo* issue from the Superior Court to the Court of Pleas and Quarter Sessions of Granville County, to proceed on the judgment in that Court.

PER CURIAM.—This cause came on to be argued upon the transcript of the record from the Superior Court of Law of Granville County, upon consideration whereof, this Court is of opinion that there is error in the record and proceedings of the said Superior Court in this, to wit: that the said Superior Court ought not to have taken cognizance of the appeal brought up to that Court from the Court of Pleas and Quarter Sessions of the said county, the said appeal having been improvidently allowed: Therefore, it is considered and adjudged by the Court here, that the judgment of the said Superior Court be and the same is hereby reversed; and this Court proceeding to de-

(220) cide what judgment shall be entered in the said Superior Court, doth order, that the said Court dismiss the said appeal with costs, and award a *procedendo* to the said Court of Pleas and Quarter Sessions, and that this judgment, and the opinion of this Court as delivered by the Honorable JOSEPH JOHN DANIEL, one of the Judges thereof, be certified to the said Superior Court accordingly. And it is considered by the Court here, that the plaintiff recover of the defendant and Ira C. Arnold and Wyatt Cannady, the costs in this Court incurred, to be taxed by the clerk.

Cited: Dunns v. Jones, 20 N. C., 292; *Stiner v. Cawthorn, Ib.,* 642; *Stephens v. Batchelor,* 23 N. C., 61; *S. v. Justice,* 24 N. C., 433; *Donnell v. Shields,* 30 N. C., 373; *Smith v. Cunningham, Ib.,* 461; *Kelly v. Muse,* 33 N. C., 184; *Lynch v. Johnson, Ib.,* 225; *McMillan v. Davis,* 52 N. C., 221.

Doe ex dem. REBECCA CARSON v. JOHN B. BAKER.

A person entering into the possession of lands, under a voluntary parol agreement to convey, no rent being reserved, is not a tenant from year to year and is not entitled to notice to quit. But there must be some act, as a demand of possession by the one party or a refusal to deliver by the other, to convert the defendant into a trespasser, before an action can be maintained against him.

EJECTMENT, tried Spring Term, 1832, at PITT, before *Daniel,* Judge.

The lessor of the plaintiff claimed title to the premises in dispute, under the will of Thomas Carson, who devised the same to her for life, and after her death to his three daughters with one of whom the defendant intermarried.

It was proved on the part of the defendant, that at the instance and request of the lessor of the plaintiff, he procured partition to be made of the lands so devised, paid his portion of the costs and went into possession of the premises with the consent of the lessor of the plaintiff, who promised to make him a conveyance of her interest therein at any time, reserving to herself the right to get firewood and wood for family use. The defendant cleared a part of the land and made valuable improvements thereon.

A notice dated 25 September, 1830, to quit the premises on the first day of January next, ensuing, was served on the defendant a few days after it bore date. The declaration in Ejectment was served on the defendant 18 April, 1831, in which the demise was laid on 1 January, 1831. (221)

Upon these facts the Court below being of opinion that sufficient legal notice had not been given, directed judgment of nonsuit, from which the plaintiff appealed.

Devereux for the defendant.

RUFFIN, C. J. The position seems to be correct, that the defendant was not tenant from year to year, and therefore was not entitled to notice to quit, in the sense of determining thereby his estate. For he did not enter claiming an estate in himself, or legal interest in the land, and was not liable for rent, either in a sum agreed on, or by way of use and occupation. His possession was merely by the license of the owner for an indeterminate period; which seems to be the only remnant of the old strict common law tenancy at will, which now exists.

In such cases, the possession is lawful, and may be continued until one party or the other determines the will: the lessor by demanding the possession, or the occupier by some act wrongful to the owner, which turns him into a trespasser. Before that, ejectment cannot be maintained; for that action assumes, that the possession of the defendant at the time of bringing it, and at any time after the demise laid in the declaration, is wrongful. Hence in *Right v. Read* (13 East., 210), it was held that after the defendant had been put into possession under a treaty for a purchase by the lessor of the plaintiff, he could not maintain

this action until the defendant was made a wrong-doer, either by a refusal to deliver the possession or some other *tort.* (222) Hence the notice given in this case was necessary, or some other. The question remains, whether this action is consistent with that notice, so as to be sustainable upon it. The notice is to quit on 1 January, 1831; and the declaration was served in April, 1831, upon a demise laid on the first of January. It has been in some cases argued, that service of the declaration of itself determined the will, and that the common rule subsequently entered into, includes an admission of the entry of the lessor to make the demise, which is sufficient. If this be true in any case, it can be only where the demise is laid on the day of the service; for it must go on the idea that the entry to serve the declaration, determined the permissive occupation, and that then the demise was made, and the ouster subsequently; which the occupier is not bound to defend, and therefore defends at his peril. But if the demise be laid as of a prior day, then it is before any supposable entry of the lessor, because the defendant's possession on that day was legalized and as a fiction, a lease, apparently illegal, cannot be admitted. Hence it is laid down generally, that in all cases of permissive occupations the demise must be laid after the determination of the license. *Birch v. Wright,* 1 Term, 383; Adams on Eject., 191. This is not merely technical, because the action supposes the lessor to have the right to make the demise at the time it is laid, and that the defendant had then no right to possess, and hence, it is conclusive of the lessor's title from that day, in the action for mesne profits. In *Dem. v. Rawlins* (10 East., 261), no demand of possession was shown, except the service of the declaration, which it was insisted, was sufficient. But the contrary was held, upon the ground that the demise was laid on the preceding 1st of January, and the Court asks from what time before the service of the declaration was the defendant a trespasser?

In the case before us, the question is not upon the effect of another notice to quit before January, if one had been given; nor upon the effect of the declaration, if it had been (223) served on the first of January; but whether upon the notice given, the lessor of the plaintiff can be supposed to have made the demise on that day. He cannot, because it was not against his will that the defendant should possess to the end of that day, and therefore, until its expiration, the lessor cannot be presumed to have entered, as the demise assumes he did. Until the end of the day, the defendant had not resused to deliver the possession as demanded, and consequently

was not a trespasser at the time of the demise Upon this ground, the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Love v. Edmondston, 23 N. C., 153; *Humphries v. Humphries,* 25 N. C., 363; *Butner v. Chaffin,* 61 N. C., 498; *Guess v. McAuley, Ib.,* 516; *Jones v Boyd,* 80 N. C., 263; *Allen v. Taylor,* 96 N. C., 39.

JOHN THOMAS AND WIFE and others v. NANCY GARVIN.

1. A proceeding for partition at law, can not take place, except there be a common possession, and a common possession is always implied from a common title until the contrary be shown.
2. But if an actual ouster be made by one tenant in common of his cotenant, there is no longer a common possession and the remedy is not by petition for partition, but by ejectment.

This was a petition for partition, to which the defendant pleaded: 1st. That she was not tenant in common with the petitioners. 2d. That she was not tenant in common in possession with petitioners. 3d. That she was in the sole adverse possession of the premises. To these pleas replications were entered. The petition was filed Fall Term, 1828, of BLADEN, by Sarah Mulford, who died pending the suit, and the present petitioners were made parties with leave to prosecute.—On the trial before *Daniel, J.,* at Spring Term, 1831, the defendant produced a conveyance from Ephraim Mulford and Sarah, his wife, the ancestors of petitioners, dated 4 January, 1802, to Richard Garvan, the husband of the defendant for all their interest in the premises.—Sarah Mulford had never been privately examined touching the execution of this deed. Ephraim Mulford, the husband, died in 1807. Richard (224) Garvan died in 1827, having continued in the actual, sole and exclusive possession of the premises from the date of the deed in 1802 until his death and then devised them to the defendant, who continued in possession up to the filing of this petition. Sarah Mulford died in 1829, leaving the present petitioners her heirs.

It was further proved that Ephraim Mulford before the sale to Garvan resided with him and they cultivated the disputed lands together. After the death of Mulford, his widow resided 4 or 5 miles from the disputed land.

The jury were instructed, that if the defendant and her husband during his life had continued in *adverse* possession of the land under the deed from Mulford and wife, for seven years from the death of Mulford, the entry of the petitioners was barred, and they were not tenants in common with petitioners and consequently were not entitled to have partition of the lands. They were also further instructed, that if they had been tenants in common, yet if the mother of the petitioners had been *actually ousted* of the possession by Garvan, and he, and those claiming under him, were in the sole possession claiming *adversely* to her, the petition could not be sustained, but the plaintiffs were put to their action of ejectment.

The jury, under the instructions, returned a verdict for the defendant, and the petition was dismissed with costs, from which judgment the plaintiffs appealed.

Devereux for plaintiffs.
Badger for denfendants.

GASTON, J. A proceeding for partition at law, cannot take place except there be a common possession, and a common possession is always implied from a common title until the contrary be shown. But if an actual ouster be made by one tenant in common with his co-tenant, there is no longer a common possession, and the remedy is not by petition for partition, but by ejectment to recover possession of the individual moiety.

The sole enjoyment of the property by one of the
(225) tenants is not of itself an ouster, for his possession will be understood to be in conformity with right, and the possession of one tenant in common, as such, is in law the possession of all the tenants in common. But the sole enjoyment of property for a great number of years, without claim from another, having right and under no disability to assert it, becomes evidence of a title to such sole enjoyment; and this not because it clearly proves the acquisition of such a right, but because from the antiquity of the transaction, clear proof cannot well be obtained to ascertain the truth, and public policy forbids a possessor to be disturbed by stale claims when the testimony to meet them cannot easily be had. Where the law prescribes no specific bar from length of time, twenty years have been regarded in this country as constituting the period for a legal presumption of such facts as will sanction the possession and protect the possessor. We think the Judge who tried this cause was correct in charging the jury that the twenty-one years exclusive possession of the defendant, and her deceased

husband, since the petitioner became discovert, did raise the legal presumption of an ouster; that the verdict of the jury, upon that instruction was right, and that there is no error in the judgment which was rendered against the petitioner.

The judgment of the Court below, must be affirmed with costs.

PER CURIAM. Judgment affirmed.

Cited: Baird v. Baird, 21 N. C., 538; *Northcott v. Casper,* 41 N. C., 314; *Black v. Lindsay,* 41 N. C., 468; *Purvis v. Wilson,* 50 N. C., 24; *Day v. Howard,* 73 N. C., 6; *Covington v. Stewart,* 77 N. C., 150; *Withrow v. Biggerstaff,* 82 N. C., 84; *Alsbrook v. Reid,* 89 N. C., 153; *Page v. Branch,* 97 N. C., 102; *Alexander v. Gibbon,* 118 N. C., 803.

CALEB SPENCER, admr., etc. v. WILLIAM CAHOON.

The giving of a bond by an administrator is not a condition precedent to his appointment. Where it appeared from the records of the court, that A B was appointed administrator, and qualified as such, though a blank bond was signed by him and his securities, the acts of such administrator were held valid, until his letters were called in and revoked.

DETINUE for sundry slaves, tried at Spring Term, 1831, of HYDE, before *Martin, J.*

Pleas—general issue, and statute of limitations. (226)

The plaintiff claimed title to the slaves, as administrator *de bonis non* of one Jeremiah Gibbs.

The defendant set up title under a purchase from one Stephen Gibbs, who he alleged, had been previously appointed administrator of said Jeremiah. The evidence of his appointment was the following entry on the records of the Court of Pleas and Quarter Sessions of Hyde County: "November Sessions, 1816. It is ordered, that Stephen Gibbs be appointed administrator of the estate of Jeremiah Gibbs, on his entering into bond, in the sum of $4,000, with John C. Bonner and William Shelby, securities." It appeared that no bond had been given by Gibbs, but that he, with said Brown and Shelby, had signed a blank piece of paper endorsed with the figures $4,000, that this paper was presented to, and accepted by the Court, as the administration bond of said Gibbs, and he thereupon qualified as administrator. That said Gibbs returned an inven-

tory, and sold some of the property as administrator. It is deemed unnecessary to mention the other points made in the case as they are not adverted to in the opinion of the Court.

A verdict was returned for the plaintiff, from the judgment rendered, whereon, the defendant appealed.

Devereux for the defendant.
W. C. Stanley for the plaintiff.

DANIEL, J., after stating the case, proceeded to deliver the opinion of the Court.

The question for the Court to decide, is, whether Stephen Gibbs was ever legally appointed administrator of Jeremiah Gibbs. The plaintiff contends that he was not, and that the sale and distribution of the slaves belonging to the estate of the intestate, by Stephen Gibbs, transfered no title to the defendant.

The case is imperfectly made up; it does not expressly state, that the records show, that Stephen Gibbs qualified as the administrator. We, however, take the fact to be, that the evidence of his qualification was made to appear by the records of the Court, and not by parol proof. The records (227) then show an order made, appointing Stephen Gibbs administrator, the acceptance of the paper offered as a bond, and his qualification. There was enough appearing on the record to authorize the clerk to issue letters of administration to Stephen Gibbs. The appointment was not void, but voidable; the letters of administration were subject to have been called in, and repealed at the instance of any person interested; but whilst the order made remained unrepealed, the administrator had power from a competent authority to sell the slaves. The observation of the Court, in *Hoskins v. Miller,* 13 N. C., 362, is not an authority for the plaintiff in this case. The Court there said, "if the order had been, that administration would be granted to Taylor, upon his giving bond, it would have been conditional and nugatory. The Court can make no such order, for they still would have to judge of the bond and administer the oath." In the present case, the Court took upon themselves to judge of the bond (certainly an erroneous judgment), and did administer the oath. There remained no condition, in the opinion of the County Court, uncomplied with. They erroneously conceived that a blank bond, signed and sealed by the parties, would be good if it was afterwards filled up by the clerk. Upon the whole, we think Stephen Gibbs was a rightful administrator, and that the plaintiff in this

case, from the facts stated, ought not to recover. A new trial is therefore awarded. We regret this the less, because on a second trial it can be shown whether the acceptance of the paper as a bond, and the qualification of Stephen Gibbs appears on the record of the Court or not.

PER CURIAM. Judgment reversed.

Cited: Davis v. Lanier, 47 N. C., 310; *Jones v. Gordon,* 55 N. C., 354; *Muse v. Hodges,* 94 N. C., 60; *Mobley v. Watts,* 98 N. C., 286; *Howerton v. Sexton,* 104 N. C., 86.

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BENNETT HESTER and others v. ZACHARIAH HESTER and others.

1. The Act of 1819 (Rev., c. 1004), only applies to complete and finished instruments, but does not prohibit the introduction of parol evidence, to show that a paper writing offered for probate, was never in fact the will of the deceased.
2. A widow who dissented from her husband's will, and had her dower and share of personal estate allotted to her as in case of an intestacy, is a competent witness to prove declarations made to her by her husband in his lifetime, as to the *factum* of a paper offered as his will, on an issue of *devisavit vel non* to which she is no party.

This was an issue of DEVISAVIT VEL NON upon a paper writing offered as the last will and testament of Benjamin Hester, tried at GRANVILLE Spring Term, 1833, before *Settle, J.*

Several points were made in the Court below, but as only one was decided in this Court, it is unnecessary to notice any of the others.

Upon the trial, the defendant offered to introduce as a witness, the widow of the deceased, to prove a conversation between herself and her husband in his life (no person being present but themselves), in which her husband had expressed dissatisfaction with the supposed will, said that he had thrown it aside, and that he would send for two of his neighbors to help him arrange it more to his satisfaction. The witness was not a party to the suit, had entered her dissent in the County Court from the said supposed will—her dower and share of the personal estate had been allotted to her as upon an intestacy.

The introduction of this evidence was objected to by the counsel for the plaintiff and rejected by the presiding Judge upon two grounds: 1st. Because of interest in the witness; and 2d. Because the policy of the law forbade her examination to prove any conversation between her husband and herself—such dis-

closure being a violation of that perfect confidence which the law for the security of domestic happiness designed to encourage and protect.

There was a verdict for the plaintiffs and the defendants appealed to this Court.*

It was also objected in this Court that such evidence (229) was not admissible, as our act of 1819 (Rev., c. 1004), prohibited the introduction of parol evidence to revoke a written will.

Nash and *Badger* for the plaintiffs.

W. H. Haywood and *Devereux* for the defendants.

DANIEL, J., after stating the case, proceeded as follows:

It is contended for the plaintiff, that parol evidence is inadmissible to revoke a written will; and that the witness should have been rejected on that ground. The answer to this objection is, that the act of Assembly only applies to an instrument which is finished, and was once incontestably the written will of the deceased; the law will not suffer such an instrument to be revoked by parol evidence. The act does not profess to prohibit parol evidence being introduced to show that a paper writing defectively executed, but still offered for probate as a will, was not in fact the will of the deceased.

Secondly, the plaintiff's counsel still contends that the testimony of the widow was properly rejected; and relies upon *Doker v. Hasler*, 21 E. C. L., 416, in which the Chief-Justice of the C. B. decided that the widow could not be asked to disclose conversations between her and her late husband, the Judge observing, that the happiness of the marriage state required, that the confidence between man and wife should be kept for ever inviolable. The plaintiff's counsel relies also, on 2 Stark., 706. It is a rule that the husband and wife cannot be witness for each other, for their interest is identical; nor against each other, on grounds of public policy, for fear of creating distrust and sowing dissensions between them, and occasioning perjury; but the rule should not be extended to the exclusion of truth, beyond the limits within which the reason of the law calls for it. Now the identity of interest is destroyed, by the death of either the husband or wife; there is no longer any inducement to commit perjury; as for sowing discord, that cannot take place with one that is dead; and distrust will not be created by apprehension, of that being made known,

*The first point decided in this case was also so decided in *Howel v. Barden*, 14 N. C., 442.

which there was no wish to keep secret. *Doker v. Hasler, supra.,* was decided upon the authority of *Monroe v. Twistleton,* Peake's Ev., Appendix, 44. That case was (230) one where the wife had been divorced, and the Court said, if she could be permitted to give evidence of what had been confidentially communicated to her during the marriage, to charge the man who had been her husband, in a civil action, she might also disclose confidential communications, and give evidence against him in a criminal matter; and that could never be endured; so her testimony was rejected. It does not appear to me that *Monroe v. Twistleton* was an authority to support the decision made in *Doker v. Hasler.* Furthermore, *Doker v. Hasler* (if an authority to the extent for which it is adduced) is at points with *Beveridge v. Mintor,* 11 E. C. L., 521, where it was decided that in an action of assumpsit against the executors of the husband, the widow was a competent witness to prove his admission.

Mr. Starkie says the principle is preserved, of adhering to the rule, even after the marriage tie has been dissolved by the death of one of the parties, 3 Stark., 706; but the authority he relies on to support this proposition, *Aveson v. Lord Kenniard,* 6 East., 188, does not bear him out to the extent he has laid it down. I do not think, that the policy of the law forbids the introduction of the testimony which was offered by the defendant in this case.

The rule upon the subject of confidential communications is not denied; the sanctity of such communications will be protected. Persons connected by the marriage tie have, as was said at the bar, the right to think aloud in the presence of each other. But the question remains, what communications are to be deemed confidential? Not those, we think, which are made to the wife, to be by her communicated to others; nor those which the husband makes to the wife as to a matter of fact upon which a thing is to operate after his death, when it must be the wish of the husband, that the operation should be according to the truth of the fact, as established by his declaration. Suppose a husband to disclose to his wife, that (231) he has given to one of their children a horse, can she not after his death prove that as against the executor? Suppose also that the declaration to which the wife was called had been made to her and another, there is no reason why she, if she will, may not testify to it, as well as the other. Why? Because it is then apparent that it was not confidential between the husband and wife, in the sense of the rule. The same reason equally applies, when from the subject of the conversation, it is

obvious he did not wish it concealed, but on the contrary must have desired to make it known, and through her, if he found no other means of doing so.

The widow was not interested; she was not a party and had dissented from the supposed will, and had her share of both the real and personal estate assigned to her. If the supposed will was rejected, she was already provided for; and if it should be established, she would not have less of the estate after her dissent, than she was entitled to by law, in case her husband had died intestate. Therefore, I think that neither interest nor policy stood in the way of the widow's being introduced as a witness.

There were other questions of law raised in this case but we think it unnecessary to decide them, as we are of the opinion a new trial must be granted, because the Superior Court rejected the evidence of the widow of the deceased on the trial of the issue.

PER CURIAM. Judgment reversed.

Cited: S. v. Jolly, 20 N. C., 112; *Gaskill v. King,* 34 N. C., 215.

(232)

STEPHEN GRAHAM v. STEPHEN M. HOUSTON.

1. Under the Act of 1791 (Rev., ch. 346), a possession of 21 years with color of title, under known and visible boundaries, constitutes a valid title, and no evidence tending to rebut the presumption that a grant had in fact issued, can defeat such title.
2. Possession of the whole of a tract of land, in virtue of the actual possession of part holds only where no other person is in the actual possession of any part—as soon as another takes possession of part, either with or without a paper title, the plaintiff loses possession of that part.
3. One who rents turpentine boxes, agreeing to give a certain part of the turpentine for rent, is not a tenant, has no interest in the soil, and the owner may bring *T. Q. C. F.* for an entry upon the land, *et semble* for taking away the turpentine also.
4. For acts done after an ouster, no action lies till a re-entry, but only for the first entry.

TRESPASS QUARE CLAUSUM FREGIT, tried before *Settle, J.,* at Fall Term, 1833. of DUPLIN.

The plaintiff claimed the land on which the alleged trespass was committed, under a deed from Daniel Glisson, Sheriff of Duplin, to one Jacob Williams, dated 23 January, 1793, and

produced the judgment and execution under which the land was sold. Jacob Williams died in October, 1823, and the land descended to his daughter, the wife of the present plaintiff—the plaintiff and those under whom he claimed had been in the actual and continued possession of different parts of the land conveyed by said deed, from the time of the purchase by said Williams, till the time of the trespass complained of and had held it under known and visible lines and boundaries. Between some of the different parts of the land, one George Houston had obtained two patents; the one dated 29 November, 1803, the other 28 November, 1818; and under said patents, had taken and held possession by tending turpentine boxes, from the day of their date; but between one part of the land so possessed by the plaintiff, and that upon which the alleged trespass was committed, no grant intervened—of the land claimed by the defendant, and which was also within the boundaries of the deed under which the plaintiff claimed, there was no actual possession of the plaintiff or those under whom he claimed, except as proved by a witness named Woodward, (233) who testified that in 1829 by permission of the plaintiff, he tended turpentine boxes situate as well on the lands within the bounds of the defendant's patent as on that within the bounds of the plaintiff's deed and without those of the defendant's patent—the said witness agreeing to pay the plaintiff one-third of all the turpentine he should make on the land—the witness with the consent of the plaintiff continued to tend said trees till April or May, 1830, when he was ousted by the defendant; this was before the commencement of this suit. After Woodward was ousted from the land, he abandoned his interest therein, and the defendant entered and took possession of and appropriated to his own use a quantity of the turpentine made by Woodward. The defendant's grant was dated 29 December, 1829. He also produced a patent to Jacob Williams under whom the plaintiff claimed, for a part of the tract contained in Glisson's deed to Williams, dated 23 November, 1832. The defendant also proved the declarations of said Jacob Williams, subsequent to the date of his deed from Glisson, that the land granted to the defendant was vacant, and further proved, that it was, since the date of said deed, actually entered as vacant land by said Williams.

The jury were instructed, that if they believed the evidence, they might presume a grant from the State for the land in controversy; that the deed from Glisson to Williams was a color of title and might be taken into consideration by them as a circumstance in raising that presumption—but that pre-

sumption might be rebutted by evidence on the part of the defendant. They were further instructed, that under the act of 1791 (Rev., c. 346), if the plaintiff or those under whom he claimed had been in the actual and continued possession of any part of the land, contained within the boundaries of the deed from Glisson to Williams, for twenty-one years, under known and visible lines and boundaries, he had acquired a valid and indefeasible title thereto, and that no circumstance which could be offered or proved by the defendant to rebut the pre-
(234) sumption of a grant having issued, would be of any avail to defeat the plaintiff's title so acquired. His Honor also instructed them, that if the plaintiff had possession of any part of the land contained within the bounds of the deed from Glisson to Williams, such possession was in law considered the possession of the whole land contained within said deed, except so far as the defendant or any other person had a paper title for a part of said land accompanied by a seven years continued adverse possession, and that if they believed the testimony, the plaintiff had such a possession as would enable him to maintain this action.

Pursuant to these instructions the jury returned a verdict for the plaintiff, and a rule for a new trial being discharged, the defendant appealed to this Court.

W. C. Stanley, for the defendant.
Henry, for the plaintiff.

RUFFIN, C. J. The counsel for the appellant has made several points, of which, that principally relied on is, that the Judge of the Superior Court erred in holding that, under the Act of 1791, a possession of twenty-one years with color of title under known and visible boundaries, constitutes a valid title, and that no evidence tending to rebut the presumption that a grant had in fact issued, can defeat such title.

The act is entitled, "an act for quieting ancient titles and limiting the claim of the State;" and its enacting words are, that such possessions shall be a legal bar against "the entry of any person under the right or claim of the State to all intents and purposes." Stronger or more precise language could not be used to take away the right of entry of all persons but the possessor and thereby to confirm his. The act is plainly upon its face a statute of limitations, to operate against the sovereign. It was not intended to prescribe a rule of evidence, from which presumptions of fact were to be made by the Court or jury. None was necessary, for before the act a grant might be presumed as well as any other deed. It is true that in the

preamble, the necessity for passing the act is stated to arise from the loss of grants, and therefore the act rests upon a presumption that a grant has issued. But that does (235) not change the nature nor the effect of the enactments. Similar presumptions are the grounds of all statutes of limitation. They are not presumptions which are to be deduced under the law, but have been already drawn by the legislators and produce the law which prescribes a positive rule to the judicial tribunals, without reference to the actual presumptions they might form in each particular case. The anonymous case in 2 N. C., 466 was cited for the defendant, but it does not support the argument. What is there said is true in reference to the question then before the Court. It was a *caveat* of an entry, in which the caveator relied on a possession of 21 years. A *caveat* implies that the land is vacant; and the contest is, which of the parties shall have the grant, which both of them admit that one or the other of them must have. Laws 1777, c. 114; Laws 1779, c. 140. *McNeill v. Lewis* 4 N. C., 517. It is absurd to say that one is entitled to a grant now, because he already has a legal title. The case only decides, that if the caveator had a title, either by grant shown or presumption of a grant, it was not competent for him to prove it, because in that very proceeding he admits as it were of record, that he had not a legal title.

The character of the act of '91 is not however now to be declared for the first time. In *Fitz Randolph v. Norman,* 4 N. C., 564, Chief Justice TAYLOR said, the design of it was to give that protection to individuals against the State, which the act of 1715 had afforded them against each other; in other words to render possession a positive bar. In *Tate v. Southard,* 8 N. C., 45, Chief Justice HENDERSON said, if it be necessary, when one brings himself within the act of '91, to presume a grant, it is a legal presumption which cannot be contradicted; and a verdict which in such case expressly finds that a grant did not in fact issue, would, as to that part of the finding, be disregarded. In *Rhem v. Jackson,* 13 N. C., 188, he again remarks, that the possession of 21 years is substituted by (236) the act for the grant itself. The Court is of opinion, that the Superior Court did not err in the instructions given on this point. The effect of the grants to other persons and the possessions under them, if there were such possessions, continued for seven years, could do no more than defeat the title of the plaintiff to the lands covered by those grants in the same manner as if the plaintiff made title by patent to the whole tract.

The appellant's counsel has made no objection in reference to the foregoing point, to the rules laid down by the Judge as to the extent of the plaintiff's possession, resulting from an actual occupation of part of the land. The record, however, states an opinion of the Judge upon that subject, in which this Court does not concur, and which seems to be so obviously erroneous as to induce the belief that there is an inaccuracy in the transcript. The observation is that the plaintiff's possession of a part was the possession of the whole tract covered by the deed "except so far as the defendant or any other person had a paper title for a part of his land accompanied by a seven years continued possession." Now it is true, that the plaintiff's title after being matured by a possession of 21 years, might be defeated as to a part of the land by an adverse possession of that part for seven years under color of title, and by that means only. But his possession of the whole in virtue of his actual possession of part is true only so long as no other is in the actual possession of any part. As soon as another takes possession of any part, either with or without a paper title, the plaintiff loses the possession of that part. For this error, could it affect the rights of the parties, the judgment would be reversed, if the case as of record in the Superior Court be the same as in the transcript here. The Court does not deem it necessary to ascertain whether it be the misprision of the clerk, because the point is immaterial; since, in the opinion of the Court, neither the defendant nor any other person was in the adverse possession of the land on which the trespass was committed.

The appellant contends the contrary, as another point.
(237) As to that, the case is, that the plaintiff's deed and the defendant's grant cover the *locus in quo,* which is altogether woodland; the plaintiff was actually living on another part of his tract, and made a contract with one Woodward in 1829, that the latter should make turpentine on the land on shares, which he did as well without as within the lines of the defendant's grant, until the spring of 1830, when the defendant claiming under a grant, issued in December 1829, ordered him off and took the turpentine that was then made; for which acts this action is brought.

It is objected first, that Woodward had the actual possession at the time of the defendant's entry, and that the plaintiff's constructive possession terminated when Woodward's began. It is conceded, that a constructive possession lasts only until there is an actual possession. But it is a mistake to call the plaintiff's a constructive possession; that is such a possession as

the law carries to the owner by virtue of his title only, there being no actual occupation of any part of the land by anybody. Upon a possession of that sort, the statute of limitations can never operate. But when the owner is actually possessed, by residence for instance, of part of a tract of land, he is actually possessed of the whole that his deed covers, whether within his inclosure or not, unless another either actually occupies adversely a part, and thereby destroys the first possession as to that part; or unless part of the land be covered by deeds, and neither claimant be seated on that part, but each is on other portions of their respective tracts, in which case the actual possession of what is within both deeds is adjudged in him who has the title. The possession of the plaintiff was therefore actual in the *locus in quo,* at the time Woodward came upon the land. Nor did it cease, when he did come. Woodward had no possession in exclusion of the plaintiff, who continued to reside on his land. There was no lease, nor a right to any determinate part of the land vested in Woodward, who had at most, a license only to make turpentine from the growing trees on the land on which the plaintiff lived; he was (238) a mere hireling, to be compensated by a part of the product of his labor, and had no more interest in the soil than any other servant. The present property and possession of the land were in the plaintiff; and the cases cited in the argument, are direct authorities that the plaintiff alone may maintain his action for the entry of the defendant. As to the trespass in taking away the turpentine, it might well be held that the whole property in it was in the plaintiff; as when a planter agrees to give a part of the crop as overseer's wages. But the case does not require of the Court to consider that question. For if the property of the turpentine were in both Woodward and Graham, the judgment cannot be reversed. The objection comes too late; for even if the part ownership of the plaintiff appears in the declaration, it is not a ground for arresting the judgment, because it might have been pleaded in abatement. *Addison v. Overend,* 6 Term, 766. Unless the non-joinder be pleaded, the defendant must rely on getting the damages apportioned at the trial; and if the jury did not do it (which would be here presumed), the plaintiff, and not the defendant has ground for complaint.

It is objected secondly, that the case states that the defendant *ousted* Woodward, and "afterwards" took away the turpentine; and does not state the re-entry of the plaintiff; and therefore no action for the turpentine will now lie for the plaintiff. It is true, that for acts done after an ouster, no action lies until

a re-entry, but only for the first entry. The case does not show whether or not the turpentine was made, and had been collected by Woodward, and merely left by him on the land when he went away. In that case it was a mere personal chattel, and trespass would lie for taking it at any time, the plaintiff having a present property in it, and right of possession. But if the defendant collected it from the trees, it would be otherwise, and the plaintiff must show a re-entry. This, the Court thinks he has done. The *locus in quo,* was altogether wood land, to which the plaintiff had a good title, and of which he had, in our sense of the terms, the actual possession of a part of the
(239) larger tract on which he lived, as already shown. The defendant did no act like permanent occupation, but merely entered and carried off the turpentine. In England an actual re-entry upon the *locus in quo,* is necessary, because possession by actual occupation of the very part is requisite to maintain trespass. But here even a constructive possession suffices. In this case, however, as soon as the defendant put his foot off the land, the exclusive possession vested again in the plaintiff; which is tantamount to actual re-entry. If one cut trees on the wood land of another, on which the latter lives, and does this from day to day, and nothing more is done, this is not a disseisin, but a trespass on the other's possession; which is actual and exclusive as the trespasser from time to time departs. The one does not gain a possession by such acts, nor the other lose it.

The Court does not examine the remaining point; which is, that a naked possession by an intruder on the land of the sovereign, will not maintain trespass even against a wrong-doer; because the opinion has already been given, that the plaintiff is not an intruder, but has gained a perfect title under or against the State. The judgment is affirmed.

PER CURIAM. Judgment affirmed.

Cited: Ring v. King, 20 N. C., 305; *Treadwell v. Riddick,* 23 N. C., 58; *Bynum v. Thompson,* 25 N. C., 581; *Smith v. Ingram,* 29 N. C., 179; *Lamb v. Swain,* 48 N. C., 372; *Scott v. Elkins,* 83 N. C., 427; *London v. Bear,* 84 N. C., 272; *Maxwell v. Jones,* 90 N. C., 327; *Mobley v. Griffin,* 104 N. C., 115; *S. v. Boyce,* 109 N. C., 751; *Mitchell v. Bridgers,* 113 N. C., 69.

JAMES LAWSON v. AMBROSE SMITH.

EJECTMENT, tried at Spring Term, 1833, at Columbus, before *Martin, J.*

Verdict for the defendant and the plaintiff appealed.

H. L. Holmes for the defendant.

No counsel appeared for the plaintiff.

PER CURIAM. There is in the record no exception or case stated on which the motion for a new trial was founded; and consequently there is no ground why this Court should set aside the verdict. No error is perceived in the other parts of the record. The judgment is therefore affirmed.

(240)

JOHN BARTON v. ALEXANDER MORPHIS.

The refusal by the court to permit a witness to be re-examined, is no ground for a new trial in this Court, it being discretionary with the court below to permit it or not.

TROVER for a negro slave Larry, tried at PERSON Spring Term, 1833, before *Settle, J.*

The plaintiff proved title to the slave, and the question was as to the conversion by the defendant.

The plaintiff proved by a witness (Turner), a confession made by the defendant in a conversation with a runaway slave named Jack, sufficient to authorize a jury to find that a conversion had been made by the defendant. The credit of Turner was attacked, and to prop and support him the plaintiff introduced several witnesses. The testimony of these witnesses was objected to by the defendant, as being irrelevant and improper, but it was admitted by the Court. The witnesses on each side had been separated on the day that they were examined; at 9 o'clock on the evening of that day, both parties stated to the Court that their testimony was closed; the Court then adjourned until the next day, when a witness by the name of McDaniel, who had been introduced by the defendant on the preceding day, made application to the Court to explain his testimony, stating that improper inferences had been drawn from it, and he was afraid it was misunderstood. This application was made before any remarks had been made on his testimony

by counsel; the Court refused to hear him. The defendant had, on the day of the examination of the witnesses, offered to read a deposition of the witness, Turner, which had been taken *de bene esse* for the purpose of discrediting him, by showing variances between that and his present statements. The Court said it might be read; but the defendant proposed to read such parts only, as would be legally competent, if offered by the plaintiff in chief. The Court refused to let it be read in that manner, and stated that if part was read the whole must be read. After this opinion was given by the Court, the defendant's counsel declined reading it altogether. The
(241) plaintiff offered to read the deposition of Betsey Brazier, which had been taken *de bene esse*, after legal notice had been given and the defendant had cross-examined. To lay a foundation for reading the deposition, he proved by the brother of the witness that he had seen her the day before he set out to Court, that she was very far advanced in pregnancy, and at the time he was speaking, he supposed it probable that she had just been delivered. The defendant objected to the reading of the deposition, but the Court permitted it to be read. There was a verdict for the plaintiff; the defendant moved for a new trial, 1st, because the Court had permitted the plaintiff to introduce improper evidence; 2dly, because the Court rejected proper and legal evidence. The motion was overruled, and judgment renderd for the plaintiff, from which the defendant appealed.

W. A. Graham and *Nash* for the plaintiff.
Winston for the defendant.

DANIEL, J., after stating the case, proceeded to deliver the opinion of the Court.

After the credit of the witness, Turner, was attacked, it became material and necessary for the plaintiff to show that there was an intimacy between the defendant and the runaway slave Jack, about the time deposed to by Turner, in order that the jury might draw the inference that such a conversation had taken place as that stated by Turner. For this purpose the witnesses Bradshaw, Jones, Watts and Thomas were introduced. I think Bradshaw's evidence was admissible for the purpose of introducing and explaining the conduct and behaviour of the defendant, when the charge was made that he had carried off Barton's slave, and also for the purpose of proving his answer on that occasion. (1 Stark. 50.)

The testimony of Jones offered to show that the defendant used just such language as might be expected of a man who

was harboring a runaway. The words spoken and manner of speaking them to Jones by the defendant, was a circumstance which the plaintiff might link with the other circumstances to show an intimacy between Jack and the de- (242) fendant.

Watts proved that the defendant admitted that he had purchased Jack, for the price of $200, in January, 1829. His evidence went to support Turner, who had deposed that in the conversation which he overheard with Jack and the defendant, the latter said he would buy him out of the woods.

The evidence of Thomas was material to show an intimacy between Jack and the defendant. The night the party went to apprehend Jack, the defendant left the party and again rejoined them, when he told the company that he had seen Jack, and that they had agreed to meet at the school house, where he had promised to pay him some money. At 10 o'clock the defendant, Thomas and Jack came to the school house, when after some management, Jack was arrested by the rest of the company. I think this evidence was in point to prove an intimacy.

2dly. The refusal by the Court to permit McDaniel to be re-examined, was no ground for a new trial. It was discretionary in the Court to permit it or not, and the defendant's counsel now abandons this point in his case.

3dly. Did the Court err in refusing to let the deposition which Turner had given, be read in the manner requested by the defendant's counsel? The deposition was no evidence as to the main question in the cause, viz.: the conversion of the property, because Turner was there to testify orally, nor could the plaintiff have read that part of it in chief, if Turner had not been present, which relates to what the slave Jack informed the witness the defendant had done. But when the defendant offered it as a written declaration made by the witness upon the same subject matter, for the limited purpose of impeaching the witness, by showing a material variance between the written deposition and his evidence given on the trial; then all the writing, which would have had a tendency to show that the witness was consistent or inconsistent, should have been read and not parts of it. The deposition has been sent up as a part of the case; it appears that Turner was consistent as to the time he first saw Jack, and the con- (243) versation he then had with him; he is consistent as to the time that he, Stewart and Bradshaw went to the out house of the defendant, and the conversation that then took place between Jack and the defendant. The only apparent inconsistency in the two statements, is in the inducement which prompted him

to go at the time he did to the out house of the defendant. In his statement before the Court, he said that it was from information imparted to him when he first saw Jack (viz. September, 1827), he was induced to go with Stewart and Bradshaw a certain night in December, 1827, to the house of the defendant, to observe an interview between him and Jack.

In his deposition (which was taken when he was very sick), he stated that he saw Jack in the fall of the year 1827; that he was then a runaway; that he made certain disclosures to him, relative to the conduct of the defendant, in sending away the slave of the plaintiff, and said that a negro by the name of Joe, could give information, which would detect the defendant at any time. Turner tells Bradshaw and Stewart what he had learned, and it was agreed between them, that they would find out if there was any truth in the account given by Jack. After they had formed that determination, Stewart told the witness, that Thompson's Larry had informed said Stewart, that the defendant and Jack could be caught at night, at a little out-house in the defendant's field; that in consequence of this information from Thompson's negro, they then agreed to go to said house at the time specified, and did go. When they got there, he saw and heard, what he had related in Court. It must be remembered, that the deposition of the witness was taken when he was very sick, and, in the nature of things, it cannot be expected, that the same degree of accuracy as to collateral circumstances, will be observed, as when the witness was in full health, and in the full possession of his mental faculties. The information which the witness got from Stewart (as stated in the deposition), was the *immediate* cause of his going to the out-house of the defendant, at the time he
(244) did. Yet from reading that deposition, it appears to me very certain, that the *mediate* cause was what Jack had disclosed to him in 1827. I think, all the deposition was pertinent to the ascertainment of the limited fact, whether Turner had made a material variance in his different statements of the same case, or not. The defendant, therefore, had no right to read a part only.

The plaintiff offered to read the deposition of *Betsey Brazier*. It had been taken *de bene esse*, and to lay a foundation for reading it, he proved by her brother that he saw her the day before he set out to Court—that she was far advanced in pregnancy, and at the time he was speaking, he supposed it probable that she had been delivered. The reading of the deposition was objected to, but admitted by the Court. Was there any error in this? The defendant contends that the cause

shown would have been very good for a continuance of the suit; but it was not sufficient to authorize the reading of the deposition. The Act of 1777 declares, that where the witness shall be under the necessity of leaving the State, before such cause is to be tried, or before the cause is at issue, the deposition may be taken and received as legal evidence. The Act of 1803 authorizes the depositions of witnesses, who are in a dangerous state of health, or about to leave the State, to be taken and received as legal evidence. The object of these acts, was both to expedite and insure the correct administration of justice. The reception of the deposition in evidence was in conformity to the general practice, and is certainly within the spirit of the Act of 1803. I perceive no grounds for a new trial, on any of the points taken by the defendant.

PER CURIAM. Judgment affirmed.

Cited: Featherston v. Wilson, 123 N. C., 627.

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(245)

THOMAS SOUTHERLAND AND WIFE v. JOHN WEBB.

1. A, by his will devised his property to his two children, and if either of them died without leaving issue, the whole of his estate both real and personal to go to the survivor.
2. B, one of the children, upon a bill for an account against the executor of A, obtains a decree for a sum of money; in part performance of which, he accepts certain negro slaves which were not of the property of his testator. On the death of B, without leaving issue, the survivor is not entitled to recover these slaves from a stranger to whom they had been *bona fide* sold by B.

DETINUE for three negro slaves, tried at EDGECOMBE, Spring Term, 1833, before *Strange,* Judge, on a case agreed. The opinion of the Court being for the defendant, judgment of nonsuit was rendered and the plaintiff appealed.

The case stated that Miles Hardy made his last will and testament, and thereby devised lands and bequeathed specifically several slaves to each of his two children, Henry and Harriet. In the said will there is the following clause: "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." The testator appointed Christopher Duckett, executor of his will, who qualified and took upon him-

self the management of the estate. The executor died after making his will, and appointing William G. Duckett his executor, who qualified as such. Henry Hardy, one of the legatees under the will of Miles Hardy, filed his bill in equity against William G. Duckett as executor of C. Duckett, who had been executor of Miles Hardy, for an account of the estate of Miles Hardy; and there was a decree in his favor for the sum of $1,344.66, with interest. Henry Hardy agreed to take slaves in payment of the said decree, and the slaves, for which this action is now brought, were delivered over by William G. Duckett to him in part performance of this decree. These slaves formed
(246) no part of the estate of Miles Hardy, but were delivered over as part of the estate of C. Duckett, in payment of the decree. Henry Hardy sold the slaves *bona fide*, and for a valuable consideration, to the defendant. Henry Hardy has since died without leaving issue, and Harriet, his sister, who has intermarried with Sutherland, now claims the slaves under the will of her father, Miles Hardy.

Badger and *Attorney-General* for the plaintiffs.
Mordecai for the defendant.

DANIEL, J. The slaves mentioned in the plaintiff's declaration were not the property of Miles Hardy and therefore did not pass to the plaintiff, Harriet, on the death of her brother without issue, under the executory devise or bequest contained in her father's will. The slaves originally belonged to Duckett, and the value of them went as so much money in satisfying the decree that was obtained against Duckett as executor. The transfer of these slaves by Duckett to Henry Hardy, vested in the said Henry the absolute legal estate. The amount of the decree, perhaps, did belong to the plaintiffs, after the death of Henry without issue; and her interest in the said decree might have been secured to the plaintiff by the Court at the time it was rendered. But the Superior Court of Edgecombe was trying the question of legal property, and had no power to substitute the slaves that were rendered by Henry in satisfaction of that decree, for the money itself. We therefore think that the judgment rendered in the said Superior Court must be affirmed.

PER CURIAM. Judgment affirmed.

(247)

Den ex dem. NANCY PAUL v. Fen and FRANCIS WARD.

1. Where general instructions are given to a jury, that upon the whole case, as appearing upon the evidence, the plaintiff is entitled to recover, if there be any defect in the title of the plaintiff upon any ground, the instruction is erroneous.
2. *An alien can not take by descent, curtesy, dower, or other title, de*rived merely from the law.
3. An assignment of dower to an alien whether voluntarily by the heir, or by the law itself, is null, and will not entitle her to recover in ejectment.

EJECTMENT, tried Spring Term, 1833, at WASHINGTON before *Norwood, J.*

It appeared on the trial that John Dorsey, an Irishman, came to the United States in 1798, removed from Petersburg, Va., to this State in 1800, and in 1801 intermarried with the lessor of the plaintiff, also a native of Ireland, then 22 years old. Dorsey became possessed of several lots in Plymouth, and among them of the lot in dispute (No. 120), and died so possessed in 1805. Nancy, the widow, filed her petition for dower in the County Court of Washington, and the lot, No. 120, was allotted to her. She intermarried in 1807 with Edward Paul, and she and her second husband took possession of the premises and resided thereon. The lot had been sold under execution, against the heirs of Dorsey, and purchased by Edward Paul, the husband of said Nancy, and by several mesne conveyances had been conveyed from him to one Robert Hamilton, whose tenant the present defendant was. Edward Paul died 1 November, 1829.

Upon these facts his Honor instructed the jury to find for the plaintiff, and a new trial being refused, defendant appealed to this Court.

Badger for the plaintiff.
Devereux for the defendant.

RUFFIN, C. J. The instructions given the jury are general that upon the whole case, as appearing upon the evidence, the plaintiff was entitled to recover. If there be, then, a defect in the title of the lessor of the plaintiff, upon any ground, the instruction was erroneous.

For the defendant two objections are made to it; the (248)
one founded upon the alienage of the lessor of the plaintiff, and the other upon that of her husband, under whom she claims dower.

The law seems to be settled, that an alien can not take by descent, curtesy, dower or other title derived merely from the law. (7 Rep., 25.) For as an alien has not capacity to hold, the law will not cast an estate on one; as that would be merely for the benefit of the sovereign, on whom it might as well be thrown at once. To avoid that consequence, the alien is put altogether out of the way, and the estate goes to those persons who would take it, if the alien were not in being. But it is said for the plaintiff that the title set up in this suit is not one derived from the mere act of law; and that although alienage might have been a bar to a recovery of dower, yet she has recovered it and now claims the land, not by force of her right as widow, but by force of that recovery and the assignment of dower, as an assurance. It is true that an alien may purchase land and take it in that way though he can not hold. It may yet be doubted whether a recovery of dower can be considered a purchase to that purpose; for it is not upon a title alleged generally in the demandant, which might be by purchase, but upon the very one of dower, as conferred by law. Again, after the assignment, she is in, not under the heir, but in the *per* by her husband, and in continuation of his estate (7 Rep., 37), and the heir is said to be only the minister of the law, to carve for her. It may well be then, while the heir is concluded by the judgment, as to every fact which constitutes the title of the widow as against himself, yet that he is not so concluded as to this matter of alienage, which, in respect to the public policy, avoids the estate of the wife, both as against the wife and the heir. For there seems to be no reason founded in the rights of the widow as a party to the recovery, for holding the heir bound, since she cannot hold; and the question then is, whether the recovery should conclude the heir, merely for the benefit of the sovereign who is not a party to it. It would seem to me,

(249) that since the law denies to the lessor of the plaintiff dower, upon the ground of a personal incapacity to take in that way, an assignment of dower, whether voluntarily by the heir, or by the law itself, is null. As an alien cannot take an interest in the soil by act of law, it is a fraud on the law, in her to attempt it, which avoids the title set up under it. Indeed it is laid down generally, that an alien cannot maintain real or mixed actions. (Co. Lit. 31 a.)

But whether the heir be concluded or not, the creditors of Dorsey are not; and the case states that Paul, the second husband, purchased upon execution for a debt of Dorsey against his heirs. If the land descended from Dorsey it was thus subject, except such part as the lessor of the plaintiff was *entitled*

to as dower. The judgment for dower is no estoppel to the creditors. (*Briley v. Cherry,* 13 N. C., 2.)

But upon the case stated, nothing descended from Dorsey of which the persons claiming to be heirs, could endow the lessor of the plaintiff; for Dorsey himself was an alien, who does not appear to have been naturalized or to have taken the oath of allegiance, as required by the Constitution of this State (Sec. 40). As the widow of an alien husband, the lessor of the plaintiff was not dowable. (Co. Lit. 31 a.) Nor did the land descend to any, as his heir; for, upon his death, the law cast the freehold and inheritance directly upon the sovereign. (Co. Lit. 2, 6.) This opinion goes equally to the titles of the lessor of the plaintiff, and of the defendant; but that does not help the former, who must rely on the strength of her own, and that of the defendant may have become good by time. There must therefore be a new trial.

PER CURIAM. Decreed accordingly.

Cited: Copeland v. Sauls, 46 N. C., 72; *Trustees v. Chambers,* 56 N. C., 263.

(250)

CHARLES WESTBROOK and others, executors of WM. CROOM v. RICHARD CROOM.

C, by his will devises certain lands and slaves to his son R; he then devises other lands and property to be sold on a credit of 1, 2, or 3 years, and all the residue of his estate (not otherwise disposed of), to be sold on a credit of 12 months, "lands rented and negroes hired, except R's lot of land and negroes, the possession of which I wish him to have at my death." He then directs the money arising from the sale, rent, hire, etc., to be applied to the settlement of his estate, etc. *Held,* that on the construction of the whole will, R's share was not exempted from the payment of debts, on a deficiency of the fund appropriated to that purpose, by the testator.

DEBT on bond, tried before *Settle, J.,* Fall Term, 1833, of LENOIR.

As the material facts of this case are stated in the opinion of the Court, it is thought unnecessary to repeat them here.

Devereux and *Mordecai* for the plaintiffs.
Hogg and *Bryan* for the defendant.

DANIEL, J. William Croom made his last will and testament, by which, he devised lands and bequeathed legacies to his wife and several children, as is set forth at large in the copy

thereof, which form a part of the case. The plaintiffs, being the executors, delivered to the defendant Richard Croom, one of the sons, his legacy; and took from him a bond, on which this action is founded, to refund his proportionable part of moneys or property, to pay the debts of the testator, provided the particular fund, set apart in the will for the purpose, should not be sufficient; and provided further, that the legacy of the defendant was, by the will, liable to contribution. The plaintiffs say, that the particular fund set apart by the will to pay debts, has proved insufficient for that purpose, and that the defendant has been requested to contribute his proportion to aid in extinguishing the debts remaining unpaid. He has refused, and now contends that his legacy, by the terms of the will, was exonerated from contribution. The plaintiffs brought
(251) this action of debt on the bond. A case agreed was made up by the parties, and submitted to the Court for its decision, whether the defendant, by the will, was exonerated from contributing to pay the debts of the testator or not. If he was, then a nonsuit was to be entered. If he was not, then a judgment was to be rendered for the plaintiffs for the penalty of the bond, to be discharged by the payment of the sum reported by the clerk, to be due from the defendant. The opinion of the Court being in favor of the defendant, a nonsuit was ordered, from which judgment the plaintiffs appealed.

Whether Richard Croom should contribute or not, to the payment of the debts of the testator, in consequence of receiving his legacy, under the terms it was paid by the executors, depends on the construction which is to be put on the following clause in the will of William Croom: "I leave all my lands between Adkin's branch, the river, Kinston and the main road, to be sold on a credit of one, two or three years, at public or private sale, at the discretion of my executors. I leave also, all the residue of my estate to be sold on a credit of twelve months, lands rented and negroes hired, except Richard's lot of land, and negroes, the possession of which together with the Adkins mill, I wish him to have at my death. And the moneys arising from the sale of the lands, stock, produce, rent, and hire of negroes, to be applied to the settlement of my estate, paying my son, Wm. Croom, two thousand, or twenty-five hundred or three thousand dollars, if there be a sufficient surplus." The testator's will makes the law for the disposition of his property, and the duty of those who are called upon to expound it, is to endeavor by all the means of interpretation within their reach, to ascertain that intent. As his intent in this clause is not expressed in the plainest terms, it becomes important to examine the whole

of the will, and see whether we can derive from any other part of it, assistance in expounding that which has been before set forth, and is now under consideration. The testator describes himself as of Newington, Lenoir County, North Carolina, and then on a journey to Florida. In the first place, he gives to his wife, *for the term of her life,* Newington and the ad- (252) joining lands, the stock and furniture upon it, and the negroes that he obtained by marriage with her. He then gives to his son Hardy, his Falling Creek lands, and all the stock and negroes of which he was already in possession, and one negro besides, by name. He gives to his next son, Bryan, whom he states as residing in Florida, all the negroes there, in his possession, and two negroes by name, in the possession of one Joshua Byrd, and all his right of lands in Florida, and also the sum of *two thousand dollars, to be paid out of the sale of his estate,* to aid Bryan in purchasing more lands in Florida. By the next clause, he gives to his son Richard, his lands below Adkins' branch, describing their bounds particularly. By the succeeding clause, he gives to his son William, his Tower Hill plantation, which he particularly describes. In the next, he gives to his daughters Anne and Eliza, equally to be divided between them, all the lands lying below the Tower Hill tract. And in the following clause, he gives to his son George Alexander, the lands devised to his mother for life, and requests her to convey to this son, lands which she owned by gift from her father, *in order to make his share equal with the shares of the other children;* and for the same purpose gives him two negroes, in addition to those which he is to derive from the division thereinafter directed. Then, by the next section, he directs, that all his negroes not before given away shall be divided among his five youngest children, Richard, Anne, William, Eliza and George Alexander, to be divided among them by families. Then follows the section which has been before particularly recited; and finally he appoints executors, one of whom he requests to act as guardian of his son William, until he shall arrive at age.

We learn then, from this general view of the will, that the testator's two eldest children were settled off and portioned, although titles had not yet been made for the property put into their possession—that the defendant whom he names as the first of this five younger children, was at an age which fitted him for being settled and portioned off, and that (253) William, the second in order of these five, was yet a minor. We learn, also, by the terms used in the devise and bequest to his youngest child, George, that *equality* in the division

of his property among his children, was a primary purpose of the will. We discover too, from a comparison of the clause in which he gives two thousand dollars to his son, Bryan, to be raised out of the sales of his estate, with the expressions in the clause we are construing, "paying my son, Bryan, two thousand dollars, or twenty-five hundred, or three thousand dollars, if there be a sufficient surplus," that he had in view a *definite* fund, which he had no doubt would raise the smallest of these sums, and which possibly might be sufficient to raise the largest of them.

The phrase, "lands rented and negroes hired" in this perplexing section of the will, is exceedingly vague. *What* lands are to be rented and *what* negroes to be hired? Does he mean *all* the lands of which he died seized, and all his negroes except those allotted for the portion of his third son? If he has said so explicitly, there is no room for construction; but he has not, and there seems to be insuperable objections to putting such an interpretation on these words. The provision made for his wife is for her life only, and would leave her for some time at least after his death, and if the interpretation contended for by the defendant be correct, might leave her during life, without a home and the means to enjoy it. He could not have meant to include the lands and negroes left to her *for life,* in this disposition. With respect also to the property which he had advanced provisionally to his two elder children, and which advancement he here confirmed, terms more explicit than those he has used would be necessary, to show that this was a part of the property to be hired and rented, and that the children, thus advanced, were to be dispossessed by his executors of the patrimony which they were actually enjoying. The lands and negroes here intended, are those given to the minor children, which they were not of age to manage, and the profits of which for a time were to be applied in aid of the fund created
(254) for the payment of his debts and satisfaction of the pecuniary legacy to his second son. Richard's lands and share of the negroes are in terms excluded from it, because although he had not yet been portioned off, he was the next in order to be settled, and had attained in the testator's estimation, a proper age for that purpose.

The actual contest in this case, is then between the four younger children and all the legatees, including Richard; if the construction must prevail for which he contends, then as to the younger children, the equality which their father intended, must be fatally defeated. The enquiry now presents itself on these words, "lands rented and negroes hired," for what length

of time is this property directed to be rented and hired—how many years of the profits of the lands and negroes, allotted to the four youngest children, are appropriated in aid of the fund for the creditors and his pecuniary legatee? The defendant contends that this charge on the property is indefinite, and that the profits must be thus applied, until all the debts are discharged and Bryan's legacy paid, and that if the creditors and legatee will grant no further indulgence, it must be sold for this purpose. An indefinite charge to this effect, seems to be forbidden by that part of the clause which enlarges the legacy to Bryan, from two thousand to twenty-five hundred or even three thousand dollars "if there be a sufficient surplus." If the charge was unlimited in its duration, how and when was this surplus to be ascertained?

We do not understand that the testator intended to charge, with the payment of his debts, the lands devised and legacies bequeathed to these children, to the exclusion of Richard's share, or of the shares of the others, in case the fund set apart for that purpose should prove deficient. It seems to us, that the testator intended that the negroes and lands should be hired and rented but for the space of one year, to aid in enlarging the fund for the payment of debts and raising the legacy for his son, Bryan. For after directing that the tract of land should be sold in such manner as suited his executors, he proceeds thus, "I leave also all the residue of my estate to be sold on a credit of twelve months, lands rented and negroes hired (255) except Richard's lot of lands and negroes, the possession of which together with the Adkins mill, I wish him to have at my death." The words, "on a credit of twelve months" are here placed in the middle of the clause sought to be construed. It is true, that according to a strict grammatical construction, this would only relate to the antecedent subject matter, to wit: the residue of his estate to be sold. But the law does not require that wills should be expounded according to grammatical strictness, and it is enough if we can collect the meaning of the testator, whether it be expressed grammatically or not. Satisfied that he did not intend an indefinite charge, we are presented in this very sentence with a term—a defined time in relation to a part of what is directed in it—and this defined time is in immediate connection with the direction "lands rented and negroes hired." The two ideas, the one of time, and the other of renting and hiring, are in the testator's mind, in the same moment, and expressed almost in the same instant. We think that the one was connected in *intent* also with the other, although the intention is imperfectly declared.

The testator gave his executors a discretionary power to sell the land upon a credit of one, two or three years. This discretion, probably, was designed by the testator to be exercised by his executors, as circumstances might enable them to make arrangements with the creditors. The sale of the residue of the estate on a credit of twelve months, hire of the negroes and rents of the lands, would produce a fund, which might be collected and reduced into money during the second year after his death, and enable the executors to extinguish the debts by the time they were compelled by law to settle the estate. The executors, at the end of two years having settled the estate by paying the debts, would know whether there was a surplus sufficient to pay Bryan, either of the sums bequeathed to him by the will. Upon examining the whole will, we think the (256) testator did not intend that his negroes shold be hired and his lands rented, but for the term of one year. And we are unable to collect from the manner in which this clause is worded, that the testator intended to charge his debts upon the devises and legacies given to the wife and other children, to the exclusion of the lot and share given to Richard. The circumstance of Richard's lot and share being payable immediately on the death of the testator, when taken in connection with all that is to be found in the will, does not raise an inference strong enough, to induce us to declare that his legacy was intended to be freed at all events from contribution. If the fund, which, according to this opinion, has been expressly created by the testator for the payment of his debts, that is to say, the property directed to be sold for that purpose, and the profits for one year of the lands and negroes given to the younger children, has been exhausted, then as the will is silent as to the mode in which the unsatisfied part of the debts shall be paid, the legatees ought to contribute according to the ordinary rules of law. We think the judgment of nonsuit given in the Superior Court must be reversed, and we would proceed to direct a judgment to be entered for the plaintiffs, but that from some inadvertence there are blanks left in the case agreed, with respect to the amount due according to the report, which blanks we are not authorized to fill. Unless the parties can remove this difficulty, we can do no more than set aside the nonsuit, and remand the cause for further proceedings.

PER CURIAM. Judgment reversed and cause remanded.

(257)

JOSHUA WHITE, admr. *de bonis non*, of JACOB WHITE v. DAVID WHITE.

When a Judge undertakes to decide on facts and inferences which ought properly to be left to the jury, the judgment will be reversed, and a new trial awarded.

TROVER for several negro slaves, tried before *Norwood, J.*, at Spring Term, 1833, of PERQUIMANS.

The material facts of the case will be found in the opinion of the Court.

Iredell for the plaintiff.

Mendenhall and *Kinney* for the defendant.

DANIEL, J. This was an action of TROVER, brought by the plaintiff as the administrator *de bonis non*, with the will annexed of Jacob White, to recover of the defendant the value of several slaves. The defendant pleaded the general issue, and the statute of limitations.

The controversy was, whether the plaintiff's testator ever had any title to the slaves which are sought to be recovered. Hagar, the mother of the slaves sued for, had belonged to Joshua White, the father of the plaintiff's testator. In 1776, Joshua White signed and sealed a paper writing, in which he declared that no law moral or divine, had given him right or *property* in the person of any of his fellow creatures:—that he then had under his care a negro girl named Hagar, and that he released (after 1785, when she would be eighteen years of age), all claim or pretension of claim to the said girl; and to this he bound his heirs, executors and administrators. This declaration in writing, the jury have found, was never delivered as a deed, either to Hagar or any other person for her benefit; in law, therefore, she still belonged to Joshua White. The only evidence of the manner in which the girl came into the possession of Jacob White, is his declaration made in a conversation with the girl, after the death of his father, when he told her he would keep her no longer, that he had kept her in conformity with a promise made to his father, until she (258) was eighteen years old, and that she should go to her protectors. Jacob White said, about a year before he died, that he did not own any slaves. Whilst the slave Hagar was in the possession of Jacob, his father, Joshua, made his will (but at what date the case does not state), in which he appointed an executor. After the death of Joshua, his executor qualified.

By one clause in the will, the testator gave to his son, Jacob, a tract of land and *all the property he had before possessed him with.* Jacob White after making a will and appointing an executor, died in 1816. The executor of Jacob qualified and never claimed the slaves as belonging to the estate of his testator. The executor died in 1821, and the plaintiff administered in 1831; demanded the slaves as part of the estate of Jacob, and on refusal by the defendant to deliver them, brought this action. The defendant insisted on the trial, that on these facts the plaintiff could not recover.

On the trial of the cause (as I gather from the very imperfect statement sent up), five distinct questions arose: 1st. Was the paper delivered as a deed? 2d. Was Hagar a part and parcel of the property, of which the testator had before possessed his son, Jacob? 3d. If she was, did the executor ever assent to the legacy? 4th. Was the act of limitations a bar to the plaintiff's action? 5th. Could the plaintiff recover, after having declared as administrator and then stating in his declaration, that the conversion had taken place at a date subsequent to the death of the testator? The Court, after charging the jury that the plaintiff might recover upon his own possession although he had declared in his representative character, proceeded and said to the jury, "if they believed the plaintiff's witnesses, his title was made out, and that he had a right to recover, unless the defendant had shown a good defence." If this be a correct statement, and I am bound so to consider it, the Judge erred in his charge. Whether Hagar under the clause of Joshua White's will, and if so, whether the executor had ever assented to that bequest so as to vest the legal title of Hagar in Jacob, (259) were necessary inquiries before it could be determined that the plaintiff had made out his case, and matters on which the Judge alone could not pass. The correct charge, I think would have been, to have told the jury that the will of Joshua, by construction of law, passed to Jacob the beneficial interest in Hagar, if she had been put into his possession *as property;* but not, if she were placed under his protection as *free;* and that the character of Jacob's possession, was a point for them to determine—and further, that if Jacob kept the possession of Hagar for many years, claiming the property in her under his bequest, such a possession would well warrant the presumption of an assent by Joshua's executor, but that if he did not hold Hagar as property, nor claim title to her under his father's will, there was no evidence on which to raise such a presumption. The Judge did not leave it to the jury to infer, from the written declaration made by the testator, and to be

gathered from the paper, although it might not operate as a deed, and from the conduct and declarations of his son as to the manner he held Hagar, whether she was "parcel or not parcel" of all the property he had before possessed his son with, and was intended to pass under the words mentioned in the aforesaid clause in the will. Neither did the Judge leave it to the jury to say whether, from the evidence and circumstances of the case, the presumption of an assent to the legacy by the executor arising from lapse of time, was or was not rebutted. I feel myself bound then to declare, upon the case stated, that the judgment rendered must be reversed and a new trial granted.

PER CURIAM. Judgment reversed.

Cited: S. C., 18 N. C., 268; *Propst v. Roseman*, 49 N. C., 132.

(260)

JACOB WHITE'S ADMINISTRATOR v. DAVID WHITE.
JACOB WHITE'S ADMINISTRATOR v. JOSIAH NICHOLSON.

Iredell for the plaintiff.
Badger for the defendant.

PER CURIAM.—As the statement of these two cases in the record represents that the same evidence and instructions of the Court were given in these as in *White v. White*, ante 257, there must be a new trial in these cases for the reasons upon which it was granted in the other.

JACOB WHITE'S ADMINISTRATOR v. JOHN C. WHITE.

Iredell for the plaintiff.
Badger for the defendant.

PER CURIAM.—It does not appear in this case that any question was made upon the plea of the statute of limitations, nor what were the declarations of the plaintiff in 1824. There is a reference to those declarations as stated in the case of the same plaintiff against Nicholson, but none such are discovered in that record. The Court is therefore at a loss to understand the question intended to be submitted to us. But as the same questions upon the construction of the will and the assent of the executor necessarily arose, in this as in the other cases, a new trial must on those grounds be awarded.

(261)

JOHN R. COOPER v. ELIHU CHAMBERS.

1. A promise by A to pay the debt of a third person, on his being discharged from custody, is not within the Act of 1826, c. 10, there being a *new* and *original* consideration moving between the parties.
2. Such a promise, though the debt be payable "in trade," is within the jurisdiction of a single magistrate.

This was an action of ASSUMPSIT commenced by warrant before a single magistrate for $18 and interest, which came up to the Superior Court of HAYWOOD by appeal.

It appeared on the trial before *Norwood, J.*, that the plaintiff had caused one Starns to be arrested on a *ca. sa.* and committed to jail. While in custody the defendant agreed to see the plaintiff's debt, interest and costs, paid "in trade," if he would discharge Starns from imprisonment. Starns was accordingly discharged, and the defendant paid part of the prison fees. It was objected by the defendant's counsel: 1st. That a parol promise would not sustain the action. 2d. That the case was not within the jurisdiction of a single magistrate. Both objections were overruled by the Court, and from the judgment rendered against him, the defendant appealed.

No counsel appeared for either party.

DANIEL, J. The first objection made to the plaintiff's recovery is, that the action is founded upon a parol promise or agreement to pay the debt of another.

By Laws 1826, c. 10, it is declared that no person shall be charged upon a special promise to answer the debt, default or miscarriage of another person, unless the agreement is reduced to writing and signed by the promisor or his agent. But when the promise to pay the debt of another, arises out of some new and original consideration of benefit or harm, moving between the newly contracting parties, the case is not within the statute. 1 Saund., 211, note (a) 8 Johns, 39. This is a case of that description; the consideration to support the promise was the injury or harm the plaintiff sustained, by discharging his debtor at the request of the defendant, and upon the agreement that he would pay the debt. When the plaintiff
(262) discharged Starns from prison, he was entirely freed from the debt, and the defendant became the debtor. The defendant did not derive any benefit from this agreement, but the plaintiff sustained harm, by giving up those advantages with which the law had invested him, to coerce the debt from Starns. Here was a new and an original consideration, mov-

ing between the contracting parties at the time the agreement was entered into; and the case is not within the meaning of the statute. This case is very different, from a collateral undertaking by the defendant, that Starns should pay the debt or he would, or that Starns should do any other act or thing; for then such collateral undertaking would be within the meaning of the Legislature, when it declares that a special promise to answer the "debt, default or miscarriage," of another must be in writing.—We think this ojection cannot prevent the plaintiff's recovery.

The second objection is, that the promise sounds in damages only, and was not within the jurisdiction of a justice of the peace. The debt due to the plaintiff from Starns, was ascertained by a judgment and the prison fees are fixed by law; therefore, the claim does not sound in damages. The mode of payment (viz: "in trade," which I conceive to mean valuable articles of trade), is not an objection to the jurisdiction of a justice of the peace, if the value of the articles in money, at the time they were to be delivered, would be a sum within his jurisdiction. By Laws 1744, c. 13, a justice of the peace has jurisdiction of sums, under £20, for goods sold and delivered, for work and labor done, or for specific articles, although due by *assumpsit,* and the justice may give judgment for the value. We must take it for granted, in this case, as no objection has been raised, on that ground, that the plaintiff has demanded the "trade," before he brought his warrant, and that the defendant did not pay or tender any articles of value in trade, to satisfy the demand. We think this case one that is within the jurisdiction of a justice of the peace, and therefore, the judgment is affirmed.

PER CURIAM. Judgment affirmed.

Cited: Ashford v. Robinson, 30 N. C., 116; *Shaver v. Adams,* 32 N. C., 15; *Nichols v. Bell,* 46 N. C., 33; *Jenkins v. Peace. Ib.,* 417; *Haun v. Burrell,* 119 N. C., 547.

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(263)

LEVI FAGAN v. CHARLES W. JACOCKS, *administrator* of WM. S. RHODES.

Where two persons engage in one common risque, as sureties for a third, and one of them subsequently takes an indemnity from the principal debtor, such indemnity enures to the benefit of all the sureties.

This was an action of ASSUMPSIT, brought to recover from the defendant, money alleged to have been paid by him as co-surety with the defendant's intestate, for one Abram Maer. It came on in the form of a case agreed at Spring Term, 1833, of BERTIE Superior Court.

It appeared from the case that the plaintiff with the defendant's intestate, and one Horace Ely, were co-sureties for Abram Maer, to a guardian bond, on which judgment was rendered against Maer, and his sureties for $6,744.48, with interest. Maer and Ely were both insolvent at the rendition of this judgment. Maer had executed a deed to John S. Bryan in trust, among other things, to secure the said Fagan and Ely, on account of their suretyship for him. From the fund arising from this trust, $3,654.88 was paid towards the judgment against Maer and his sureties. The plaintiff, Fagan, paid besides, $1,257.39 of this judgment, and the sum of $1,867.02 was paid by the defendant. Ely paid nothing.

It was agreed that the case should be decided on the same principles as if it were in a Court of Equity.

His Honor, Judge *Norwood,* being of opinion that the plaintiff was not entitled to recover, rendered judgment of nonsuit, from which, the plaintiff appealed.

Nash for the plaintiff.
Hogg for the defendant.

GASTON, J. This cause comes before us on the appeal of the plaintiff from a judgment of nonsuit rendered in the Superior Court, upon a case agreed between the parties, and we are of opinion that this judgment is correct. It is a
(264) part of the case agreed, that the cause may be decided upon the same principles as though it were pending in a Court of Equity. We do not conceive that this agreement of the parties could bestow upon the Court, an authority to decide the case by any other principles than those which the law prescribes for its decision. The parties may agree upon facts, but the conclusion to be pronounced upon those facts, must be in conformity to the rules which are laid down by a higher authority than that of the parties. In this case, however, we apprehend that there is no difference between the law and equity which are applicable to it. The plaintiff is not entitled to recover from the defendant, because he has not paid more than his ratable proportion of the debt, which in consequence of the insolvency of Maer and of Ely, has been thrown upon the intestate of the defendant. The sum which has been raised

by the sale of Maer's property and applied in part discharge of this debt, was not in contemplation of law, or within the meaning of our act of 1807, paid by the plaintiff. It was applied, as the deed of trust from Maer to Bryan, directed it to be applied, and although the motive of Maer in making the deed of trust is declared to be the indemnity of Ely and Fagan, yet this cannot change the character of the fund or the effect of this application of it. And in equity we understand the rule to be well settled, that when two or more persons engage in one common risque, as sureties for another, and one of them subsequently takes an indemnity from the principal debtor, such indemnity shall enure to the benefit of all these sureties. This principle is distinctly asserted in *Moore v. Moore,* 11 N. C., 358, and the decision there is expressly based upon the ground that the sureties had not engaged in the same common risque.

PER CURIAM. Judgment affirmed.

Cited: Hall v. Robinson, 30 N. C., 61; *Pool v. Williams, Ib.,* 288; *Gregory v. Murrell,* 37 N. C., 236; *Falkner v. Hunt,* 68 N. C., 477.

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(265)

SAMUEL VINES v. OBEDIENCE BROWNRIGG.

It is not essential to the validity of a deed of gift for slaves, under the act of 1806, that the subscribing witness should be able to testify to the *delivery,* as well as to the *signing* and *sealing.* That fact may be proved by other testimony.

This was an action of DETINUE for several negro slaves, tried before *Strange, J.,* at PITT Spring Term, 1833.

The plaintiff claimed title to the slaves under a deed of gift. The subscribing witnesses to the deed testified, that they saw the donor sign and seal the deed, when the donee was not present; that the deed was then taken away by the donor, and they saw nothing more of it till after his death, when they were called on by the plaintiff to prove its execution. There was sufficient evidence of its delivery, from other sources.

It was objected by the defendant's counsel, that under the act of 1806, the deed was not valid, unless the *subscribing witnesses* could prove the delivery, as well as the signing and sealing; this objection was overruled by the Court. A verdict was returned for the plaintiff, and a rule for a new trial being discharged, the defendant appealed.

Hogg, Bryan and *Mordecai* for the plaintiff.
The *Attorney-General* and *Devereux* for the defendant.

DANIEL, J. At common law, a personal chattel passed by way of gift, either by a delivery to the donee, or it passed by a delivery of a deed of gift, without a delivery of the chattel. Slaves are personal chattels, and where creditors or purchasers are not concerned, the same law governed gifts of this species of property, as did other descriptions of chattels, up to the year 1806. In that year, the Legislature declared that no gift thereafter to be made, of any slave or slaves, should be good or available in law or equity, unless the same should be made in writing, signed by the donor and attested by at least one witness, and proved as conveyances of land, and registered in the (266) office of the public register, by a given time. By this statute parol gifts of slaves were abolished; subsequent to the year 1806, all gifts of slaves to be good and available, had to be in writing either in the form of a deed or a writing without seal, accompanied with an actual delivery of the slave, which writing must be signed by the donor and attested by a subscribing witness, and registered in the time prescribed by law. Without these forms and solemnities, all gifts of slaves are void. The second section of the act of 1806, is as follows: "On all trials where any such writings shall be introduced to support the title of either party, the due and fair execution of such writing, shall be proved by a witness subscribing and attesting the execution of such writing, but if such witness shall be dead or removed out of the State, then the probate or acknowledgment and registration of such writing may be given in evidence." The plaintiff in the present case, claims the slaves mentioned in the writ and declaration, by a writing purporting to be a deed of gift; it was registered within the time prescribed by law, it was subscribed by a witness who on the trial proved that G. Brownrigg, the supposed donor, signed and sealed the same, but the witness was unable to prove that the paper writing thus signed and sealed, had ever been delivered. The plaintiff proposed to supply the deficiency of proof, which was necessary to a due execution of a deed of gift by other witnesses, whose names were not subscribed to the paper writing. This testimony was objected to, because the second section of the act of 1806, requires that the execution of the writing shall be proved by a witness subscribing and attesting the execution of it. The Court admitted the evidence and there was a verdict for the plaintiff. On a motion for a new trial, the defendant contends that the Court erred by permitting such evidence to

be received. We are now called on to decide, whether, as the subscribing witness was present in Court and examined on the trial, the delivery of the deed could be proven by any other person? It appears to me, that as the first section of the act has required the writing to be subscribed by a witness, and also required that it should be proved and registered (267) as conveyances of land, that the second section was introduced into the act for the purpose of expressing the will of the Legislature, that on any trial at law for slaves, when the said writing should be offered in evidence, it should not be introduced on the terms that conveyances of land, are admitted in evidence, viz: only by showing that it had been admitted to probate and registration, but that the subscribing witness, if alive and in the State, should attend and prove the writing, according to the rules of the common law. The writing was not to be given in evidence as conveyances of land are, unless the subscribing witness was dead or absent from the State. The second section of the act of 1806, is a copy of the third section of the act of 1792, relating to the sale of slaves. The Legislature intended that when the title to slaves came in question, either upon a sale, and a writing, was introduced, or by a gift and a writing was offered to support the title, the same should not be evidence by barely showing that the writing had been admitted to probate and registration, but that the common law rule should be followed, of producing the subscribing witness and proving the instrument by him, if he was able to prove it; if not, the writing might still be proven, as instruments are proven by the rules of the common law. If A is a subscribing witness to a writing, evidencing a gift of slaves, and saw it signed and sealed but could not prove its delivery, then B, who is not a subscribing witness, may be introduced to prove the delivery. If the subscribing witness, on the trial, was to perjure himself in denying that he saw the deed executed, yet the instrument may be established by other witnesses who have not subscribed to the deed.

The act of 1806, is an act to prevent frauds and perjuries, and it requires the subscribing witness, the witness of the law, to be produced on the trial to prove the execution of the writing; yet, like the construction that has been put on the statute of frauds in England, if the subscribing witness is unable or will not prove the execution of the writing, it (268) may be proven by other witnesses. In England, the statute of frauds requires a will, which shall be good to pass lands, to be attested by three witnesses, who shall sign in the presence of the testator. It has been decided there, that if the

attesting witnesses to a will of lands, swear against their own attestation, they may, nevertheless, be contradicted by means of other testimony. *Lowe v. Joliffe,* 1 Bla., 365; *Goodtitle v. Clayton,* 4 Burr., 2224. I am of opinion that the Court acted correctly in admitting the evidence, and that the deed of gift was properly proven, and that the judgment should be affirmed.

PER CURIAM. Judgment affirmed.

Cited: *Gaskill v. King,* 34 N. C., 212.

ROBERT VANHOOK, chairman, etc., use of New Bern Bank v. JOHN BARNETT and CAREY WILLIAMS.

When an administration bond was made payable to A B, and *"other Justices* of Person County," and it appeared that the principal obligor was at the time of executing it a justice of said county: Held, that such bond was valid, and the words *"other Justices,"* were to be rejected as senseless and uncertain.

DEBT on bond. *Pleas*—General issue, conditions performed and not broken.

The plaintiff offered in evidence a writing purporting to be a bond, payable to "Robert Vanhook, chairman, and other *Justices* of the county of Person." This paper was signed by John Garner, as principal, and the present defendants, as his sureties. John Garner was at the time of giving said bond, a justice of the peace for Person County.

The Deputy Clerk proved that he usually transacted the business of the Clerk's office—that the instrument was
(269) filled up by him, and signed by the persons whose names were subscribed to it—that he had found the paper among the records, on file with other administration bonds. Barnett's name was not mentioned in the body of the bond. The plaintiff then produced the record of a judgment confessed by Garner, as the administrator of one Winstead, in favor of the relators, for recovery of which this suit was brought. The introduction of this judgment was objected to, but was admitted by the Court as *prima facie* evidence of assets, and the defendant was permitted to offer evidence that the administrator had no assets at the confession of the judgment.

Martin, J., before whom the case was tried at PERSON Fall Term, 1832, instructed the jury, that the facts above stated,

if true and unexplained, would in law constitute a delivery; that the bond was valid, although Garner was one of the justices of Person; and that the question of assets was a fact to be ascertained by them. The jury returned a verdict for the plaintiff; from the judgment rendered, whereon, the defendants appealed.

Devereux for the plaintiff.
Mangum for defendants.

DANIEL, J. The defendants in this action contend that a new trial should be granted, on all, or some one, of the several grounds taken by them. First, that the Court erred in its opinion, when it declared the bond, upon which the action was founded, was valid in law, it being shown that John Garner, one of the obligors, was, at the time of the execution of the bond a justice of the peace for the county of Person; and, therefore, from the wording of the instrument, was to be considered an obligee of the said bond, which in law would make the instrument a nullity. The bond is given to "Robert Vanhook, chairman, and other justices of the County Court of Person, to be paid to the said chairman or his successors in office, or *other* justices of the county of Person." This case is not like that of *Justices v. Shannonhouse,* 13 N. C., 6, and other similar cases, which have been decided in this Court, under the authority of that decision. In that case, the obligation was given to "John Muller, Ambrose Knox, and the (270) *rest of the justices* assigned to keep the peace," etc. The two obligees that were named, and the *rest* of the justices assigned to keep the peace for the county of Pasquotank, necessarily included *all* the justices of that county; and as Shannonhouse and Wilson were two of the justices of that county, at the time the bond was executed, the Court declared the bond to be nugatory and of no effect. In the present case, the bond is given to Robert Vanhook, chairman, and other justices of the County Court of Person. It may be asked what *other justices?* Do these words mean a part or the whole of the justices? If a part only, then it may be asked, what part, and who are they? The clause in the bond, containing the words—"and other justices of the County Court of Person"—is, in my opinion, uncertain, senseless and unmeaning, and must be rejected by the Court, in putting a construction upon this instrument. That part which is certain, shall not be vitiated by that which is uncertain and unmeaning. We, therefore, agree with the Judge who tried the cause, that the instrument is a good bond

at common law. The bond having been executed after the Act of Assembly, passed in 1825, went into operation, directing that the bonds of administrators should be made payable to the Governor and his successors in office, prevents this instrument being considered an official bond.

Secondly, the Deputy Clerk of the County Court gave in evidence, that he usually transacted the business pertaining to the office—that the instrument aforesaid was filled up in his handwriting, and that the signatures of the names subscribed were in the proper handwriting of the persons designated; and that he had found the instrument among the records of the Court, on file with the bonds of administration and others. The Court charged the jury, that the facts above stated, if true and unexplained, would in law, constitute a delivery of the bond. The defendant excepts to this part of the charge of the Court, and I think, the Judge expressed himself rather inaccurately. The bond was not an official, but a common law bond, and it
(271) being filled up in the handwriting of the Deputy Clerk and found among the records of the Court, is not in law a delivery of the bond, though it is such strong evidence of it, as might naturally induce the Judge to say it proved it. It should have been left to the jury to say if from the evidence, they could, or could not infer, that the obligors had placed the instrument in the hands of the clerk or any other person, for the purpose and with the intention, that it should operate as an administration bond. If the jury could so infer, and it is hardly possible they should not, then, the bond having been delivered to a third person for the obligee, although that third person might be a stranger, it nevertheless, became the legal obligation of those who executed the same, from the date of the delivery to the third person; and it could not be avoided by the obligors, if the obligee afterwards accepted it as a bond. *Threadgill v. Jennings,* 14 N. C., 384.

The third ground taken by the defendant, for a new trial, is, because the Judge stated to the jury, that the record of the judgment confessed to the bank by Garner, the administrator, was *prima facie* evidence, not only of the amount of the debt, but also of the fact, that he had assets to pay the same. I think the Court erred in this part of the charge to the jury. It has been determined by this Court, in *McKellar v. Bowell,* 11 N. C., 34, that the record of a recovery against a guardian, is not evidence against his securities, in an action brought by the plaintiff in that recovery against the securities to subject them upon the guardian bond for the default of their principal.

The same argument and reasons now urged by the plaintiff's counsel, to prove that the judgment against the principal, is *prima facie* evidence against the security in another action, were either urged by the counsel, or noticed by the Court, in *McKellar v. Bowell, supra.* Chief Justice TAYLOR, in his elaborate opinion delivered in that case, has explained and answered the whole of them. After this question has undergone so solemn a determination in this Court, I do not feel myself at liberty to say, it is not the law of the land.

The fourth reason offered for a new trial, is at the (272) instance of the defendant, Barnett. His name is not mentioned in the body of the bond, nor does it begin with the words, "we are held and firmly bound to R. V., etc;" but it begins thus—"Know all men by these presents, that John Garner, Carey Williams and Richard H. Burton are held and firmly bound unto R. V., etc." At the bottom of the paper, there are the signatures and seals of Garner, Williams, Burton and Barnett. In the body of the printed form of the bond, there had been a blank left for the insertion of the names of the obligors; the name of Barnett had been omitted in filling up the blank. In *Smith v. Crooker* (5 Mass., 539), a bond had been executed by a surety before his name was inserted in the body of the bond, his name being afterwards inserted when he was not present. The bond was held good against him. The Court said they were satisfied it was sufficient evidence, that he consented that the blank might afterwards be filled by inserting his name. The Court further said in this case, it is very clear that the security would be holden as an obligor, on his executing the bond, if the blank had been filled up with his name. I think that Barnett became bound in the bond to Vanhook, by signing and sealing the instrument, if it was afterwards delivered. I think, nevertheless, that there should be a new trial for the reasons stated in the second and third grounds taken by the defendants.

PER CURIAM. Judgment reversed, and a new trial granted.

Cited: Williams v. Springs, 29 N. C., 386; *Iredell v. Barbee,* 31 N. C., 254; *Kerns v. Peeler,* 49 N. C., 228; *Greene v. Thornton, Ib.,* 231; *Adams v. Hedgepeth,* 50 N. C., 329; *Howell v. Parsons,* 89 N. C., 232; *Moore v. Alexander,* 96 N. C., 36.

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JAMES J. HOYATT and others v. DAVID PHIFER.

1. The recital of a former in a subsequent deed is evidence of the existence of the former deed against a party to the latter and all claiming under him, but not against a stranger.
2. But when the admission contained in the recital is relied on by a stranger, for a fact operating in his favor, and there are also other facts disclosed which operate against him, the recital must be taken altogether.

TRESPASS QUARE CLAUSUM FREGIT. *Plea*—general issue. On the trial before *Norwood, J.*, at Fall Term, 1833, of MECKLENBURG, the plaintiff proved that the defendant entered on the *locus in quo*, and committed the trespass. There being no actual possession, the plaintiffs, for the purpose of showing that they had a constructive possession, deduced their title to the land, in the following manner:—a grant from the State to William Polk, dated on 27 February, 1796; then a deed from Polk, dated on 8 February, 1820, to Duponceau and Kentzing; they then deduced title through sundry mesne conveyances, from Duponceau and Kentzing to themselves. The defendant's counsel moved the Court, that the plaintiffs be nonsuited because they had not produced in evidence, the deed from William Polk to Tench Cox, mentioned in the recital of his deed to Duponceau and Kentzing. The deed from Polk to Duponceau and Kentzing, of 8 February, 1820, recites the grants from the State to him of seventeen tracts of land, including the one in question, and also recites that "by an instrument in writing under his hand and seal, on or about the twenty-third day of January, *Anno Domini*, one thousand seven hundred and ninety-seven, the said William Polk did bargain, and sell, and convey unto Tench Cox, Esq., his heirs and assigns, all the said seventeen tracts of land with their appurtenances, for and in consideration of the sum of nine cents, money of the United States, per acre," and then conveys the same as follows: "The said William Polk, for and in consideration of the premises,

(274) and of the sum of one dollar, money of the United States, to him in hand paid, by the said Peter S. Duponceau and Abraham Kentzing assignees of said Tench Cox, who became such since 20 October, 1798, the receipt whereof is hereby acknowledged, hath granted, bargained and sold, released and confirmed, etc., the said land to Peter S. Duponceau and Abraham Kentzing in fee." The Court reserved the point of law, and the case was put to the jury, who returned a verdict for the plaintiff, subject to the opinion of the Court upon the question reserved. Upon argument the Court decided, that

it was necessary for the plaintiff in order to make out a complete title, to produce the said recited deed from William Polk to Tench Cox on the trial, as well as a deed from Cox to Duponceau and Kentzing, and thereupon, ordered the verdict to be set aside and a nonsuit to be entered. From which judgment, the plaintiffs appealed to this Court.

Iredell and *Devereux* for the plaintiff.
No counsel appeared for the defendant.

DANIEL, J., after stating the case, delivered the opinion of the Court:

It has been held that the recital of a deed in a subsequent deed, is evidence of the former, against a party to the latter, and those who claim under him, and therefore it operates by way of admission; but such a recital is not evidence against a stranger to the second deed. (1 Starkie, 369; *Ford v. Lord Gray,* Salk., 285; 4 Binney, 231.) But when the defendant relies on the admission contained in the recital, as evidence of a fact in his favor; he must recollect that the admission must be taken altogether, and that if there are other facts disclosed in the admission, which operate against the defendant, the plaintiffs will be entitled to the benefit of them. The whole of a recital is to be taken, and therefore, if a patent be recited to be surrendered, and one relies upon the recital as proof of the existence of the patent, it will also be proof of a surrender. (3 Star., 311; 2 Ventris, 171; Com. Digest Evidence, B 5.)

The recital states, that Polk conveyed the land by deed of bargain and sale to Cox in the year 1797; by (275) another recital in the same deed, it appears that Duponceau and Kentzing, became the assignees of Cox since the 20 October, 1798. Assignees of what?—the recital is speaking of the land; and we must take it to mean that they are the assignees of the land. The plaintiffs, therefore, having made out their title to the land without the assistance of the tripartite deed and mortgage of 12 August, 1819, it now becomes unnecessary for us to determine whether those deeds had been properly proven or not. We think the nonsuit should be set aside, and judgment rendered for the plaintiffs, on the verdict given by the jury.

PER CURIAM. Judgment reversed.

LAVERTY and GANTLEY v. TURNER and PHILIPS.

The failure to serve the defendants with the copy of a declaration, filed in the County Court, five days before the first day of the term, can only be taken advantage of by plea in abatement, and not by a mere motion to dismiss.

The plaintiffs brought their action of DEBT against the defendants, in the Court of Pleas and Quarter Sessions for ORANGE, returnable to May Session, 1833. The plaintiffs filed their declaration in the clerk's office, within the three first days of the term.

The defendants appeared and made an affidavit that they had not been served with a copy of the declaration, whereupon they moved the Court to dismiss the suit. This motion was overruled, and the defendants appealed to the Superior Court. In the Superior Court, before *Daniel, J.*, the plaintiffs moved to dismiss the appeal, which the Court ordered to be done, and awarded a writ of *procedendo* to the County Court. The defendants being dissatisfied with the order, appealed to this Court.

Graham and *Badger* for the plaintiffs.
Waddell for the defendants.

(276) DANIEL, J., after stating the facts, proceeded as follows:

The question submitted for our determination is, whether the defendant had a right, barely on a motion founded on an affidavit to have the plaintiffs' suit dismissed? The Act of Assembly passed, in *1777, c. 2, declares that on actions brought in the Superior Courts, "the plaintiff shall file his declaration, in the clerk's office, on or before the second day of the term to which his suit shall be brought, and serve the defendant with a copy at least five days before the commencement of such term, otherwise the action may be abated on the plea of the defendant." The same act in a subsequent section, declares that on actions brought in the County Courts, "the plaintiff in every suit shall file his declaration on the first day of the term or first calling of the cause in court, and shall also serve the defendant or his attorney with a copy thereof, at least five days before the term." If the plaintiff fails to *file his declaration* or to appear and prosecute his suit, the defendant may enter a *non pros.* By another act of the General Assembly, passed

*24 State Records, 48.

in 1786, it is declared, "that every attorney when employed in any suit, in any of the courts of this State, shall file his declaration in the clerk's office any time within the first three days of the term, to which the writ is made returnable, and on failure thereof, such suit shall be dismissed by the Court at the cost of the plaintiff."

In this case, the counsel for the plaintiff contends that so much of the act of 1777, as requires a copy of the declaration to be served on the defendant, is repealed by the act of 1786, and that the plaintiffs having filed their declaration in the clerk's office, within the three first days of the term, had done all that was required by the law.

If the act of 1777 is repealed, there is an end of the question, and the defendants must fail. We deem it unnecessary to decide this point, because we are of the opinion, that if the part of the act of 1777, which bears on the case, is still in force the defendants cannot avail themselves of the benefit of it, by mere motion. The act authorizes the defendant to *non pros.* the plaintiff only when the latter *fails to file his* (277) *declaration* in the time prescribed, or fails to appear and prosecute his suit. It does not give him the authority, by mere motion, to *non pros.* the plaintiff because he has not served a copy of the declaration at least five days before the term. Upon actions brought in the Superior Courts, the act expressly requires, that the defendant should only avail himself of such an omission by plea in abatement. And although the act has not expressly stated how such an omission shall be taken advantage of in the County Courts, yet it is very clear it cannot be by a motion to dismiss the suit. We think that in analogy to the requirements of the act, which regulates the practices in the Superior Courts, the defendants should only be permitted to avail themselves, by plea in abatement, of the omission of the plaintiffs to serve on them a copy of the declaration. We are, therefore, of opinion that the judgment rendered in the Superior Court ought to be affirmed.

PER CURIAM. Judgment affirmed.

WILLIAM JOHNSTON v. McGINN and GRAHAM.

What is reasonable notice to an endorser, depends on the local situation and respective occupation and pursuits of the parties, and is to be judged of by the court.

This was a WARRANT brought by the endorser of a promissory note, against the endorsers, tried before *Seawell, J.*, at

MECKLENBURG Spring Term, 1833. The question was whether legal notice had been given to the endorsers, of the non-payment of the note by the maker. The note had been made on 3 December, 1827, payable one day after date; and it was endorsed to the plaintiff on the 14 December, 1827. The plaintiff who lived 30 miles from the endorsers, on 31 Decem-
(278) ber, 1827, brought a warrant jointly against the maker and endorser, and obtained judgment (but at what time the case did not state), from which judgment the defendant appealed; and at November County Court, 1828, the plaintiff was nonsuited. In a day or two after the nonsuit, the plaintiff brought this warrant against the endorsers. The Court in its direction to the jury, instructed them, that the warrant and proceedings in the suit against the maker and endorsers, were in law a demand upon the maker, and notice to the endorser of the non-payment, and that they were looked to for payment. There was a verdict and judgment for the plaintiff, and the defendants appealed.

Devereux for the plaintiff.

No counsel appeared for the defendants.

DANIEL, J., after stating the case as above, proceeded:

The general rule is, that the endorsee must prove that he has used all due diligence in demanding payment of the maker, and afterwards in giving notice to the endorser of the default of the maker, and that he is looked to for payment. Whether due diligence has been used is a question of law, but depends on facts, such as the situation of the parties, their places of abode and the facility of communication. *Derbyshire v. Parker,* 6 East. 3. 2 Cowp. 602. *Tindel v. Brown,* 1 T. R. 167. The Courts of this State have said, what shall be reasonable notice depends on the local situation and respective occupation and pursuits of the parties, of which it seems the Court is to judge; *London v. Howard,* 3 N. C., 332; *Austin v. Rodman,* 8 N. C., 195. The parties in this case, resided thirty miles from each other; and on the seventeenth day after the endorsement, the plaintiff issued his warrant, jointly, against the maker and endorsers, which was executed by the constable on all of them; but whether, on the maker first, and then on the endorsers, does not appear. We do not learn from the case, at what time the trial of the warrant took place, it might have been thirty days after the date, which time added to the seventeen days
(279) that elapsed after the endorsement, before the warrant was issued, would make forty-seven days between the date of the endorsement, and the date of the notice to the en-

dorsers. After such a length of time, it appears to us, that the endorsers would have been discharged from their liability.

The service of the warrant on the maker, was certainly a demand of payment of him; but at what time this was done, does not appear; nor does the time that the endorsers had notice thereof appear, so as to enable the Court to judge, whether due diligence had been used or not. There must be a new trial. The plaintiff should not regret this, because if a new trial was refused, we do not see how we could render judgment against the defendant, upon the warrant brought against "McGinn and Graham," without an amendment, which we are not authorized to allow. We think therefore, the judgment should be reversed and a new trial granted.

PER CURIAM. Judgment reversed.

SUSAN HARRISS, by her next friend, v. JACOB RICHARDSON.

A guardian appointed by a Court of Chancery may, by order of the court, rightfully sell the personal property of his ward. And the Act of 1762, c. 69, confers the same powers on the County Courts in this State.

DETINUE for negro slave, Lydia, tried before *Seawell, J.*, at PASQUOTANK Fall Term, 1833.

It appeared on the trial, that the slave Lydia had been the property of the plaintiff, but had been sold by her guardian, by order of the County Court of Pasquotank, which court had jurisdiction of the ward, and by which the guardian had been appointed. This order was made on the petition of the guardian, setting forth that his ward had no other property than the mother of Lydia and her three children, which (280) were all expensive to her.

Upon these facts appearing, the Court instructed the jury, that the County Court of Pasquotank had no authority to order the sale, and no title could be derived from any sale made under it. The jury returned a verdict for the plaintiff. A new trial being moved for and refused, the defendant appealed.

Kinney for the plaintiff.
Iredell for the defendant.

GASTON, J., delivered the opinion of the Court:

It is conceded in the argument of the case, and is clearly established by authorities, that a guardian appointed by the Court of Chancery, may, by the order of that Court rightfully

sell the personal property of his ward. The act of 1762 (c. 69), after reciting "that the greatest part of the estates in this province belonging to orphans are of so inconsiderable value, that an application to the Court of Chancery in many instances will occasion an expense, which the profits of them are not sufficient to defray, and that it has been found by experience, that the court of each respective county, exercising the power of regulating the education of orphans, and the management of their estates, have proved of singular service to them," proceeds in the fifth section to enact "that the Superior Courts and Courts of Pleas and Quarter Sessions, within their respective jurisdictions, have, and shall have *full* power and authority from time to time, to take cognizance of *all* matters concerning orphans and their estates;" and in the last section provides "that nothing in this act contained shall be construed to restrain or abridge the power of the Court of Chancery, in any matter or thing relating to orphans or their estates." The enacting words of the Statute are large enough to confer, and the preamble and the proviso above mentioned, seem clearly to indicate an intention to confer, on the courts above mentioned an authority respecting all matters concerning orphans, and the estates of orphans co-extensive with that which belonged to the Court of Chancery; and an opinion favorable to this
(281) construction has been before intimated by this Court, in *West v. Kittrell,* 8 N. C., 493. Unless therefore, something can be found in the body of the act inconsistent with the interpretation, to which we are thus conducted or restrictive of it with respect to certain subjects, this must be pronounced to be a true exposition of the grant of power. It is insisted that sections 10, 11 and 12 of the act contain enactments which are inconsistent with the supposition, that the Court to which this general grant was made, derived authority from it to order or to sanction a *sale of slaves* by the guardian. Section 10 enacts, that the guardian shall, by order of the Superior or Inferior Court, cause to be sold the perishable estate of his ward (except in the instances thereinafter mentioned), at public sale after advertisement for twenty days giving six months credit upon good security. Section 11 enacts that where the orphan has lands and a sufficient number of slaves to cultivate and improve them, such slaves, *unless otherwise ordered by the Superior or Inferior Court,* shall be employed on these lands, and all horses, cattle, hogs and sheep shall be kept on the lands until the orphan comes of age; and the 12th provides that where such stock grows too numerous, or it shall be to the advantage of the ward, the guardian may sell by order of the Court such part

of it as the Court may think fit. And it is argued that the limited grants of power conferred by these sections to permit a sale of the perishable parts of an orphan's estate, are repugnant to and inconsistent with the supposed general grant of a like power over every part, even the more permanent and valuable part of an orphan's personal estate. But are these sections to be regarded as conferring powers on the Courts? Are they not rather directory to the guardian, indicating the course which he ought to pursue in the management of the estate confided to his care? It may indeed be inferred and very properly inferred from the silence of the act with respect to the sale of slaves, that the law makers did not contemplate such a sale as being generally for the interest of the infant, or consistent with the duty of the guardian. The omission to point out any case in which slaves might be sold, may well be regarded (282) as imposing on the guardian the necessity of supporting an application for permission to sell them by plenary proof that the act was required by the interests of his ward, and imposing on the Court the duty of strictly scrutinizing such an unusual application. But it would be a forced construction to consider these directions as abridging the full chancery powers over the estate of the orphan distinctly conferred by the statute.

By Laws 1789, c. 312, sec. 5, it is enacted that when a guardian shall have notice of any debt against the estate of his ward, he may obtain an order of Court for the sale of so much and such part of the personal or real estate of his ward as the Court shall deem proper; that the same shall be sold on credit, and the proceeds in the hands of the guardian shall be liable in the same manner as assets in the hands of an executor after a *scire facias;* and that no execution shall be levied on the property of the ward, until twelve months after judgment obtained. We are unable to collect from this act any distinct legislative intent restrictive of the right of the guardian to sell personal property under the sanction of a Court of Chancery, or of the Courts to which a concurrent jurisdiction in relation to orphans and their estates has been given by the act of 1762. Every provision in it may consist with the existence of such an authority to sell personal property. It empowers the Court to designate whether real or personal estate shall be sold, it provides a mode heretofore unknown, whereby the proceeds may be reached in the hands of the guardian; and it makes a salutary regulation to prevent a sale of the ward's property by execution during a period in which the guardian can conveniently make sale on credit of such part of it as shall be most expedient, and collect the proceeds of the sale.

The subsequent acts of the Legislature which have been referred to in the argument, furnished no aid in establishing the proper construction of the act of 1762. They state
(283) that doubts have prevailed how far the powers of the Courts extend, and out of abundant caution, make enactments to confer certain powers if they do not already exist, or to regulate their exercise if theretofore conferred.

We find ourselves constrained to say, that the county Courts do possess the authority to order a sale by a guardian of the slaves of his ward, and that a fair *bona fide* purchaser under such a sale may acquire a valid title to the property. Such sales however are so unusual—the occasions which would justify them are so rare—the dangers of imposition on the Court by misrepresentations of the guardian and of corrupt combination between him and the ostensible purchasers so obvious, that the vigilance of Courts and jurors should be exerted in detecting any fraud which may infect the proceeding.

Whether there has been any unfairness in this sale, has not been submitted to the jury. We hold this to be an all important inquiry, and for that purpose shall reverse the judgment and award a new trial.

PER CURIAM. Judgment reversed.

Cited: Howard v. Thompson, 30 N. C., 370; *Williams v. Harrington,* 33 N. C., 621; *Harshaw v. Taylor,* 48 N. C., 514.

LEWIS M. COWPER v. THOMAS SAUNDERS.

On a contract to deliver specific articles at a certain place within a certain period it not appearing that any *act* was to be done by the plaintiff to entitle him to recover for a breach of such contract, it is not necessary for him to prove that he was present at the place, during the time appointed.

This was an action on the CASE brought for an alleged breach of a contract, for the delivery of shingles. It appeared that the shingles were to be delivered at Gates Court House, within five weeks from the time the contract was entered into. No evidence was given that the plaintiff was at the place during the time appointed ready to receive the shingles, and it
(284) was insisted by the plaintiff that he was discharged from the necessity of attending by the act of the defendant himself, who denied the contract altogether and declared he

should not deliver them—to prove this, evidence was given of a letter addressed by the defendant to the plaintiff's agent, which letter was received by him 3 or 4 July—the time for delivery of the shingles expired on 2 July.

His Honor Judge *Seawell* instructed the jury, that to entitle the plaintiff to recover, he must either show that he was at the place agreed on for the delivery of the shingles, within the time agreed on, or that his failure was occasioned by some act of the defendant, and that if he failed to be at the place within the time, any notice he might receive afterwards, that the defendant did not intend to deliver the shingles would not enable him to maintain this action, though the letter containing such notice were written before the expiration of the time.

A verdict being returned for the defendant and a new trial moved for and refused, judgment was rendered thereon, from which the plaintiff appealed.

Badger for the plaintiff.
Iredell for the defendant.

GASTON, J. The transcript of the record filed in this case is so exceedingly imperfect, and the case made so destitute of precision, that we find it difficult to understand the point intended to be brought before us. There is no declaration whatever so that we cannot see what is the contract alleged to have been made and broken. The case tells us no more of its nature than is to be collected from the statement that the action was brought to recover damages for an alleged breach of contract to deliver shingles—which by the contract were to be delivered at a place certain, and within five weeks from a prescribed day. Whether this contract to deliver was founded on the consideration of money actually paid, or of money to be paid at the time of the delivery, or of money to be paid afterwards, we are wholly without the means to ascertain. Whether the defendant made any attempt to deliver according to the last day, or at an earlier day, we are uninformed. Under these circumstances, the Judge's charge is brought before us for revision. (285) We can perceive no other course than to examine its correctness as applying to all cases of a contract like that stated to affirm the judgment if the charge be universally correct, and to reverse the judgment if the charge be in any such case erroneous. It is highly probable that this course may not do justice to the opinion of the Judge, nor decide the legal questions intended to be submitted, but we are obliged to act upon the case judicially brought before us and we can see no other rule by which to direct our action.

The opinion purports to lay it down as a rule of law, that when one man sues another upon his contract to deliver specific articles at a place named and within a period of time named, the plaintiff cannot recover unless he show that he was at the place agreed on within the time named, or was prevented from attending by some act of the defendant. Now where according to the contract there are concurrent *acts* to be done by the parties, as for instance, the one to deliver specific articles on receiving the price, and the other to pay the price on receiving specific articles, there we understand the rule of law clearly to be that neither can sue the other for a non-performance without an allegation that he had performed or was ready to perform the act stipulated to be done on his part. But upon the case stated, there is but *one* act to be done, and that to be done on the part of the defendant. If this contract be obligatory, and the case so represents it, the defendant must either perform his engagement, or do what is tantamount to performance, or allege some sufficient reason for non-performance. The place for the delivery of the articles was fixed, and the time for the delivery so far certain as that it should not exceed a certain day. It was the duty of the defendant to deliver the articles at all events on the last day of this appointed period, and it was competent for him to make the delivery at an earlier day on giving reasonable notice of such a design to the plaintiff so that he might have an opportunity to attend. If
(286) indeed on the last day, or at an earlier one of which the plaintiff had received reasonable notice, the plaintiff did not attend to receive the articles the defendant would have been justified at leaving them there at the plaintiff's risk. But without some attempt on the part of the defendant to execute his engagement, which is either equivalent to a performance or furnishes a legitimate excuse for non-performance unless there is more in the case than is disclosed to us, we cannot say that the plaintiff ought not to recover.

PER CURIAM. Judgment reversed, and a new trial granted.

Cited: Grandy v. McCleese, 47 N. C., 145.

WILLIAM GILLIAM, administrator of JOSEPH WELCH, v. JOSEPH M. WELCH, administrator of ELIZABETH WELCH.

A bequest of a slave to a *feme covert, "for her proper use,"* does not vest in her a separate and exclusive right; but the legacy if assented to by the executor, goes to the husband.

GILLIAM *v.* WELCH.

DETINUE, tried at CABARRUS, before *Seawell, J.*, Spring Term, 1833.

The action was brought by the administrator of Joseph M. Welch, against Elizabeth Welch's administrator, to recover a slave by the name of Esther, and her child by the name of America. The defendant plead the general issue.

The plaintiff claimed title to the slaves under the following bequests, in the last will and testament of George Davis, deceased: "I will and bequeath to my daughter Betsey Welch, my negro girl Esther, *for her proper use.*" The daughter Betsey, was then the wife of Joseph Welch, the plaintiff's intestate, and who was then alive. The defendant is the administrator of Elizabeth, the wife of Joseph Welch. The assent of the executor of George Davis, was given to the legacy.

The Court directed the jury, that the bequest made as aforesaid, enured to the benefit of the husband, who (287) upon the assent of the executor, acquired a legal title. A verdict was rendered for the plaintiff. The defendant moved for a new trial, because the Court misdirected the jury, as to the law. The motion was overruled, judgment rendered for the plaintiff, and the defendant appealed.

No counsel appeared for the plaintiff.
Devereux for the defendant.

DANIEL, J. The question for this court to determine, is, whether the slave Esther, mentioned in the legacy to the testator's daughter, Betsey Welch, enured to the wife separately, or was the husband entitled to her, after taking possession with the assent of the executor?

Whether the wife was to have a separate interest in the slaves, depends upon the intention of the testator, to be collected from reading the whole will, before the husband can be deprived of his marital rights, it is necessary to show a decided intention in the testator, that the husband should have no interest whatsoever. *Lamb v. Milnes*, 5 Ves. 521. In examining the will of George Davis, I discover he uses the same words, or nearly the same at the termination of three separate and distinct bequests, one of which bequests is to a son. They are as follows: "Fifthly, I will and bequeath my negro boy Jess to my daughter Peggy Dickson, for her own proper use."

"Sixthly, I will and bequeath my negro boy Nelson to my son Aaron, for his own proper use forever."

"Seventhly, I will and bequeath to my daughter Betsy Welch, my negro girl Esther, for her proper use."

It will be seen here, that the legacy to the son, where the same words are used, is placed in the will between the legacies to the two daughters. It seems to me that the words made use of by the testator, and which the defendant contends created a separate interest in the wife, only show a disposition (289) to transfer an absolute estate in the slaves to the several legatees mentioned in the will, rather than a separate estate to his daughters. In *Roberts v. Spicer,* 5 Mod. 491, and *Wills v. Seyers,* 4 Mod. 409, it was held that a legacy to a married woman, "to and for her own use and benefit," did not give a separate estate. In *Adamson v. Armetage,* 19 Ves. 415, the Master of the Rolls said he thought the direction that the legacy shall be for her *sole* use, sufficient to vest the property in her, exclusive of the marital right. This remark was but a *dictum* no ways necessary to be made, in the correct determination of the case, then before the Court. The Court will not force a construction, to give the legacy to the separate use of the wife, *Brown v. Clark,* 2 Ves. 166. It appears to me that the "proper use" of the legacy, is to apply it to the maintenance of the wife and family, and to discharge debts. The husband is bound by law to maintain her and the children, and he is further bound to discharge the debts. The fund, unless a clear intention otherwise appears, should be placed in the husband's hands, to enable him to discharge those obligations which the marriage has brought upon him. The law declares that a clear intent, for the sole and separate use of the wife must be shown, or the husband shall have the property. After looking over the whole will, and observing that the testator has used the same words in his disposition of other legacies, where there could not be a possible necessity for a separate estate to be created, I am of the opinion that he did not by the use of the words, "for her proper use," intend to create a separate estate in the slave Esther, to and for the benefit of his daughter Elizabeth.

PER CURIAM. Judgment affirmed

Cited: Crawford v. Shaver, 37 N. C., 240.

Den ex dem. ANN CLOUD v. JAMES WEBB.

The possession of one tenant in common is in law the possession of all—and the sole, silent occupation by one of the entire property without an account to, or claim by the others, is not an *ouster,* or evidence from which an ouster can be inferred, unless continued for 20 years.

CLOUD *v.* WEBB.

EJECTMENT tried before *Strange, J.*, at ORANGE Spring Term, 1832.

Upon the new trial granted in this cause (14 N. C., 315), the following facts appeared in addition to those there stated. Ann Cloud, the lessor of the plaintiff, filed her petition for partition of the lands in controversy, in the County Court of Orange, which was carried up by appeal to the Superior Court. James Webb having pleaded *sole tenure,* this action was brought under direction of the Court to try the title—a witness testified that during the pendency of the suit, in conversation with the lessor of the plaintiff, he aksed her why she had not settled her claim in the lifetime of Neal? to which she replied, "he was my brother, and I was unwilling to have any difficulty with him, but now he is dead and the land is gone into the hands of strangers, I will get what I can."

The Court being of opinion that these facts did not materially vary the case from the former, directed judgment to be entered for the plaintiff, from which the defendant appealed.

Winston for the plaintiff.
Badger for the defendant.

GASTON, J., delivered the opinion of the Court:

On a former occasion this case was brought before the Court on the appeal of the plaintiff, and then the judgment rendered below was reversed and a new trial ordered. 14 N. C., 315. Upon the second trial, a verdict and judgment was rendered for the plaintiff, and it now comes before us on the appeal of the defendant. It presents in substance the same matters for consideration which were then presented, and adjudged, for the Judge was unquestionably correct in declaring, as he did, that Ann Cloud's declaration of her motives for not preferring a petition for partition before Neal's death, (291) neither proved an ouster nor furnished evidence sufficient in law from which an actual ouster might be inferred. The law, therefore, applicable to the controversy must be regarded as *settled* by the previous decision, unless it can be conclusively shown that the former decision was erroneous. No arguments are now urged against it, which were not then urged to prevent it, and a re-consideration of those formerly made does not convince us that an error was heretofore committed.

Every possession will be construed to be consistent with right, unless there be demonstration plain that it is claimed and held otherwise. When the husband of Ann Cloud died, she was un-

questionably entitled to an undivided fourth part of the land, for which undivided share she has now sued, and Henry Neal was entitled to the other three-fourth parts as tenant in common with her and Neal was then in possession. The possession of one tenant in common is in law the possession of all the tenants in common. One however may disseize or oust the others, and from the time of such ouster the possession of him who keeps out the rest is not their possession, but is adverse to their claims of possession. The sole silent occupation by one of the entire property, without an account to, or claim by the others, is not in law an ouster, nor furnishes evidence from which an ouster can be inferred, unless it has been continued for that length of time which furnishes a legal presumption of the facts necessary to uphold an exclusive possession. Twenty years, independently of our act of 1826, constitute that period, and about fifteen years only elapsed between the death of Daniel Cloud and the institution of legal proceedings by Ann Cloud to have her share allotted in severalty. The act of 1826, if it were applicable to subjects of this description, does not affect the case, for, that act bars no antecedent right by a less time than twenty years, if such right be asserted within three years after its enactment, and here the petition for partition was filed in a year afterwards. Besides this sole possession for an insufficient time to raise the presumption of an ouster, there (292) is no other fact to warrant such a presumption, except the conveyances and re-conveyances of a part of the land, but the case states that these were not followed by *any change of possession.* If they had been, a sole possession by the bargainee of a part under a deed in severalty for that part, might and probably would amount to a demonstration plain, that such possession was a several holding under that deed, was tantamount to an ouster of that part, and therefore adverse to Mrs. Cloud's claim of a right to the possession thereof.

It is the opinion of the Court that the judgment which has been rendered is correct and must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Black v. Lindsay, 44 N. C., 468; *Day v. Howard,* 73 N. C., 6; *Covington v. Stewart,* 77 N. C., 150; *Caldwell v. Neely,* 81 N. C., 117; *Withrow v. Biggerstaff,* 82 N. C., 84; *Page v. Branch,* 97 N. C., 102; *Dobbins v. Dobbins,* 141 N. C., 217; *Rhea v. Craig, Ib.,* 611.

WILLIAM STEVENS v. DRURY SMITH.

Where the plaintiff declared on a single bill of the defendant for four hundred and forty-seven *dollars* and sixty six cents, and the instrument offered in evidence corresponded with that set forth, except that it wanted the word "*dollars:*" *Held*, that this was no variance, and that the word "*dollars*" must be supplied by construction.

DEBT on single bill of the defendant, tried at SAMPSON Spring Term, 1833, before *Martin, J.*

The plaintiff declared upon a single bill of the defendant, for the payment of the sum of four hundred and forty-seven dollars, sixty-six cents. On exhibition of the instrument offered in evidence, it corresponded in all respects with that set forth in the declaration, except in this—it promised the payment of four hundred and forty-seven dollars and sixty-six cents. The defendant objected that the instrument offered in evidence was different from that alleged in the declaration. The Judge overruled the objection and the plaintiff had a verdict and judgment for his debt. It is insisted that the objection taken to the evidence was good and the Judge erred in overruling it.

Holmes and *Winston* for the plaintiff. (293)
Henry for the defendant.

GASTON, J., after stating the case, proceeded as follows:

The Court is of opinion that the Judge did not err in overruling the objection. There was no alternative but to give to the note the construction which the Judge put upon it, or to consider the most important part of it as wholly unmeaning. If a sensible meaning could be given to this part of the instrument, it was the duty of the Court to assign to it this meaning. The reasons stated by the Judge for the interpretation which he adopted and which reasons we need not repeat are satisfactory. To these however, it may be added that the note by its terms, was made for the payment of money, that it must be understood, unless otherwise distinctly expressed, to be made for the payment of money, the currency of our country—that of this currency, by the express enactment of Congress, act of 2 April, 1792, a dollar is *the unit*—that all other coins are recognized as either multiplies or fractional parts of that unit; that by the act of our State Legislature, 1809, c. 775, the currency of the State is recognized to be that of "dollars and cents," that is these units and the hundredth parts thereof, and that this note could not be understood by the parties, by a Court or by a jury in any other sense than as stipulating for

the payment of four hundred and forty-seven dollars (or units) and sixty-six cents (or the hundredth parts thereof). The judgment of the Court below is affirmed with costs.

PER CURIAM. Judgment affirmed.

Cited: S. v. Keeter, 80 N. C., 474.

(294)

JOSEPH S. BATTLE v. SAMUEL W. W. VICK.

The appointment of guardian is a matter of discretion, the exercise of which cannot be revised by this Court.

This was a contest between the parties for the appointment of guardian to an idiot. The County Court of NASH gave the appointment to the defendant, and the Superior Court at Spring Term, 1832, *Daniel, J.,* presiding, affirmed this order and the defendant appealed to this Court.

Badger for the plaintiff.

The *Attorney-General* and *Devereux* for the defendant.

GASTON, J. We are unable to see any error in law in this judgment of the Superior Court. The case was one which called for the exercise of a sound discretion in the Judge, and we have no reason to doubt but that it was exercised correctly. Matters which depend on discretion, must be principally regulated by the particular circumstances of each case, and it must be an extraordinary case indeed, in which a Court like this whose powers are limited to the correction of errors in law can become so fully possessed of these circumstances as to enable it where there is no precise rule of law, safely and wisely to revise the adjudication.

PER CURIAM. Judgment affirmed.

(295)

Den ex dem. WILLOUGHBY D. BARNARD v. Roe and WILLIAM C. ETHERIDGE.

In this State, when no judgment is formally entered upon a verdict, connected with the pleadings, which authorizes a judgment, the court is bound to intend such a judgment as ought to have been rendered.

EJECTMENT, tried Fall Term, 1833, of CURRITUCK, before *Seawell, J.*

The material facts of this case will be found fully stated in the opinion of the Court.

Kinney for the plaintiff.
Iredell for the defendant.

GASTON, J., delivered the opinion of the Court:

The plaintiff on the trial of this ejectment, offered in evidence to support the title of his lessor a deed from the sheriff, purporting to convey the land in controversy, an execution purporting to give the sheriff an authority to sell it, and a judgment on which it was alleged this execution had issued. The defendant objected to the testimony offered, that the judgment did not warrant the execution. The Judge sustained this objection and nonsuited the plaintiff. The plaintiff moved to set aside the nonsuit. This motion was refused and the plaintiff appealed.

The execution commands the sheriff, of the goods and chattels, lands and tenements of James P. Hughes and wife, to make a sum of money which was recently recovered by Willoughby D. Barnard, "administrator of Dennis Dozier, deceased," and it is insisted that the judgment was rendered in favor of the said Willoughby D. Barnard, personally. The record is exceedingly imperfect and informal. It sets forth a writ issued in behalf of Willoughby D. Barnard, administrator of Dennis Dozier, the pleas of the defendants, the issues joined and "leave given on motion of the plaintiff to amend the writ by striking out 'administrator.'" It does not state that the amendment was made, but sets forth a verdict upon the issues joined, in favor of the plaintiff, gives no formal (296) judgment and shows the execution such as is above recited, issued upon the judgment in that suit and returned by the sheriff executed. It has been long settled in this State,

that upon a verdict which connected with the pleadings, authorizes a judgment and where no judgment is formally entered, we are bound to intend such a judgment as ought to have been rendered. The defendant contends that leave having been given to the plaintiff in that suit to amend his writ, the writ must be considered as though it had then been amended accordingly; and that upon a writ so amended, and on the issues and verdict, the judgment ought to have been rendered in behalf of Barnard personally. *Ufford v. Lucas,* 9 N. C., 214, is relied on as an authority in support of this argument. In that case, a writ had been sued out in detinue, and pending the action leave had been given to amend the writ so as to suit it to an action in trover. The amendment was not actually made on the record, but the action proceeded as an action of trover, and the verdict and judgment were in trover. After an appeal to this Court, the defendant endeavored to reverse the judgment because of a variance between that and the writ, but the Court refused to reverse for this cause, and declared that the parties having agreed that the writ might be amended to trover, and all the proceedings thenceforth up to the rendition of the judgment being in trover, the appellate court would consider the amendment made as fully as though it had been entered of record. But in the record which we are now considering there is nothing from which it can be seen that the proceeding subsequent to the leave given, did correspond with the *new* form which the plaintiff was permitted to give to his writ. It does not appear of record, nor can we infer it that the plaintiff availed himself of this leave. We cannot pronounce therefore that such an amendment was made nor can we intend any other judgment than that which consists with the writ, the pleadings and the verdict, and which consists also with the execution that issued thereon.

(297) It is not to be inferred from what has been said that if the judgment could have been construed or intended as one in favor of Barnard personally, the misprision of the clerk in inserting the words "administrator of D. Dozier" in the execution, could cause that execution to be regarded as a nullity. The execution was returned to the Court and made a part of the record of the suit in which the judgment was rendered. It is clear we think that the misprision could and would have been corrected by the proper Court as a matter of course; and if so we are not prepared to decide that such a discrepancy between the judgment and execution can be objected to by third persons as actually invalidating the execution.

It is the opinion of the Court that the judgment of nonsuit be reversed and a new trial awarded.

PER CURIAM. Judgment reversed.

Cited: Harper v. Miller, 26 N. C., 36; *Brooks v. Ratcliffe,* 33 N. C., 325; *Peterson v. Vann,* 83 N. C., 121; *Walton v. Pearson,* 85 N. C., 50.

PRESIDENT AND DIRECTORS OF THE BANK OF NEW BERN v. TURNER PULLEN.

1. A return on an execution by a sheriff, of a private matter between himself and the plaintiff in the execution, *e. g.* "payment to the plaintiff" or "indulgence by him," is no evidence for the sheriff in a suit brought against him by the plaintiff in the execution.
2. But between third persons, such return is evidence.

This was an action on the CASE against the defendant as sheriff of WAKE, in which the plaintiff declared.

1st. That the defendant has failed to make return of certain writs of execution, issued at the instance of the plaintiff against A. S. H. Burgess and others.

2d, for a false return.

3d, upon the special case or the facts stated.

On the trial before *Martin, J.,* at Wake Spring Term, 1830, the plaintiffs proved that they obtained a judgment in Wake County Court, at August term, 1824, against A. S. H. Burgess, principal, and Wm. Hill and T. Hunter sure- (298) ties, for $980, with interest on $950 till paid; that he sued out a writ of *fi. fa.* on said judgment to November term, 1824, and placed it in the hands of the defendant, then sheriff of Wake, who levied the same on the land and slaves of Burgess, 4 October, 1824, and closed his return by saying, "all of which property is said to be under deed in trust, except Coy, Preston and Austin." This execution, with the levy endorsed, was returned to the office of the court.

The plaintiff then sued out a writ of *venditioni exponas,* on this judgment, returnable to February Term, 1825, which was likewise delivered to the defendant, as sheriff, and was returned by him with the following endorsement: *"Indulged by order of the plaintiff. T. Pullen, Sheriff."* The plaintiff then sued out an *alias* writ of *venditioni exponas,* on 1 April, 1825, returnable to May Term, 1825, which also came into the hands

of the defendant, and upon which he returned, "sale of the within property postponed by order of the plaintiff." The defendant continued sheriff, until May Term, 1825.

Several other executions in favor of other plaintiffs against Burgess were produced in evidence, by virtue of which, the sheriff sold negroes Coy, Preston, Austin and Albert and applied the proceeds of this sale to the satisfaction of those executions, except $145, which he returned "by agreement of all persons interested, was paid to A. S. H. Burgess, the balance of the property within named, viz., the lot No. 16, etc., and negroes Harry and Polly being claimed by virtue of a deed of trust, to secure the judgment of the Newbern Bank, and the other property within named, being covered by other deeds the same was not sold by me. T. Pullen, Sheriff."

Upon the facts disclosed by the executions, etc., the Judge instructed the jury that the plaintiffs had not produced evidence to support their action; in submission to which opinion, the plaintiff submitted to judgment of nonsuit. A rule for a new trial being discharged, the plaintiffs appealed.

(299) *W. H. Haywood* for the plaintiff.
Badger for the defendant.

RUFFIN, C. J. I cannot think such a return as this evidence for the sheriff. It is in his own discharge entirely; and is like one, that he had paid the plaintiff the money, which surely would not be proof of the fact. If it be good that far, it is making it so altogether; because it alleges a matter not susceptible of contradiction. The payment might have been in private; and so may the order for indulgence. It is but a slight inconvenience to the sheriff, to call witnesses, or to take a permanent evidence in writing of the fact; but if his own return will do, it is opening the door to great abuses. It may be said that payment to the party is not an answer to the writ, but only an excuse for not making one. So is this; it is a reason why he did not execute the process, and not showing how he has done it. In other cases, where his return has been held evidence, the question was either between third persons, between whom he stood indifferent, or when he charged himself. If he returns satisfaction, he concludes all persons, because he makes the debt his own. A return of a levy is evidence for him in an action of trover for the property seized, upon this ground. If he return a rescue, it is the same thing, because that does not excuse him, unless it be by the public enemies, which must be a matter notorious, and then easily susceptible

of proof by witnesses; and as to process upon it, the Court only gives to such a return sufficient credence to grant the attachment, but not to convict or punish under it. *Nulla bona* is a negative return, and in its nature throws the proof on the other side, who must prove goods of the debtor, before he can subject the sheriff, no matter what the return was. In *Gyfford v. Woodgate,* 11 East. 297, the action was between the parties to the execution, between whom the sheriff was indifferent. It does not follow, because his return was read in that suit, and indeed was part of the plaintiff's case, that it would have been received if the action had been against the sheriff himself, for making a second seizure before he had sold the property first seized. In *Bradley v. Wyndham,* 1 Wils. 44, the (300) counsel for the sheriff did not rely upon a return of the sheriff, but proved the fact that the fraudulent instructions were given by the plaintiff's attorney. And so in *Smallcomb v. Buckingham,* 1 Ld. Raym. 251, the sheriff did not return, that the plaintiff did not apply for a warrant on his *fi. fa.* but showed the truth by other evidence and that the plaintiff in the other *fi. fa.* proceeded to execute his writ. I admit that between the plaintiffs in the two writs, the return is evidence; because if true, it ought to postpone the dilatory creditor; and if the sheriff cannot make it appear to be true, he is justly liable to the creditor, whose preferable right of satisfaction that return has postponed. The truth is, that if the sheriff had returned *nulla bona,* as he may properly do, when the creditor postpones the sale and another then proceeds to sell (which is the regular mode of making the return), then the facts must have been proved by witnesses in justification of the sheriff. The question is, whether after charging himself by the levy and entering it on his writ, he can discharge himself, not by entering *nulla bona* generally, which opens the whole case to evidence on both sides, but by a special return of a private thing between him and the plaintiff, to which the other can probably have no opposing evidence. I think not. The sheriff ought to be held to a strict return according to the writ; or if he be permitted to excuse himself for not obeying its precept, he ought to be prepared to prove the excuse by other evidence than his own testimony. He now makes an affirmative return, which cannot well be negatived. No precedent in point is found; and I think there ought to be a new trial.

PER CURIAM. Judgment reversed, and a new trial granted.

Cited: Smith v. Spencer, 25 N. C., 267.

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JONES and ROBESON v. KINCHEN KEY and others.

1. There is a presumption arising on the face of every imperfect testamentary paper, that it was not intended to operate in its then unfinished state; but this is a presumption of fact, and liable to be rebutted by other testimony.
2. A clause of attestation being annexed to a paper not attested, is not conclusive evidence of the abandonment by the testator of his intention that it should operate as his will.

This was an issue of DEVISAVIT VEL NON, arising on a paper writing, offered as the will of John Key, deceased.

On the trial before *Martin, J.*, at Spring Term, 1833, of BLADEN it appeared that the paper offered in evidence had an attestation clause, without being attested by any witness; much testimony was given touching the execution of the instrument, which it is unnecessary to state.

The Court instructed the jury as to the effect of the clause of attestation, that that circumstance alone was not conclusive evidence of the intention of the testator, that the instrument should not operate as his will; that it was *prima facie, evidence* of such intent, but might be repelled by other proof, on the sufficiency of which they were to decide.

A verdict was returned for the plaintiff. A new trial was moved for on the ground of misdirection on the above and other points (which are now abandoned), and the defendants appealed to this Court.

Badger for the plaintiff.
Devereux for the defendant.

RUFFIN, C. J. Of the exceptions stated in the record, only one has been insisted on in this Court It is contended, that this paper cannot be sustained as a will, because it has an attestation clause, and is not attested; which is the exception taken in the Superior Court. In the discussion here, the proposition is amplified; and it is argued that as the will pro-
(302) fesses to pass both realty and personalty, and for want of attestation is inoperative as to the former, it cannot be good for any purpose.

It is readily conceived that a strong intention of the testator may be inferred, that an unattested will should not operate at all unless it be available in every respect, or at least, as to both kinds of estate; as in provisions for different members of his family, in land for some, and personalty for others. But that is a question for the jury, whether he intended the paper

to operate as far as the law would allow it, in its present form, or intended that unless the law would allow it in its present form to be effectual in all its dispositions, it should not be in any. That consideration can however seldom, if ever, enter into the mind of a testator, who is bestowing his bounty on strangers; for it cannot well be, that his inclination to serve one, is at all dependent upon his ability to serve another. And it seems impossible, that where the same persons are the donees of both the real and the personal state, and in the same proportions in each, that the testator can intend the legatees shall lose the legacies, because the law enables the heir to defeat the devises. But if it were not so, the intention is a question of fact; upon which consequently it is the province of the jury to pass. When the publication is proved, the effect is to make the paper a will for all purposes to which the law, in respect of the formality of its execution, will allow it to be a will. The question of intention respects the publication. Did the supposed testator publish, or intend to publish the particular paper for one purpose, if it could not be effectual in all its provisions? There may be presumptions upon that point, from the state of the family, and the nature of the provisions; but they are but presumptions, and those of fact. For there is no such legal principle, as that a will professing to pass both kinds of estate, must be executed so as to do so, or it will pass neither. The contrary is seen in the common case of a will with one witness. As a presumption of fact, it stands only until it be repelled by express or other evidence of publication; that is, that the testator executed the particular paper, or adopted, or recognized it, in its actual state as finished, and to be (303) finally his will without more doing to it on his part. When that is shown, the paper is a will of those parts of the estate, respecting which the evidence of publication then offered is competent to establish the publication of a will disposing of them alone.

The same may be said of the other part of the objection, as confined to the terms in which the exception in the Superior Court is taken. This, it may be remarked, applies as strongly to a will professing to pass only personal property, as to one purporting to dispose of both kinds. There is a presumption that a paper, which upon its face is imperfect, has not been published as a will, or was not intended by the maker of it to operate in the condition in which it is. This presumption will be more or less strong, according to the nature or degrees of the imperfections. If the paper be not signed, or if it be not finished, that is, not written out to express all the gifts the

testator means to make, leaving, for instance, a part of his property undisposed of; or if another paper (though imperfect also) written at the same time or afterwards, containing new and inconsistent dispositions, or the party from time to time make alterations and additions without appointing executors or coming to a conclusion; in such and many other cases which might be stated, the inference is, that he never published the particular paper or intended conclusively, in case of immediate death, his estate to be enjoyed according to it. The state of the papers and the nature of the provisions, may so well satisfy the mind that such was not the intention of the party, that the conviction would not be removed by evidence that he spoke of making or having made a will, for he may well be supposed to allude to a consistent, digested and finished instrument yet to be drawn up for execution from the others, as heads, memoranda and a general outline to be yet further altered or added to. A presumption certainly arises from other imperfections, as the want of date or attestation; and especially when the paper shows that it was once the party's purpose to have it attested. But this is manifestly weaker than the other presumptions, because the paper is not imperfect in the sense of
(304) not fully expressing the testator's mind as to the final disposition of his whole estate, and being signed by him, imports that no alteration or addition was intended. The question in such a case, is not about the *animus testandi* as in that paper; but as to the *animus testandi by* that paper; in other words it is reduced to the naked inquiry of publication, as it is technically called. Of a will of lands, publication must be proved by two witnesses, or by the circumstances specified in the act of 1784. But as to personalty, no particular mode is required by law. It may be shown by subscribing or other witnesess, who know the fact by the letters or separate memoranda of the deceased; or in any way which will satisfy the jury, that the paper was considered and intended by the party in case of his death, then to pass his estate—the clause of attestation, if written by the party himself, shows that at one time he intended to avail himself of the security of subscribing witnesses. But suppose him afterwards to run his pen through that clause, would not that show a contrary intention to dispense with them, and rebut every inference against the publication; of itself it proves that the party has determined to dispense with subscribing witnesses, as the means of communicating to the world, after his death, the publication of his will. When the will is written by another person who inserts the attestation clause without direction, it can hardly be said that any inference can

be drawn from it against the will; for then there is no reason to suppose the testator ever meant to call on a witness as the instrument of authentication. But whatever be thought from the party's leaving that clause, unobliterated, it can be at the utmost only a presumption, that he never published the paper, and is liable to be rebutted, as the Judge stated to the jury. The circumstances raising a contrary presumption, were, in this case, fully sufficient to authorize the Judge to leave them to the jury as evidence, if believed by them, to repel it. Here the testator gave directions for a full will, it was written and given to him as his will; it purports to be perfect on its face and to dispose of his whole estate and contains (305) an appointment of executors; it is afterwards signed by himself and sealed up and deposited with another person, with directions to open it after his death. If all this were true (which seems to be the real doubt), there would seem to be no ground for hesitation upon the question of publication, or the intention to give his estate by that very paper. The judgment therefore must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Tucker v. Tucker, 27 N. C., 168.

STATE v. BENJAMIN F. SEABORN.

1. A statement in the record that "on balloting, the following jurors are duly elected, sworn and charged to serve as grand jurors," etc., is a sufficient compliance with the provisions of Laws of 1779, c. 157.
2. In the superior courts of original criminal jurisdiction, every thing as to the method of proceeding is presumed and taken to be right, unless the contrary appears.
3. An irregularity in the mode of empaneling a grand jury, can only be taken advantage of by plea in abatement upon the arraignment, and the objection comes too late after verdict.
4. It is not necessary in an affidavit for removal of a cause, that the *belief* of the affiant should be stated; it is sufficient if it sets forth the *facts* on which he grounds his belief.
5. An order of removal "to C.... County," without saying the *Superior Court* of the county, is sufficient.
6. Upon a conviction of arson the convict is ousted of his clergy.

The prisoner was indicted for the crime of ARSON. The indictment contained six counts. The first count charged the arson to have been committed by "feloniously, willfully and maliciously," setting fire to the dwelling house of one Richard

Smith, in the city of Raleigh, and concluded at common law. The second count was like the first, except that it laid the dwelling house to be that of one John Hosea. The third count charged the prisoner, with "feloniously, voluntarily, willfully and maliciously" setting fire to the dwelling house of (306) one Richard Smith, and concluded against the form of the *statute*. The fourth resembled the third except in laying the property of the dwelling house in John Hosea. The fifth was like the third and fourth, except in concluding against the form of the *statutes;* and the sixth differed from the fifth, only in laying it to be the dwelling house of John Hosea.

The indictment was found at WAKE Spring Term, 1833. In the sheriff's return of the *venire,* one of the persons summoned, was stated in the record to be named Joes Jones, and the clerk in making up the record, stated "on ballotting, the following persons are duly elected, sworn and charged to serve as grand jurors at this term, to-wit, Seth Jones, foreman," etc., and among the rest Joel Jones. The name of Joel Jones did not appear on the original *venire,* otherwise than as above.

The prisoner when put to the bar, offered the following affidavit for the removal of his cause:

"Benjamin Seaborn maketh oath that he is advised by his counsel, that a state of feeling exists in this county, so firmly seated as to his guilt, that a fair and impartial trial therein can be hardly expected."

Upon this affidavit, the cause was ordered to be removed "to the county of Cumberland, for trial, to be had in said court to be held for said county, on the second Monday after the fourth Monday in April," etc.

On the trial in Cumberland, the evidence for the State consisted in a great variety of circumstances, among which was the fact of a large amount of money being found upon the prisoner shortly after the fire, part of the money was identified by Smith as his, and it was proved that the same was in the house at 9 o'clock of the night of the burning. The prisoner had made divers statements as to his possession of the money and after his arrest he admitted that he had the money in his pocket when the house was burned, but said that he had received it from a negro Harry, the slave of Smith.

On this part of the case, his Honor, Judge *Martin* instructed the jury, that the degree of credit to be given to this (307) declaration, was for their exclusive consideration, that they should attend to and weigh all the circumstances attending it: the situation of the prisoner, his previous statements, his apparent inducements, etc., and should decide what

impression was made upon them, as to its truth or probability; and upon the whole, if they were satisfied of his guilt beyond a reasonable doubt, they should convict him; if they entertained a reasonable doubt they should acquit.

The jury returned a verdict of guilty; a motion was made for a new trial, which being refused, the following reasons were offered in arrest of judgment: 1st. That the bill of indictment was not found by a grand jury properly constituted.

2dly. That the order for removal was irregular, not being founded on a sufficient affidavit.

3dly. That there was no order for the removal of the cause to Cumberland Superior Court.

4thly. That the indictment was not sufficient.

5thly. For insufficiency of the record.

His Honor arrested the judgment, whereupon Mr. *Solicitor Troy* appealed to this court.

Badger for the *Attorney-General* for the State.

No counsel appeared for the prisoner in this Court.

RUFFIN, C. J. Upon the motion for a new trial, I agree with the Judge of the Superior Court, that there is no ground for it.

But I do not concur with him that the judgment ought to be arrested. As the consequences of this difference are so important to the prisoner, and the regular administration of the criminal law, I deem it respectful to the Judge of the Superior Court, and otherwise proper to express the reasons which govern me.

Of the several reasons in arrest, the first relates to the constitution of the grand jury. To that, two objections are made, both of which are supposed to arise on *Laws 1779, c. 6, which provides that the County Courts shall nominate jurors for the Superior Courts, of whom a list shall be given to the sheriffs, who shall summon the persons and return the lists, and "that the Superior Courts shall direct the names (308) of all the jurors so returned, to be written on scrolls of paper, which shall be put into a box and drawn out by a child under ten years of age, and the first eighteen drawn shall be a grand jury." The first objection is, that it must appear expressly in the record, that all this was done, and that it does not so appear in this case; in which the record, after setting out the list returned or the *venire facias,* as it is called in the case, proceeds thus: "On balloting, the following jurors are duly elected, sworn and charged to serve as grand jurors, etc."

*23 State Records, 946.

Upon the construction of this statute, the remark must be obvious, that it is not, at least in all its parts, to be taken as literal, and absolutely mandatory. The first eighteen drawn are not positively to be a grand jury; for some of them may not have been freeholders when nominated, or may not then be so, and freeholders are required by the first section. It means, that the first eighteen drawn, found upon trial to be otherwise qualified shall constitute that body. When therefore eighteen persons are stated to be duly elected out of a larger number, and to be thus elected by ballot, it cannot be understood otherwise, than that the body consisted of those whose names were on the scrolls first drawn, and who were found to be thus qualified. This signification we find given to those words "elect" and "ballot" in the law cases. But this act itself in the very next section applies this term *ballot* to the selecting of a petit jury by drawing the scrolls.

But if the record cannot be considered as affirming these facts, it may yet be sufficient. It is not necessary it should be affirmative of every part of the form or mode of proceeding. In the Superior Courts of original criminal jurisdiction everything as to the method of proceeding is presumed and taken to be right, unless the contrary appear. To this *S. v. Kimbrough,* 13 N. C., 431, following that of *S. v. Lewis,* 10 N. C., 410, is an authority in point. The words of the Chief Justice are, "when such a Court has taken an indictment, it shall be intended that it was duly taken; that it was taken by the requisite (309) number of good and lawful men, duly drawn, sworn, and charged—in other words, that everything was done correctly, as far as concerns manner and form." There the record stated, that *"upon balloting* the following persons are drawn to serve as grand jurors, viz.," etc., and that they returned the indictment; but it did not state any particulars of the balloting, nor that the jurors were sworn or acted on oath, otherwise than as to be inferred from the indictment itself. The conviction was sustained, and the prisoner executed. A single reflection will satisfy us, that this has always been acted on as law. It is the uniform tenor of all the records in reference to this point. I have never seen one, nor I presume has any other person, in which the writing of the scrolls, putting them in a box and drawing them out by a child, to the number of eighteen, were either in all or any of these particulars specifically stated, or otherwise set forth than in general terms similar to those here used.

I conceive therefore, that there is nothing in this objection. Nor would there be, I think, were the proceedings that of any

Court; because it comes too late, for the reasons more particularly applicable to the next point.

The second objection to the grand jury is, that in the record one Joel Jones is named as one of the grand jurors sworn, while the list returned contained no such person, but one of the name of Joes Jones. This differs from the former objection in this. That here the facts which it is alleged constitute the error do appear in the record; whereas the first error was supposed to consist in the silence of the record upon certain facts. It is insisted that the grand jury must be composed only of those summoned, and that, if one be empaneled on it by a different name from all those summoned, he must be taken to be a different person; and the bill is not well found.

This objection if founded in fact and taken in due season in the Superior Court would, in my opinion, have been unanswerable; and had it then been overruled, it would have been error. But this I am saying as a mere *dictum;* for admitting the exception to have been once sufficient, the question (310) remains whether the case was open to it when it was actually taken, which is the point of the present decision.

I do not find that it is yet settled in England, whether an exception to a grand juror can be taken after verdict or even after plea to the felony. Perhaps the unequivocal terms of St. 11 Hen. IV ch. 9, may make it imperative on the Court to receive it at any time; since if well founded, it avoids the indictment *ab initio* "with all the dependence thereof," which includes, as some suppose, the prisoner's plea in chief and "the verdict." Yet others have held, that although the proceedings be void under the statute, the matter of avoidance must be brought before the Court at a proper and at an early stage, namely before the bill found, by challenge, or by special plea upon arraignment, with a plea over to the felony either then or upon the overruling of the first plea. To that effect is the great authority of Lord *Coke* (3 Inst. 33, 34; and in Bacon's Abridgment, Juries A) this is said to be the better opinion. But Serjeant *Hawkins* afterwards remarks (Book 2, c. 25, secs. 23, 26, 27) that it seems yet *doubtful,* how far advantage can be taken of the disqualification of a grand juror after trial. Whatever may be the correctness of this doubt, it is manifest that it depends upon that Statute and has no other foundation.

There is nothing to ground it on, in this State. The Statute of Hen. IV is not in force here; because we have legislated for ourselves upon this subject, and have established by many acts a complete system of our own, inconsistent in many respects with that of England. I do not think it necessary to

recite our statutes, and content myself with a reference to them. They are Laws 1779, c. 137. 1806, c. 693, sec. 11, and c. 694, 1807, c. 712, and 1810, c. 801. A perusal of them must satisfy any mind, that all these statutes are directory in their nature. There is not an annulling clause or word in any one of them; and from many of the provisions it must be deduced, that no such consequences of an irregularity was intended. If we advert,

(311) for instance, to the very particular directions of (Laws 1806, c. 694), relative to the forming of the jury lists from the tax list, to be furnished by the clerk of the county court; to the writing the names on scrolls of equal size; to the putting them in a box having a certain number of divisions, marks, locks and keys; to the locking the box, the custody of the keys and of the box; and to the drawing of the names by a child under a certain age; when I say, we advert to these provisions, and also recollect that many of the matters can by no method get into the record of the Superior Court, and that the statute contemplates that no part of them will get there, by communication from the county court, except the list of jurors to be summoned, that is, the result of all the previous ceremonies; the impression on the mind must amount to conviction, that the enactments are merely directory, and if so, that others upon the same subject in the same statute, or in another statute in *pari materia,* partake of the same character. But the prevailing consideration is the want of any words importing that the proceeding shall be void, if the directions of the acts be not strictly observed. Upon this ground, *S. v. McEntire,* 4 N. C., 267, was decided; and ruled, that in this State exceptions to grand jurors must be taken at a period analogous to that for excepting to a petit juror; that is, at the earliest point of time the party could. That to a petit juror must be by challenge when tendered; as has long been settled at common law, and was also here under the same act of '79 in *S. v. Oldham,* 2 N. C., 450. In strictness, so ought a grand juror to be challenged before he is sworn. Thus it was at common law, and there our acts still leave the case. That was the course, I recollect, in Burr's trial; 9 Mass., 10. *Commonwealth v. Smith* rules that, upon a statute of that State, similar to ours, *no plea* of an irregularity in empaneling the grand jury could be received. But it seems to be agreed in *S. v. McEntire, supra,* that the objection may be by plea upon the arraignment; and to that I would adhere, as a

(312) fair and convenient method. But I think all objections of the sort are precluded by a plea to the felony.

We require the record to show that the inquisition was taken by a grand jury, perhaps, that it was a grand

jury of eighteen; and, in inferior courts, that it also show they were sworn. But when this appears, it is enough; and all matter of exception *dehors,* as to the mode of designating the jurors originally, or of forming the grand jury, and as to the disqualification of those on it, must be alleged by the prisoner before any step be taken, which presupposes that in fact, or that he admits the inquisition was well taken by competent persons. The present case will illustrate the correctness of this principle. The objection assumes as a fact, that the juror summoned, and the juror sworn are different persons. This may not be true, for the same person may be known by two names, and as well known by the one as the other. If the matter be pleaded, the State may aver and prove the identity; and the question would then be decided according to very fact. But by bringing it forward in this shape, proof is excluded, and the Court compelled to decide, perhaps against the truth, upon a mere presumption from the difference in name, that they are different persons. The application of the principle is not unusual in the criminal law. There is, according to the nature of the matter, a proper time for pleading different defences in criminal, as in civil cases. A plea in abatement for misnomer or a wrong addition must be put in upon arraignment; and that of *autre fois acquit* or *convict,* either before or, with a plea over to the felony.

I am therefore of opinion that both of the objections taken in the first reason in arrest, are insufficient and must be overruled.

Entertaining this opinion, I have not attended to the authorities cited in support of the motion to amend by the originals in Wake Superior Court, or as modified here by the original jury list, in Wake County Court.

The second reason in arrest is, that the affidavit of the prisoner, on which the trial was removed, does not express the belief of the prisoner, that he could not obtain justice in Wake; and, by consequence, that the order of removal (313) is null and the Court of Cumberland had no jurisdiction. This professes to be founded on the particular terms of Laws 1808, c. 745.

I learn from Judge DANIEL, that he considers this a correct position, if *S. v. Twitty,* 9 N. C., 248, be law; and that the ground upon which he overrules it is, that he denies that case. I do not feel called on to give any opinion upon that question, for I think this case may be decided correctly upon principles not at all inconsistent with that case. I agree with him, that the rule there laid down, turns in this particular instance, a gen-

eral jurisdiction into a very special one; and that it should seem indispensable, that there should be a plain and certain method for the Court, to which a cause is removed, to determine, whether it is bound to try it; that is, has the power to do so; about which if it stand on the force of the order, the minds of any two Judges may come to different conclusions of fact. I find too that in England such a jurisdiction has always been exercised by the King's Bench, and by statutes like ours, has been conferred on some other courts; and that the order of record is then conclusive; or, as Lord *Mansfield* expresses himself in *Rex v. Harris,* 1 Bla. 378, the suggestion, once entered on the roll, is not traversable. As to the other case upon this subject that of *S. v. Poll,* 8 N. C., 442, I must say, that I think it law; and for the reasons given in it. That was a removal, by the consent of the master and counsel. It has not been determined, that the act of 1813 extends to indictments. But if it does, that act does not authorize or contemplate a removal *by order of the Court,* founded on the consent of parties. No decision of the Court whatever is necessary. *"The parties may remove* such suit by consent," and such *"consent shall be entered on record,"* and thereupon the transcript is to be made out, and the Court to try the suit. In that case the consent to which the act gives effect, namely that of the party, was not entered of record; and that becomes the subject of judicial cognizance in Chowan for the first time. The question of jurisdiction was then open and necessarily to be decided by that Court, (314) for no other had passed on it. The want of it was manifest on the record; the cause remained in Washington. It was not removed, neither by order of the Court of Washington, nor by the prescribed acts of the parties. Whether the same rule applies when a court has decided on the point, and the cause has in fact been removed by an order, I admit I should have thought questionable, especially as a difference of opinion between the two courts might keep a case indefinitely *in transitu* between them, and all cases, civil as well as criminal, are alike affected by the rule. But as a question, I leave it for farther consideration, until its decision be directly called for.

According to that case, we are to look into the affidavit to see whether the facts, on which the applicant founds his belief, are stated; but if we find any, we can go no farther; for the Judge to whom the application was made, and he alone decides on their sufficiency.

Here the facts stated are, a firmly seated feeling amongst the people of Wake, of the prisoner's guilt, and that he is so

advised, that is, informed by his counsel. Whether that information was a sufficient warrant for the conclusion drawn by him, that a fair trial could hardly be expected, or whether the affidavit was sufficient, without showing that improper efforts had been made by some person to excite that feeling, we cannot now inquire. But I am free to say, that I should have done as the Judge in Wake did.

The specific objection, however, here is, that the affidavit must state as a fact, his own belief, and that the statement of any other facts does not dispense with that.

I think the act of 1808, does not require that express averment. By the words, he is not to set forth his belief, but he is to *set forth the facts,* whereon the *deponent* grounds his belief. His belief real or pretended, is presupposed, as affirmed by himself in the motion. In the act of 1822, c. 1130, the phraseology is altered, so as to make it the duty of a person applying for a second removal, "to set forth particularly, and in detail, the grounds of such *application.*" This shows the sense in which the terms of Statute of 1808 are to be understood. (315)

But in reality, that act was passed for a very different purpose than that of obtaining a statement of the party's belief. It was, to make his belief of no consequence. It is in amendment of Laws 1806, c. 693, §12, and is to be construed in reference to it. By the first act, a cause might be removed, "if it was suggested on oath, that there were *probable grounds,* that justice could not be obtained," in the first county. To me it would have seemed, that the Court was to judge whether the grounds were probable or not. But that was scrupled by some of the judges then in office; and there were decisions on the circuit, that a cause must be removed, if the party swore, in so many words, that there were probable grounds. This was making the party, the judge. To correct this, and restore the law to what it was originally meant to be, the act of 1808 was passed, requiring the facts to be set forth "so that the *judge* may *decide* upon such facts, whether the belief is *well grounded.*" It will be seen then, that the removal is allowed, not upon the declaration of the applicant's belief, but upon its existence, as found by the Court upon reasonable grounds, independent of such declaration; which therefore becomes immaterial. My opinion is, that the affidavit comes up, in this respect, to the statutes.

If I thought otherwise, I should hesitate long before holding, that the prisoner could avail himself of it; since the order of removal was made at his instance. The common saying,

that consent will not confer jurisdiction, is true, when there is a total want of jurisdiction. But here there is a certain jurisdiction, lawful and well established. When it has been exercised at his request; when he sought a trial in Cumberland, because he could there get a fair one, and could not in Wake, and has had it accordingly, it does not lie with him, as it strikes me, to allege that the case did not exist, on which the jurisdiction attaches. It would be mischievous to allow the party an exception against his own motion; and the more so, because, as to removals for trial civil and criminal cases stand alike, upon the same words in the same acts. But in (316) many criminal cases, the consent of the accused justifies the action of the Court, when nothing else would, as in withdrawing a juror. But I do not pursue this point further, because I think, upon the others, that the second reason must also be overruled.

The third reason is, that the order did not remove the cause to the Superior Court of Law for Cumberland.

The opinion of the Court is, that it need not, more expressly than it does. That the trial should be had by a jury of Cumberland, depended upon the order of the Court of Wake; but in what Court or place in that county, is not left to be ordered by the Judge, but is definitively fixed by the law. It could be nowhere else but in the Superior Court; and that Court is required by the statute to proceed in it. The act of 1808 uses the words "Superior Court of some adjacent county;" but all the others, 1806, 1813, 1821 and 1822, indifferently speak of adjacent or convenient "court" or "county." This shows, that the substance of the thing wished, and ordered, is the trial by a jury of another county; and every detail of time, place and court arises by consequence of law.

I do not perceive, from a perusal of the indictment, and of the record, any defect, to which the two remaining reasons in arrest, which are expressed in general terms, can apply; and having gone through the whole of them, I am obliged to say, I think the State entitled to judgment.

What that judgment must be, remains to be considered. In civil cases in which any final judgment can be rendered, this Court by the statute, gives, and here enters such an one, as upon inspection of the whole record, ought in law to be given; which, of course, is conclusive. But in criminal cases, the formal judgment, on which the convict suffers, is not entered here. The decision of the Supreme Court is to be certified to the Superior Court, which must proceed to give the judgment, according to the decision of the Supreme Court, and the law of

the land. The decision and certificate of this Court in a case where no judgment was given below, must therefore, under the act, direct the specific sentence which is neces- (317) sarily conclusive, cutting off all opportunity of reviewing the points now decided or raising others. The Court has, therefore, considered the question, properly now brought forward by the counsel, whether the prisoner is entitled to clergy.

We are of opinion, that he is not. This has not been questioned by anybody in England since Powlter's case, 11 Rep., 29, and both before and since, many persons have been executed there for arson, as it is known, that some have also suffered for it in this State. It is true, there is a difference of opinion between Lord *Coke* on the one side, and Lord *Hale* and Mr. Justice *Foster* on the other, as to the surest method of answering the difficulty of that case. Lord *Hale* once agreed with *Coke,* but afterwards changed. In Mr. *Foster's* discourse, 330 *et seq.* he gives a synopsis of all the statutes, and sums up the argument. The difference seems to resolve itself into this: what is the effect of the Statute 4 and 5 Phil. & M., c. 4. That statute takes away clergy from an accessory before the fact, to arson. It is silent as to the principal. Lord *Hale* and Mr. *Foster* say, it is a *necessary consequence* of this enactment, that the principal is ousted of clergy; because he must be tried before the accessory, and upon the allowance of clergy to him, the accessory cannot even be arraigned. The question is, whether that consequence is as necessary as to make that statute in itself, an enactment, by construction to that effect. Lord *Coke* thinks not. But he also thinks it evidence of the highest nature, that Parliament intended by the statute 5 and 6 Edw. VI, c. 10, (which is admitted on all hands, to be badly worded, and of doubtful construction) to revive *in toto,* and not partially, the statute 25 Hen. VIII, 3, by which arson is expressly ousted of clergy. Which of the distinguished parties to this controversy is right, is a question on which each person will form his own opinion, though it may be deemed presumptuous to express it. Yet I acknowledge, for myself, that I cannot upon any grounds of incongruity or inefficiency, (318) construe a statute which affixes the punishment of death to one crime, so as to say, that *thereby* it affixes that punishment to another and distinct crime, not mentioned in it. Yet if the offense thus expressly ousted, be in its nature dependent, it is natural to expect that the principal offense should likewise be ousted. Hence, when statute 25 Hen. VIII, was repealed by statute 1 Ed. VII, c. 12, and re-enacted by 5 and 6 Ed. VI, in such terms as to leave it a problem, whether it was revived in

part or in the whole; and then the statute 4 and 5 Phil. and M., passed, it might well be held to remove the doubt upon the other statutes. It could not *proprio vigore* oust the principal; but it showed that parliament considered that had already been done. As furnishing a rule of contruction, the Court used it in Powlter's case. It was giving a sense to words before dubious, by the body whose words they were; and that interpretation Lord *Coke* says the Court felt itself bound to hold to be "a good interpretation." But it is needless to pursue the inquiry, which is rather curious than useful. For Lord *Hale* and Mr. *Foster* agree, that in arson the principal is ousted of clergy; and that Powlter's case is founded in sound sense and upon legal principles, though not upon those the reporter has chosen to found it on.

The decision of the Court, therefore, is, that there must be judgment of death against the prisoner, without benefit of clergy; which must be certified accordingly.

DANIEL, J. It appears to me, that the first reason offered by the prisoner, in arrest of judgment, must be overruled. The objection that there is a variance between the names of the jurors contained in the original *venire,* and the names on the list of grand jurors, ought to have been taken by a motion to quash the proceedings, or by a special plea, before the trial of the issue in chief, made up on the plea of not guilty. And so ought the objection to the organization of the grand jury, likewise to have been taken before a trial in chief was had.
(319) This point has been determined in the case of *S. v. McEntire,* 4 N. C., 267. In that case, the first objection was that forty instead of thirty jurors, the real number, were drawn on the original *venire,* out of which were taken the grand jury, that found the bill of indictment. Secondly, that one of the grand jurors had previously been a juror in the inquest held over the body of the deceased, and had given an opinion in the case. The Court said, these objections came too late by way of a motion in arrest of judgment, after a verdict of guilty on a trial in chief, and they were overruled. The Superior Courts, are supposed to do every thing in the prescribed manner and form in which the law has appointed it to be done by them. (*S. v. Kimbrough,* 13 N. C., 431.) We should, therefore, if it were necessary to come to any determination on the second branch of the first objection, say, that the word "elect" was to be construed to mean the same thing as "drawn," and that the act of Assembly was complied with. I am of opinion, that if the case was one now open for a motion to amend any

of the mistakes of the clerk, in transcribing the record of the case, which was sent from Wake to Cumberland, the motion ought to be granted. It is asserted in this Court that the man named Joel Jones on the grand jury, is the same person whom the clerk has mistakenly named Joes Jones, in the transcript of the record sent to Cumberland. That the final letter of his Christian name had been by mistake changed from an "l" to an "s," and a motion is now made to permit the Clerk of the Superior Court of law for Wake County, to produce to the Court the original *venire,* that we might inspect it, and here order an amendment, according to the original. The ministerial acts of the clerk, I think, may be amended at any time, according to the common law. 1 Chitty, C. L., 274; 1 Saund., 247, 251; 3 Mod., 167; 4 East, 175. This Court has heretofore required, that a list of the names of the grand jury that find a bill of indictment, shall be inserted in the record sent up here; that it might appear, if judgment was pronounced, it was on the finding of both a grand and petit jury. Ac-
cording to the modern practice in England, neither the (320) names of the original *venire* nor of the grand jurors compose any part of the return to a writ of *certiorari* into the King's Bench. *King v. Darly,* 4 East, 175. This practice is contrary to the advice of Lord *Hale,* 2 Hale, 165, 166; 1 Chitty, C. L., 167. This Court follows the advice of *Hale,* as was determined in *S. v. Curry.* But it seems to me, that the record in this case does not want any amendment; the defects are waived, by the prisoner going to trial on the plea of not guilty to the indictment.

The second reason in arrest is, that the affidavit made to obtain an order of removal, did not contain facts sufficient to warrant the Judge to order the case to be removed. I think the question, whether the affidavit contained such facts as would warrant the Court to remove the cause, was to be determined solely by the Court to whom the affidavit was exhibited. Whether the facts sworn to in the affidavit were sufficient or not, we are not now to inquire. We see that there was an affidavit made, and that by the prisoner himself, to remove the cause, and an order entered and made part of the record, that the case should be removed to the county of Cumberland for trial.

I am aware of *S. v. Twitty,* 8 N. C., 248. That case was decided without the Court considering that the affidavit was in fact, nothing more than written evidence on which a motion to change the *venue* was to be predicated, and that it composed no part of the record. By the common law, when a fair and

impartial trial cannot be obtained in the county where the *venue* is laid and the indictment has been removed into the King's Bench by *certiorari,* the Court has the power of directing the trial to take place in the next adjoining county when justice requires it. And, therefore, when a suggestion is entered by leave of the Court upon the roll, that a fair and impartial trial cannot be had in the county where the *venue* is laid, the Court will award the trial to be had in an adjoining county. The suggestion when once entered is not traversable; and, (321) therefore, the Court will require very strong evidence of probable unfairness before they will allow it to be entered (1 Chitty, C. L., 166.) The affidavits, upon which the Court of B. R. is induced to make the suggestion on the roll, do not compose any part of the record. I know of no case where a writ of error has ever been brought in the House of Lords, assigning error in the preparatory affidavits, upon which the suggestion upon the roll was obtained, for the purpose of changing the *venue.* The affidavits contain evidences of facts, and are placed on file like a deposition, and compose no part of the record. I apprehend the rule is the same in this State, under our acts of Assembly of 1806 and 1808.

The third reason is, that there never was any order for the removal of the cause to the Superior Court of Law to be held for the county of Cumberland, on the 6th Monday after the 4th Monday of March, 1833, which was the style of the Superior Court of Cumberland, and its stated session.

After a suggestion was entered, that a fair and impartial trial could not be had (which in this case was done by the clerk spreading on the record as a *suggestion,* the affidavit which had been made by the prisoner), the Court ordered and directed, "that the said cause be removed to the county of Cumberland for trial, to be had in the said Court, to be held for said county, on the 2d Monday after the 4th Monday in April."

By Laws 1806, c. 1, §12, the Judge "is authorized to order a copy of the record of said cause to be removed to some adjacent Court for trial." The order that was made in this case, appears to me to comprehend a removal of the cause for trial into the Superior Court of Law for the county of Cumberland, to be held on the 6th Monday after the 4th Monday of March, 1833. The "said Court" means by necessary amendment, the Superior Court of Law for the county of Cumberland—no other court in that county has, or could have juris- (322) diction of a cause of this description, or had its sittings at that time. The times when the Superior Court of Law for the county of Cumberland holds its sittings, are fixed by a public law.

I am not prepared to say that any time was necessary to be described in the order of removal. I am disposed to think, the bare order of removal of a cause to another county for trial, would by operation of law, remove it into the next term of the Superior Court of Law of the county, to which the order directed it. The time mentioned in the order of removal, being different from the time fixed by law for holding the court, is only surplusage, and shall not vitiate the proceedings that took place in the Superior Court of Law for the county of Cumberland, which Court was held at the time fixed by law.

The fourth reason in arrest is, because the indictment is not sufficient to authorize a judgment of death. Arson, in feloniously burning a dwelling house, is a crime punishable with death. The prisoner is not entitled to the benefit of clergy. Lord *Coke,* on one side, and Lord *Hale* with Judge *Foster,* on the other, differ as to which of the acts of Parliament take away clergy from those who commit offenses of this description, yet they all agree, that clergy is taken away, and the punishment is death. (*Powlter's* case, 11 Co., 39; Foster, 307.)

On examining the whole case, I am unable to perceive any error in the charge of the Judge to the jury. Therefore, there is no ground for a new trial. I am unable to discover any errors or defects in the record, which can avail the prisoner, after general verdict of guilty. I am, therefore, of the opinion, that the order made in this case by the Superior Court of Law, arresting the judgment should be reversed, and a *procedendo* issue to the Judge of the Superior Court of Law for the county of Cumberland, to pass sentence of death on the prisoner.

PER CURIAM. Judgment reversed.

Cited: *S. v. Christmas,* 20 N. C., 548; *S. v. Davis,* 24 N. C., 160; *S. v. Martin, Ib.,* 120; *S. v. Barfield,* 30 N. C., 353; *S. v. Upchurch,* 31 N. C., 462; *Sparkman v. Daughtry,* 35 N. C., 171; *S. v. Hill,* 72 N. C., 351; *S. v. Haywood,* 73 N. C., 438, 440; *S. v. Griffice,* 74 N. C., 318; *S. v. Davis,* 80 N. C., 413; *Phillips v. Lentz,* 83 N. C., 243; *Boyden v. Williams,* 84 N. C., 610; *S. v. Watson,* 86 N. C., 625; *Emery v. Hardie,* 94 N. C., 789; *S. v. Sharp,* 110 N. C., 605, 607; *S. v. Perry,* 122 N. C., 1022; *S. v. Daniels,* 134 N. C., 648; *S. v. Paramore,* 146 N. C., 607.

(323)

STATE v. HENRY N. JASPER.

The disturbing of a congregation assembled for purposes of religious worship, by laughing and talking, and indecent actions and grimaces, during the performance of divine service, is a misdemeanor, and *per se* indictable.

This was an indictment in the following form:

STATE OF NORTH CAROLINA, Franklin County. } SUPERIOR COURT OF LAW, Spring Term, 1833.

The jurors for the State, upon their oath present, that Henry N. Jasper, late of the county of Franklin aforesaid, on the third day of March (the said third day being the Sabbath day), in the year one thousand eight hundred and thirty-three, and during other days and times, both before and after the day aforesaid, being a person regardless of the duties and solemnities of the public worship of God, and of the due observation of the Lord's day at a certain Baptist meeting house, commonly called "Haywood's meeting house," in the county aforesaid, did willfully interrupt and disturb a certain assembly of people there met for the public worship of God, within the place of their assembly, to wit: within the meeting house aforesaid, in the county aforesaid, on the third day of March aforesaid, the same being on the Sabbath day in the year last aforesaid, and on the said other days and times, by then and there talking and laughing in a loud voice, and by then and there making divers ridiculous and indecent actions and grimaces, and otherwise misbehaving himself during the performance of divine service in said meeting house to the great disturbance and insult of the orderly people there, and on the said other days and times, then and there assembled, and against the peace and dignity of the State. R. M. SAUNDERS, Att.-Gen.

The defendant being convicted of the offense charged in the indictment, a motion in arrest of judgment was submitted, which being sustained by his Honor Judge *Martin*, the Attorney-General appealed.

The *Attorney-General* for the State.

(324) RUFFIN, C. J. The defendant is indicted at common law for disturbing a congregation of religious persons assembled at their church or place of worship, and engaged in the public worship of Almighty God, by laughing and talk-

ing in a loud voice, and divers indecent actions and grimaces, during the performance of divine service. The offense is not charged as a nuisance, but as a specific misdemeanor, in itself. The defendant has been convicted, and the question is, whether the indictment can be supported and the State have judgment.

The Constitution of this State, section 34, provides there shall be no establishment of any religious church in preference to another; neither shall any person be compelled to attend any place of worship, contrary to his own faith; but all persons shall be at liberty to exercise their own mode of worship. All constraints upon the conscience of individuals are thus removed whether they be in their nature positive, that the citizen shall worship in a particular form or profess a particular creed or negative, that he shall not. The provision does not profess to confer this right. It is worded, so as to show that it is acknowlegded as pre-existing. The right is declared in the Bill of Rights to be a *natural* and unalienable *right* in all men, section 19. Its sanctity in all time to come, is guaranteed by the Constitution. The worship of God is not therein treated as indifferent, either in reference to the welfare of individuals, or the common interest. On the contrary, it is assumed to be a moral duty incumbent upon all men, and their highest privilege, as intelligent and accountable beings; a duty, that is best performed, both in honor to God, the comfort of each man and the peace and order of society, when that natural privilege is subjected to no legal restraints nor allowed to be disturbed by any person, either with or without the pretense of authority. While, therefore, no church shall be established in preference to another, all churches are established for the purposes of the security of the worshipers from penalties, or from molestation in the act of worship. The guaranty of religious freedom to all the citizens, supposes each one of them to have an interest in it, and to be conscious of religious obligation; (325) and the quiet of the body public demands that the religion which the citizens profess, and which it is supposed they would profess even against the laws of human institutions, may be safely professed, and sincerely exercised in public assemblies. For all religion is necessarily founded upon, or productive of a principle of diffusive benevolence towards our fellow creatures; and its practice consists so much in its professors imparting to, and receiving from each other, instructions both in its doctrines upon points of faith, and its moral precepts, that the idea of practical religion cannot be separated from that of the assemblage of its professors for communion of doctrine, of charity, and of worship. Hence the phrase, "place of public

worship" is appropriately introduced into the Constitution, and could not without defeating the general object of the provision, have been omitted, in that clause of the section which is restrictive of the power to compel individuals to any particular worship. So, the following clause that all shall be free "to exercise their own mode of worship," must be considered as embracing both the place of worship, and public worship in assemblies; and that it will be practiced by individuals without the injunctions of the law, or any coercion but that of conscience.

The question remains, whether the disturbance of the practice of their duties, and of the exercise of their acknowledged privileges be an offense punishable by indictment, without a statute.

It is undoubtedly so in England, with respect to the established church; and this from a regard to the interest of religion, in which, each and every person in the Kingdom, from the Sovereign to the humblest subject, has a deep concern. The indictment, therefore, need not state any other consequence, as flowing from the misconduct of the accused, such as that it was to the nuisance of the King's subjects; but is sufficient, if it charge the disturbance of a religious assembly, as the offense *per se*. (1 Hawks., P. C. B., 1, c. 32, sec. 4.) It is true, that is not the case with respect to those classes of persons
(326) called in their law, dissenters; for whose protection several statutes (I W. and M., c. 18, and 52 Geo. III, c. 155), have been passed. But that is upon the ground, that the principle of their law is, that such religious principles and the exercise of such worship is against the interest of the State. They were once altogether unlawful; when declared to be otherwise, they were merely tolerated; and those thus permitted to worship, must content themselves with the permission, in the extent to which it is given. It was, however, soon found, that it was necessary, if permitted at all, to secure it more effectually; not barely for the sake of the weak consciences of the dissenters themselves, but for that of the public peace. A disturbance of their public worship is therefore made a crime by those statutes. But in relation to the Church established by law, no such provision was necessary; for that being deemed in its establishment, of common right and of common necessity, any disturbance of it was by consequence, held to be a common injury and public wrong. Now, our ancestors declare, that no law is required to establish any mode of worship. They hold, that God has established his own Church. They do not tolerate any branch of it. They say, men have no power over the sub-

ject, further than to prevent persons, under the pretense of religious discourse, from disseminating sedition or treason; that religion needs no aid from the civil power, but the guaranty of its freedom from interruption, either by unjust laws or lawless force, or wantonness of individuals. Against the former, the Constitution is an express warrant; and by a necessary construction from that, as it seems to me, it equally forbids the latter. In this view, therefore, that every man is interested in the worship of God, and that the disturbance of it is an injury to the whole community, I think the indictment sufficient. In the further view, that the exercise of religious worship calls together large multitudes, whose assembly is lawful, and a duty in religious sense, and a public duty in the sense of the Constitution, the disturbance of whom, has an immediate (327) tendency to bitter discords, the violent commotion of neighborhoods, and a breach of the peace, I also think the indictment sufficient.

This view of the subject is sanctioned by a decision of the very point by the Constitutional Court of South Carolina, in *Bell v. Graham* (1 Nott & McCord, 278), and in *Commonwealth v. Hoxey* (16 Mass., 385), an indictment at common law, for a disturbance of a town meeting for the choice of selectmen, was supported, upon the ground that such acts tended to a breach of the peace, and to the prevention of elections which were necessary to the orderly government of the town. Not less certainly, does the public worship of Almighty God involve the good order of political society, and its disturbance produce wrath and violence.

As to the objection that the acts are laid on the third day of March, and on other days and times both before and after, the distinction is between laying them at several times without any certain day as to any one of the acts, and laying them, as here, on a day certain, and others uncertain. In the former, the indictment is bad altogether (*Shaw*, 389; 4 Mod., 103), but in the latter, it is void only as to the uncertain days, and sufficient as to the parts to which the certain time is annexed. (10 Mod., 336; 2 Hawk., P. C., B. 2, c. 25, 5, 82.)

The opinion of the Court, therefore, is, that the Superior Court erred in arresting the judgment, and that the same be certified to that Court, that it may proceed to judgment on the defendant.

PER CURIAM. Judgment reversed.

Cited: S. v. Swink, 20 N. C., 493; *S. v. Fisher,* 25 N. C., 114; *Holland v. Peck,* 37 N. C., 259; *S. v. Ramsey,* 78 N. C., 453.

(328)

STATE v. DANIEL MAY.

When a Judge decides upon a question as being one of *law*, when it is really one of *fact* and should be submitted to the jury, it is competent for him afterwards to correct his mistake, and submit the matter to the proper tribunal.

This was an INDICTMENT under the act of 1779 (Rev., c. 142), for stealing a slave. It was in the following form:

"The jurors for the State upon their oaths present, that Daniel May, late of the county of Anson, on etc., with force and arms in said county, feloniously did steal, take and carry away a certain slave named Harry, of the value, etc., the said slave, Harry, then and there being the property of another, to wit: the property of Elizabeth Lynch, with an intention to sell said slave to another, contrary, etc.

"And the jurors aforesaid, upon their oaths, etc., do further present that Daniel May, afterwards, etc., with force and arms in the county aforesaid, feloniously by seduction, did take and carry away a certain slave named Harry, of the value, etc., the said slave, Harry, then and there being the property of another, to wit: of Elizabeth Lynch, with an intention, etc."

The evidence for the State was altogether circumstantial. It was proved, among other circumstances, that the prisoner was in possession of the slave in South Carolina, and there sold him—that the negro had left his owner against his will, on 19 or 20 March, and on the 30th of the same month, the prisoner under a feigned name, sold the negro, also under a fictitious name. Many circumstances were likewise introduced for the purpose of identifying the slave.

After the evidence for the State was closed, the prisoner offered to prove the issuing of a State warrant against one William May, Hardy May and the prisoner, for the same offense, for which he was now singly indicted—that William May had absconded from the State, in consequence thereof, having conveyed a negro woman and child to Mrs. Lynch
(329) to compensate her for the loss of Harry. He also offered the confessions of William May, that he alone was guilty of stealing the slave. This evidence was objected to by Mr. Solicitor Troy. His Honor, *Judge Martin*, permitted the prisoner to introduce the State warrant, and to prove the flight of William May, but rejected the other part of the testimony. The prisoner then proved that William May resided about a fourth of a mile from Mrs. Lynch—that he fled immediately after the issuing of the warrant, and had not since returned—

that he himself resided twenty-two or twenty-three miles from Mrs. Lynch, near the South Carolina line and had not been seen in that neighborhood for five or six years.

The Judge, in charging the jury, commented at length on the testimony, and after he had completed his charge and the jury were about to retire, the counsel for the prisoner requested him to instruct them, that though they were satisfied of the identity of both the slave and the prisoner in the sale in South Carolina, yet if they believed that William May was the person who actually seduced and conveyed away the slave and the prisoner only received him knowing him to be stolen, he could not be convicted on that indictment. In reply to this, his Honor remarked in the hearing of the jury, that he did not like to distract the attention of the jury by abstract propositions, when there was no evidence to support them. He then summed up the evidence again, and stated to them that flight after a charge was a suspicious circumstance, and that they would decide whether they believed from these circumstances, that William May had stolen the slave and Daniel May had only received him knowing him to be stolen. His Honor then dwelt at length on the doctrine of presumptive proof, but it is unnecessary to state any other parts of the charge, as they were not excepted to.

The jury returned a verdict of guilty. A rule was obtained to show cause why a new trial should not be granted: first, because proper evidence had been rejected; and second, because the Judge had expressed his opinion to the jury on matter of fact. This rule being discharged, a motion was then submitted in arrest of judgment: first, because it did not (330) appear on the indictment that the theft was committed in the county of Anson; and second, because the name of the owner of the slave was set forth after a *scilicet*. This motion being overruled, and judgment of death pronounced, the prisoner appealed.

Badger appeared for the State.
No counsel appeared for the prisoner.

RUFFIN, C. J. I should very reluctantly reverse the judgment upon the ground of the remark made by the Judge in the hearing of the jury, "that he disliked to distract their attention by abstract propositions, to which there was no evidence"; since he proceeded immediately to sum up the evidence offered by the prisoner touching the matter to which the instruction prayed for related, and gave the instruction, as prayed

for, that if the jury drew from it the conclusion of fact insisted on for the prisoner, he ought to be acquitted. Undoubtedly, it is error at common law to give such an instruction in a case where there is any evidence to the point, although that given may be manifestly insufficient to establish it. Still more it is erroneous, under our statute, as an expression of the opinion of the Judge upon the sufficiency of the proof. But I think it very clear, that if a Judge inadvertently commit an error in the course of a trial, he is bound to correct it, as soon as he is sensible of it; and that he is as much at liberty to correct one of this description as any other. If proper evidence, when offered, be rejected, it may afterwards be received. If improper evidence be received, it may afterwards be pronounced incompetent, and the jury instructed not to consider it. These are but examples; and the like holds in all other cases, unless the subject now under consideration furnishes an exception. I do not perceive a reason, why a Judge who conceives himself obliged to decide, and does decide a question, as being one of law, when it is rather one of fact to be left to the
(331) jury, may not upon a change of opinion, retract his decision and submit the question to the jury. It cannot be imputed to the Judge, that he would criminally use the pretext of correcting himself, as the means of covertly conveying to the jury his opinion upon the facts. If he did, a reversal of his judgment would not be either an appropriate or adequate remedy, but public punishment. I am supposing an error committed honestly and inadvertently, and a sincere desire to correct it for the sake of duly administering the law between the parties. In such a case, I conceive it is not the object of the law, nor the province of an appellate tribunal, to watch for and catch at an inadvertence into which the Judge was betrayed for an instant; but to see that no error was finally committed, and that ultimately the law and justice of the country were truly administered. In the present case, I should have no doubt upon the point, if the Judge, besides submitting the case to the jury for their decision upon the evidence, had explicitly informed them, that he had improvidently expressed himself beyond his lawful authority, upon the evidence, and that it was their exclusive province to weigh it, and draw conclusions from it. Without such an explanation, probably the influence of the Judge's opinion, which the Legislature meant to prevent, might remain. With it, there could be no danger that a jury of ordinary intelligence, independence and integrity, could be misled; and to avoid that is the great purpose of the Legislative enactment. But I do not pursue this subject further, nor

express a conclusive opinion upon it; because I do not believe the case depends upon this point.

I conceive the remark of the Judge was strictly correct—that in *law* there was no evidence upon the point to which the instruction was prayed. The error of the Court was in submitting it to the jury at all.

The position taken for the prisoner was, that William May and not the prisoner, was the principal felon. As the guilt of the prisoner of the crime charged is presumptive, from his possession of the slave, and sale of him under the circumstances, it was doubtless material for him to establish (332) the fact asserted by him, as tending to rebut the presumption against himself. It is true that both might have been principal felons; but if William were proved to be clearly so, the prisoner's possession might be, and probably was derived from him. The question is not then, whether the fact contended for was relevant to the defense; for upon that there is no doubt. But the question is, by what evidence is it competent to the prisoner, upon this trial, to prove that fact. Direct evidence connecting William with the *corpus delicti* would certainly have been admissible. Testimony to the fact of seduction; to the possession by William anterior to that proved on the prisoner; or to any part of the *res gestæ* constituting William's alleged guilt, would have been both relevant and competent. The prisoner offered nothing of that sort. Instead of it he offered evidence that William resided near Mrs. Lynch, while the prisoner lived twenty miles off, and had not been in her neighborhood for several years, and that a State's warrant had been gotten out against them both, as being equally concerned in the theft, and that William fled from the State; which was received. Besides this, he offered evidence, that William confessed that he alone had stolen the slave, and made compensation for him; which was rejected.

Except the facts of the respective residences of the parties, which of themselves, do not tend to establish guilt in either of the parties, it is obvious, that all the evidence, as well that received as that rejected, consists of the acts and declarations of other persons, to which neither the State nor the prisoner is privy. I think the whole of it was inadmissible. The confession is plainly so. It is mere hearsay. It may seem absurd to one not accustomed to compare proofs, and estimate the weight of testimony according to the tests of veracity within our power, that an unbiased confession of one man that he is guilty of an offense with which another is charged, should not establish the guilt of him who confesses it, and by consequence,

the innocence of the other, but the law must proceed on general principles; and it excludes such a confession upon the
(333) ground, that it is hearsay evidence—the words of a stranger to the parties, and not spoken on oath. Indeed, all hearsay might have more or less effect, and from some persons of good character, well known to the jury, it might avail much. Yet it is all rejected, with very few exceptions; which do not in terms or principle extend to this case. Even a judgment upon the plea of guilty could not be offered in evidence for or against another; much less a bare confession. As a declaration of another establishing his own guilt, the confession of a slave might be used upon the same principle. This, I recollect was attempted in *Owen's* case, and also in *Kimbrough's;* but in the Supreme Court it was abandoned, and the point is not reported.

If the confession and the act of paying for the slave were properly rejected, the other evidence ought also to have been rejected. I suppose the Court received it out of abundant caution and tenderness to the prisoner. But one principle extends to and excludes the whole. It is, that all was *res inter alios acta;* and could not be heard without some proof connecting William May with the *fact,* that is with the perpetration of some deed, entering into the crime itself. No part of it could be received to inculpate the prisoner, if it would have that effect, nor can it exculpate him. It is too uncertain, and too easily fabricated falsely for the purpose of deceiving, to be relied on or acted on in a Court. When received, if not followed by evidence of some fact tending directly to establish an overt act of William in the perpetration of the felony itself, it became altogether irrelevant and ceased to be evidence, for the purpose for which it was offered. For acts or declarations of William May, subsequent to the felony, indicative of a consciousness of guilt in him, when offered as evidence from which his guilt is to be inferred, cannot be stronger than his express admission of guilt.

In my opinion, therefore, there was no error in excluding the evidence; nor in the opinion pronounced by the Judge upon that received.

In speaking of the warrant, I must be understood to
(334) refer to it as evidence for the purpose claimed in the instruction the Court was asked to give. It might be very sufficient for other purposes, as to contradict or discredit a witness or the like.

It is unnecessary for me to say anything on the motion in arrest of judgment, because I agree entirely with the opinion delivered by my brother Judge on that part of the case.

The judgment must be affirmed and a certificate sent to the Superior Court, to proceed to pass sentence of death.

DANIEL, J. The prisoner was indicted for stealing a slave, the property of Elizabeth Lynch, contrary to the act of the General Assembly passed in 1779, c. 11, and was found guilty by the verdict of a jury. A motion was made in his behalf, first, for a new trial; which the Court overruled. In the second place, a motion was made in arrest of judgment; which likewise failed. Judgment was then pronounced; from which the prisoner appealed to this Court.

The motion for a new trial rests on two ground:—First, that the Court rejected as evidence, the declarations made by William May, that he, the said William, stole the slave, and that the prisoner was innocent of the charge. Secondly, that the Judge, on the trial, expressed his opinion on the facts of the case.

I am of opinion, that a new trial cannot be granted on either of the grounds taken by the prisoner. The hearsay declarations of William May, that he committed the crime, were not on oath, nor was there any opportunity of a cross-examination. The evidence, therefore, according to the plainest principles of law, was properly rejected.

In the second place, the Judge, was requested by the prisoner's counsel, to charge the jury, that if William May feloniously took the slave, or actually seduced and conveyed away the slave from the possession of the owner, although the prisoner received him knowing him to be (335) stolen, that the prisoner would then be guilty only of receiving stolen goods, and should be acquitted on the indictment. In reply to the motion, the Judge remarked in the hearing of the jury, that he did not like to distract the attention of the jury, by abstract propositions, where there was no evidence to support them. The Judge, after these remarks, charged the jury, that the flight of William May, after having been charged by the warrant was a suspicious circumstance, and they would decide whether they believed William May had stolen the slave, and the prisoner had only received him, knowing that he was stolen. By an act of the General Assembly, passed in 1796, c. 4, it is enacted, that it shall not be lawful in any Judge in delivering a charge to a petty jury, to give an opinion whether a fact is fully or sufficiently proved, such matter being the true office and province of the jury. The expressions complained of, cannot be considered as a violation of this statute. Suppose William May had then been on his

trial for stealing the slave, and the only testimony produced againt him had been the fact of issuing the State's warrant against him, Daniel and Hardy May, charging them all as principals, and the flight of William May afterwards, coupled with the local positions of the residences of the parties, and all the other circumstances that were deposed to at the trial of the present prisoner; could he legally have been convicted? Surely he could not. All the circumstances taken together would only have raised that slight species of presumption, which in criminal cases weigheth nothing. There was no evidence, which in law, shows that William May was guilty of stealing the slave. There was no evidence given in, on which, a Judge sitting on the trial of William May could have permitted a jury to convict him of the capital crime of stealing the slave. I do not think the Judge erred in expressing himself as he did.

The prisoner moved in arrest of judgment, and assigned as reasons: first, that it did not sufficiently appear on the face of the indictment, that the theft was committed in the (336) county of Anson; and secondly, that the name of the owner of the slave was set forth in the indictment after a *scilicet.*

In this case, the County of Anson, is named both in the caption and in the beginning of the indictment. The prisoner is charged in the indictment, that he "in said county feloniously did steal, take and carry away, etc." In the English practice the mode of stating the venue is thus: "Middlesex," or "Middlesex to wit," and this statement is usually in the margin of the indictment. In the body of the indictment also, the facts should in general be stated to have arisen in the county in which the indictment is preferred, so that it may appear that the offense was within the jurisdiction of the Court. But when a county is named even in the margin, the words in the indictment, "in said county," or "county aforesaid," will have sufficient reference to the county in the margin. (1 Chitty, C. L. 160. 3 Hawk, P. C. 175. 2 Hale, P. C. 166, 180. 2 Hawk, P. C., ch. 25, s. 34.) In this indictment, the words, "in said county, did steal, take and carry away, a certain slave named Henry," sufficiently refers to the County of Anson as set forth in the caption and in the beginning of the indictment.

The second reason offered in arrest, is, that the name of the owner of the slave is set forth in the indictment after a *scilicet.* It is very usual, in criminal as well as civil proceedings, to introduce a statement under what is termed a *videlicet* or *scilicet,* as "that afterwards to wit, on etc., at etc.," the defendant did,

etc., or a fact occurred, which it is thought proper to mention. Lord *Hobart,* speaking of a *videlicet,* says, "that its use is to particularize that which was before general, or to explain that which was before doubtful or obscure; that it must not be contrary to the premises, and neither increase or diminish, but that it may work a restriction where the former words were not express and special, but so indifferent that they might receive such a restriction without apparent injury." Where the averment is material and enters into the substance of the description of the offense, though laid under a *scilicet,* it is conclusive and traversable; and if impossible or repugnant to the premises, it will vitiate, otherwise it will not (1 Bla. (337) 495. 2 Saun. 291, n. 1. 1 Chitty, C. L. 186. *Rex. v. Mayor of York,* 5 Term, 71.) *By Laws 1778, c. 11, it is enacted, that "any person or persons who shall hereafter steal, or who shall by violence, seduction or any other means take or convey away any slave or slaves, the property of another, with an intention to sell or dispose of to another, or appropriate to their own use such slave or slaves, being thereof legally convicted, shall be judged guilty of felony, and shall suffer death without the benefit of clergy." The first count in the indictment, charges that the prisoner, "feloniously did steal, take and carry away, a certain slave named Henry, then and there being the property of another, to wit, the property of Elizabeth Lynch"; with an intention to sell the said slave to another, contrary to the statute. The averment, after the *scilicet,* that the property, was the property of Elizabeth Lynch, was material and is consistent with the premises, or that which went before in the indictment. The *scilicet* is here introduced to particularize that which was before general; or to explain that, which without the *scilicet,* would have been doubtful or obscure. It pointed out the owner of the slave. After a full examination of this case, I am unable to discover any good reason for a new trial or for an arrest of judgment. I think the judgment should be affirmed.

GASTON, J. This case came before the Court at the last term, at which time I had not the honor of being one of its members, and has been kept under advisement until the present term. A majority of the Court having concurred in the judgment that there is no error in the proceedings of the Superior Court to justify a reversal of the sentence against the prisoner, I should have deemed it unnecessary to give any judicial opinion, if my brethren had wholly agreed in the reasons which

*24 State Records, 220.

conducted them to the same result. In the view which I have taken of the case it presents but one difficulty for consideration.

Did the Judge err in rejecting a part of the evidence
(338) which was offered as tending to show that William May had been guilty of the taking or seduction of the slave from the possession of the owner? If he did err in this respect, the prisoner is entitled to a new trial. If he did not err in this respect, I cannot avoid the conclusion that the prisoner is not entitled to a new trial.

The criminal act imputed to the prisoner might as readily be committed by many as by one. The question of William May's guilt or innocence was not necessarily connected with that of the guilt or innocence of Daniel. Both might be guilty, or both might be innocent, and a common guilt or a common innocence was as presumable as the guilt of one only. All the testimony then which was offered to inculpate William, as well that received, as that rejected, if tending to no other purpose, was irrelevant and on that account inadmissible. But proof that certain acts constituting a part of the criminal transaction itself were done by William might have been of high importance to the prisoner by removing so much of the inference of guilt as would be raised were those acts brought home to him. Evidence therefore that William took the negro from the possession of his owner might render it doubtful whether Daniel had participated in the taking. The negro had been removed from his master's service, and soon afterwards was offered for sale in another State by the prisoner, under circumstances plainly indicating a criminal intent. If nothing else appeared, the inference was scarcely to be resisted that the prisoner had committed the crime charged. Now, proof that the taking was by other than the prisoner, perhaps might repel this inference, not because the guilt of the one shows the innocence of the other, but because proof that specific acts were done by one, weakens or removes the presumption that the same acts were done by another.

It was, therefore, competent for the prisoner to lay before the jury all the circumstances attending the transaction under investigation, and of high import to him, to show if he could,

that the negro had been taken by William and was in
(339) William's possession before the time when the negro was seen in his possession in South Carolina. But no fact can be communicated to a jury, or its existence rendered probable but through those means of communication which the law allows. The thing to be proved must not only be relevant, but the testimony offered must be such as the law sanctions. The

issuing of a State's warrant against William and the prisoner, in which William is first named, of *itself* is no evidence, and unless necessary to explain or contradict something properly in evidence ought not to have been received. The warrant is an *accusation* merely; it is not *proof* of any fact stated in it. As connected with the flight of William it was admissible provided the flight itself were proper to be given in evidence. Flight after accusation could be received on no other ground than as conduct of William furnishing a presumption of his guilt, and amounting to an implied acknowledgment of it. If this were admissible, I am unable to see any satisfactory reason for rejecting the testimony offered, that William had paid money to the injured party in order to stifle a prosecution against him. This seems to me a fact of the same kind with flight after accusation; an act furnishing a similar presumption of guilt, and strengthening this implied acknowledgment of the crime, and the express admission of his guilt by himself would seem to me equally admissible on the same ground.

I am of opinion the whole of the testimony offered in order to show the taking by William was illegal. It was evidence not of facts or circumstances attending the transaction, but of acts and declarations of a third person, in no way a party to this controversy nor shown to be connected therewith, acts and declarations subsequent to the transaction from which an inference of the facts of the transaction was attempted to be drawn. Had William been on trial they would have been evidence against him simply because they were *his* acts and *his* declarations. It is certainly a general principle, that neither the declarations nor acts of those who are strangers to the matter in litigation can be received as evidence for either party, of the truth of the fact declared or a fact (340) to be inferred from them. Such acts and declarations are excluded as coming under the well known rule of *"res inter alios acta,"* and I am unable to find any principle or authority which will justify an exception to the rule in the present case.

Having arrived at the conclusion that the Judge did not err in rejecting the testimony offered, but that in truth he erred (no doubt from a leaning to the humane side) in receiving that which was offered to show William May's guilt, I concur therefore in the opinion of my brethren that there was no evidence on which the Judge could be asked to give the hypothetical instruction required of him, and that he was justified in stating the case supposed to be an abstract proposition.

PER CURIAM. Judgment affirmed, and a writ of *procedendo* ordered.

Cited: S. v. Bell, 25 N. C., 509; *S. v. Duncan,* 28 N. C., 239; *S. v. Gallimore,* 29 N. C., 151; *McAllister v. McAllister,* 34 N. C., 187; *S. v. White,* 68 N. C., 159; *S. v. Bishop,* 73 N. C., 46; *S. v. Davis,* 77 N. C., 485; *S. v. England,* 78 N. C., 555; *S. v. Jones,* 80 N C., 417; *S. v. Boon, Ib.,* 463; *S. v. Gee,* 92 N. C., 760; *S. v. McNair,* 93 N. C., 631; *S. v. Collins, Ib.,* 567; *S. v. Crane,* 110 N. C., 535; *Wilson v. Mfg. Co.,* 120 N. C., 95; *Gattis v. Kilgo,* 131 N. C., 207.

STATE v. EDMUND, a slave.

1. Upon an indictment under Laws 1825, c. 22, "for carrying, conveying, and concealing a slave on board a vessel, with the intent, and for the purpose of conveying the slave beyond the limits of the State, and of enabling her to effect her escape out of the State;" a verdict finding the prisoner "guilty of the felony of carrying, conveying and concealing, as charged in the bill of indictment," is defective.
2. A mulatto, free man of color, is a citizen of the State, and a slave, a person within the meaning of the act.

This was an indictment under Laws 1825, c. 22, for concealing a slave on board of a vessel, with the intent, and for the purpose of conveying said slave beyond the limits of the State, and of enabling her to effect her escape out of the State.

There were several counts in the indictment. On the trial before *Martin J.,* at NEW HANOVER, it appeared that the prisoner was a slave, the property of one West, of Virginia; that he had absconded several years before from his master's service —had passed as a free man, and acted as steward on board the brig Fisher. It further appeared that Nathan Green,
(341) the alleged owner of the slave concealed, was a free man of color, a dark mulatto, and a resident of this State.

The prisoner being convicted, and motions for a new trial and in arrest of judgment, being overruled, sentence of death was pronounced against the prisoner from which he appealed.

The jury found "the prisoner at the bar, Edmund, guilty of the felony of concealing, conveying and carrying as charged in the bill of indictment." The grounds on which the motions for new trial, and in arrest of judgment were founded, were "that the prisoner, being a slave, was neither mariner nor person within the meaning of the act; and that Green, the owner of the slave concealed, being a mulatto, was not a citizen of the State.

Badger for the State.

No counsel appeared for the prisoner.

RUFFIN, C. J. To authorize judgment of death upon this verdict, it must be taken to be a general verdict of guilty. If it was so intended, it is astonishing that it was not entered without a qualification. It certainly is qualified; but whether it be so much so as to render it uncertain, is the question. I think it too ambiguous to found a judgment on, which may have such important consequences; though I have been a good deal staggered in considering the case. But I am finally satisfied, that as the Court can intend nothing in such a case, it is proper to reverse the judgment, and order a *venire de novo.* It has been argued at the bar, that the words, "the felony" include the whole case, because *that* felony cannot exist without the intent, and the felony is found "in manner and form, as charged in the indictment." I should think so too, if there had been no other words but "guilty in manner and form as charged, etc." But the verdict says also, "the felony of carrying, conveying and concealing in manner and form as charged." *The* felony found then, *consists of* those *acts* of carrying, etc. Does "manner and form" extend to more than the circumstances of time and place, and the general epithet (342) "feloniously" applied to those overt acts in the indictment? For the indictment as it ought, not only charges generally that the overt acts were done feloniously, but also avers, as it must aver specially, that they were done with the particular intent, specified in the statute, to carry the slave out of the State, and to enable her to make her escape out of the State. It seems to me that the "manner and form" is annexed in the verdict barely to the *facts* found in it, and not to the intent alleged in the indictment, which is then alleged *as a fact,* distinct from the *acts,* which that intent makes criminal. If the verdict had gone on to negative the intent, it would not have been repugnant, in which case the Court is obliged to disregard it; but it would have been an acquittal. *Rex v. Simonds,* Sayre, 34. Why would it not have been repugnant? Because the first part does not include the intent; and, therefore, does not contradict the latter part, which negatives the intent. For if the intent be included in both, it would be manifestly contradictory, and amount to nothing. Suppose an indictment with two counts; the one for assault, and the other for an assault with intent to commit a rape. A general verdict of *guilty* is not given; but "guilty of *the assault* in manner and form as charged." I think it could hardly be said, that the intent in the latter count was found; since there was enough to satisfy the verdict, without doing so. I consider, therefore, that this verdict does not certainly find the intent, and for that

reason is incomplete. This conclusion is the more satisfactory, because it has the sanction of an adjudged case in Pennsylvania. *Bayles v. The Commonwealth,* 2 Serg. & Rawl., 40.

Upon the points made for a new trial, I have no doubt. The case made by the evidence is clearly within the statute.

DANIEL, J. The prisoner hath been tried on an indictment containing several counts, founded on an act of Assembly passed in 1825. The jury have rendered their verdict in the (343) case as follows, "guilty of the felony of concealing, conveying and carrying as charged in the bill of indictment," without finding the fact that it was with the intent and for the purpose of enabling the slave to effect her escape out of the State.

A motion for a new trial was made, because the slave whom the prisoner is charged with carrying and secreting on board of the vessel, to which he was attached as steward, was the property of a free man of color; that the owner is not a citizen of the State, within the meaning of the statute; because he has not the full and complete political privileges and immunities with which the constitution and laws have clothed a white man.

By the laws of this State, a free man of color may own and hold lands and personal property, including slaves. Without therefore stopping to inquire into the extent of the political rights and privileges of a free man of color, I am very well satisfied from the words of the act of the General Assembly, that the Legislature meant to protect the slave property of every person, who by the laws of the State are entitled to hold such property. I am, therefore, of the opinion that the owner is a citizen within the meaning of the act of Assembly; and it appearing that he was a mulatto, is not a reason to grant a new trial.

The counsel for the prisoner in the second place, moved in arrest of judgment, because it appeared by the record, that the prisoner was a slave. It is contended that he is but a chattel, a thing, and not to be considered a *"person,"* within the meaning of the act of Assembly. The Legislature, by Laws 1795, c. 5, made it felony without the benefit of clergy, in the master of a vessel who committed or procured to be committed, an offense of the description with which the prisoner is charged. That act extended only to the master or commander of the vessel. The Legislature discovered, that the reasons for inflicting the penalty on the commander equally applied to the crew or persons on board the vessel; and an act was

passed in 1825, to reach all the persons that should be attached to the vessel. The first section of that act, is in the following words, "if any master of any ship or vessel, mariner or any other *person* or persons, trading or being within (344) this State, shall carry, convey or conceal on board of any ship or vessel, any negro or mulatto slave or slaves, the property of any *citizen* or citizens of this State, etc., with the intent and for the purpose of enabling such slave or slaves to effect his or their escape out of this State, they shall suffer death without the benefit of clergy." The prisoner, although a slave, is a "person" in the natural acceptation of that term; a slave is a person capable of committing crimes, and subject to punishment. I think the prisoner is a person within the words and meaning of the act of Assembly. The motion in arrest on this point, is not good in law. But, the verdict rendered by the jury is special, and can the Court pronounce sentence against the prisoner, on the verdict as it now stands? It is contended for the State that the proper reading of this special verdict is, that the "jury find the prisoner guilty of feloniously concealing, conveying and carrying as charged in the bill of indictment." That the finding by the jury, that the carrying, concealing and conveying was felonious, as charged in the bill of indictment, is a finding, that the prisoner did the acts, with the intent set forth in the indictment. That the intent as charged, is comprehended in the words, "guilty of the felony," set out in the verdict. What will constitute a felony, is a question of law, upon facts found by the jury. That the jury necessarily intended by the word "felony" made use of by them in the verdict, to include the fact of a felonious intent in the prisoner, to carry the slave on board the vessel, so that she might effect her escape out of the State, does not directly and plainly appear to the Court. That the jury has given the same meaning to the word "felony" as made use of by them, that the Court would give, is left to conjecture. The Court cannot infer anything, that is material to constitute the offense, which is not directly found; every fact material to the issue must appear in the special verdict. We are not to conjecture that the jury meant to find the prisoner guilty of carrying the slave on board of the vessel, with a felo- nious intent, to enable her to effect her escape out of the (345) State. *Boyles v. Commonwealth,* 2 Serg. & Rawle, 40, was an indictment for endeavoring to conceal the death of an infant bastard child, so that it might not come to light whether the said infant was born dead or alive, contrary to the statute. The jury found the prisoner "guilty of the *concealment,* in

manner and form as she stands indicted." The Court thought, that the concealment might be in manner and form, yet the fact had not been found (a material one), that the child was a bastard; and unless it was a bastard there was no offense. The judgment which had been given against the prisoner was reversed. The jury did not find, that the prisoner was guilty of the *felony* of concealment; nor would that word have cured the defect. In this case, the verdict of "guilty of the felony of concealment, conveying and carrying, as charged in the bill of indictment," is insufficient without finding the fact, that he carried or concealed the slave on board the vessel, with the intent and for the purpose of enabling said slave to effect her escape out of this State. The judgment, rendered against the prisoner, must be reversed, and a *venire de novo* awarded.

PER CURIAM. Judgment reversed.

Cited: S. v. Woodly, 47 N. C., 284; *S. v. Horan,* 61 N. C., 576; *S. v. Whitaker,* 89 N. C., 474; *S v. Morgan,* 136 N. C., 632.

STATE v. THE COMMISSIONERS OF THE TOWN OF HALIFAX.

1. Under the provisions of the private acts for regulating the town of Halifax, the Commissioners of that town have authority to call out the hands and command the personal labor of those residing within its corporate limits, for the purpose of repairing the streets,
2. The Commissioners of a town are not of common right bound to repair the streets, and therefore an indictment against them for not repairing must set forth on its face how that obligation has been imposed upon them.

This was an indictment against the defendants for not keeping the streets of the town of Halifax in repair. There were three counts in the indictment.

It was admitted on the trial that the defendants had (346) expended in repairing the streets, and for other lawful and needful purposes, all the monies which they were authorized to raise by taxation or otherwise, and that there were no funds at their command at the time laid in the indictment, and it was insisted that the defendants were not bound by the provisions of the private acts relating to the town of Halifax, to *repair,* etc., but that it was only their duty to make ordinances, rules, etc., and use the pecuniary resources of the town for the purpose of repairing the streets.

His Honor, Judge *Martin,* before whom the cause was tried, charged the jury, that the commissioners had authority under the private acts, to call out the hands and command the personal labor of the inhabitants residing within the corporate limits of the town, for the purpose of repairing the streets, and that they were not excusable for the omission to repair, if there were hands enough in the town, though all the monies which had been, or ought to have been raised by virtue of their powers, had been properly expended at the time the streets were charged to have been out of repair.

On the two first counts in the indictment the defendants were acquitted. On the third the jury returned a verdict of guilty.

This count was in the following words:

"And the jurors, etc., upon their oaths, etc., do further present that on, etc., there was, etc., a public street and common highway in the town of Halifax, etc., commonly called the main street, etc., for all the citizens, etc., and that the aforesaid public street, etc., on, etc., was out of repair, etc., so as, etc., and that M. R. J. S. S. J. C. A. W., etc., all late, etc., on, etc., and from thence, etc., were commissioners of the said town of Halifax, duly chosen, elected and sworn as such, and that they in their corporate capacity of commissioners of said town of Halifax, were and are bound and obliged by the act of the General Assembly of this State, to keep and maintain the public street and common highway aforesaid, in safe convenient and complete repair. Yet the commissioners aforesaid, during, etc., at, etc., in, etc., have and did neglect and refuse to (347) keep the said public street and common highway in such repair, to the great injury, etc., and against the peace and dignity of the State."

A rule for a new trial being discharged and judgment rendered for the State—the defendants appealed.

The *Attorney-General* for the State.
Badger for the defendants.

GASTON, J. It has been insisted for the defendants that the Judge erred in that part of his instructions to the jury, wherein he declared that the commissioners had authority to call out the hands, and command the personal labor of the inhabitants residing within the corporate limits of the town for the purpose of repairing the streets. This Court has examined the various acts referred to in the case, more particularly Laws *1786, c. 35, entitled "an act for the better regulation of the

*24 State Records, 832.

town of Halifax, and extending the liberties thereof," and is of opinion that there is no error in this part of the Judge's charge. Section 5 of this act empowers the commissioners "to make *such rules, orders, regulations and ordinances, as to them shall seem meet for repairing the streets,*" with a proviso that such rules and regulations shall not be inconsistent with the Constitution and laws of the land. It was impossible by any words which the Legislature could select, to delegate a more ample authority over the subject, and we must give to these words their obvious and general meaning unless we can find clear evidence that they were used in a more restricted sense. The keeping of the highways of the country in a proper state of reparation, by the compulsory service of the inhabitants of the district within which they are situate, had been part of the law of North Carolina for a vast number of years, and probably from its earliest settlement. In 1784, 1785 and 1786, immediately before and at the time of passing this act, the attention of the Legislature had been much engaged in revising the laws with respect to the laying out and reparation of roads, and in this revisal they expressly made enactments for commanding these personal services, and rely almost ex-
(348) clusively upon them, for this important object of police.

When, therefore, in providing for the proper government of the town of Halifax, they clothe the commissioners with authority to make such ordinances as they might deem meet for repairing the streets, there is not the least reason to suppose that they did not contemplate the probability of the commissioners adopting a plan with respect to the reparation of highways within their jurisdiction, analogous to that which prevailed universally without it. We see nothing in any other part of this section, or in any other section of the act which induces us to believe this construction inaccurate. In a subsequent part of this section they have also authority to make ordinances for appointing a town constable or constables, town watches or patrols, and "to make proper allowances by fees or otherwise, for such services," but this furnishes no indication as to the mode in which the power of compelling reparation shall be exercised. The eighth section of this act directs the commissioners to lay an annual tax not exceeding eight shillings on every hundred pounds of taxable property within the town, and a proportionable poll tax on those who do not possess one hundred pounds of town property, and declares that "the monies therefrom arising shall be applied and laid out in clearing, cleaning, and repairing the streets and public passages, paying the officers of the town, and in such other public

work and business as the commissioners shall direct." It is argued that this section, taken in connection with the fifth, shows that it was the purpose of the Legislature to give the commissioners a power to raise a revenue adequate for the exigencies of the town, and that the power to make rules and ordinances was intended to embrace such rules and ordinances only as related to the application of the pecuniary resources of the town to the purposes expressed in the act. We see very distinctly a power given to make such ordinances as they may deem meet to accomplish certain purposes, and also a power to raise a revenue to a limited extent to be applied for the same purposes, but so far from discovering that the latter was intended to modify and control the former power, it ap- (349) pears to us, have been conferred as additional and auxiliary to it. Whether the power of taxation could be regarded as passing by a grant of authority to make ordinances meet and proper for accomplishing certain purposes, might have been doubted. It had been a much mooted question whether the right to tax was incident to that of making laws. During the revolutionary struggle it was zealously contended by the elder Pitt and his distinguished political associates, that the British Parliament possessed the power of legislation over the colonies, but could not rightfully levy a penny of tax. At all events it is exceedingly probable that the power of taxation was not intended to be passed thereby, and was regarded as one of sufficient importance to be the subject of distinct grant, and of special limitation. Be this as it may, if it were not embraced within the fifth section it was thought necessary to bestow it, and if embraced, it was deemed expedient to restrain the extent of the grant by the limitations in the eighth.

It will be seen that the Court does not concur with the Judge in the remaining part of the instructions which were given to the jury, and it would proceed to direct a new trial, but that it believes the indictment to be so radically defective as not to admit of a judgment being rendered against the defendants, if the instructions and verdict had been perfectly correct.

The count of this indictment on which the defendants are convicted is defective in not setting forth how the obligation to repair the streets has been thrown upon the defendants. Of common right it is the duty of the inhabitants of a parish to keep the highways through that parish in reparation, and it may very well be, as has been argued by the attorney-general, that the obligation to repair the streets of Halifax, unless some special provision has been made for the purpose, has devolved by the incorporation of the town upon the inhabitants thereof,

and that we are bound judicially to know that Halifax is one of the incorporated towns of the State, to which the constitution has given the right of electing a member of the State Legislature. But this is not an indictment against the
(350) town, or the inhabitants of the town of Halifax. It is against the defendants individually, for neglect of the duty of reparation which it alleges that the law has imposed upon them. We know of no public law which obliges the persons who may be commissioners of any incorporated town to keep the streets in order, and whenever an indictment is preferred against those who are not bound by the common law and of common right to repair, such indictment must set forth the matters by reason whereof the obligation has been devolved on the persons charged. (*Rex v. Inhabitants of Great Broughton*, 5 Bur., 2700.)

The count is further defective that it sets forth no breach of any specific duty which the acts regulating the town of Halifax impose on the commissioners. The *corpus delicti* is that the streets were permitted to be out of repair, and the indictment assumes that the defendants as commissioners were bound to prevent this public inconvenience. Now all the obligations imposed on the commissioners have been imposed by one or the other of these acts. These are for instance, to levy annually a certain tax not exceeding a given rate—to make the proper arrangement for collecting it, to apply the proceeds when received, towards the repair of the streets, the payment of public officers, and to such other public purposes as the commissioners shall think proper—and to make all such rules, ordinances and regulations as they may deem expedient for reparation of the streets. None of these acts declare, as does our public act of 1786 with respect to overseers of the roads, that for a neglect in keeping the streets in order the commissioners shall be liable to indictment. Certain means are put into the power of the commissioners for the accomplishment of certain ends. If there be a culpable neglect to use these means when there is a necessity for their use, those guilty of such neglect may be liable to indictment. But then the indictment must set forth the criminal omission, so that the defendants may know, and the Court see, what duty has been neglected. It must not allege neglect generally, still less state merely the consequence of the neglect of duty—but specify the
(351) offense producing such consequence. These principles are so distinctly asserted and explained in *S. v. Justices*, 11 N. C., 194, that we deem it unnecessary to enlarge upon them. It is true that in a case which came before the former

Supreme Court, *S. v. Commissioners,* 4 N. C., 419, this objection might have been taken to the indictment, but was overlooked or waived. But the subsequent case of *S. v. Justices, supra,* is an express adjudication upon the point. We feel ourselves bound by it as authority, and the more strongly, as the principles which it upholds tend greatly to the certainty of criminal prosecutions, and are therefore important safeguards of civil liberty.

The Court is of opinion that the judgment rendered in the Superior Court should be reversed, and that the judgment should be arrested.

PER CURIAM. Judgment arrested.

Cited: S. v. R. R., 44 N. C., 236; *S. v. Commissioners,* 48 N. C., 402; *S. v. Fishblate,* 83 N. C., 656; *S. v. McDowell,* 84 N. C., 802; *S. v. Smith,* 103 N. C., 407; *Russell v. Monroe,* 116 N. C., 726; *S. v. Britt,* 118 N. C., 1257; *S. v. Leeper,* 146 N. C., 665.

JOHN A. BINFORD v. THOMAS P. ALSTON and others.

A levy by a sheriff upon goods, where they remain in possession of the defendant, is no payment or satisfaction of the judgment, and a new execution may issue, as well where there are several defendants, as where there is but one.

A *scire facias* was sued out from the Superior Court of NASH, at the instance of John A. Binford, against Thomas P. Alston, George Cooper and Henry Arrington, calling on them to show cause wherefore an execution should not issue upon a judgment theretofore rendered against them in favor of the said Binford, on an appeal bond in said Court. The process not having been served upon Alston, the plaintiff entered a *nol. pros.* as to him, and the cause was submitted to the Court upon a case agreed between the plaintiff and the other defendants. The Court, *Norwood, J.,* presiding, gave judgment for the plaintiff, and the defendants appealed. (352)

The case agreed stated that the defendants were the sureties of Alston on a bond given for the prosecution of an appeal from the county to the Superior Court—that judgment was rendered on said bond against Alston and his sureties, and an execution issued thereon to the sheriff, who levied it upon property sufficient to satisfy the judgment—that the property

was taken by the sheriff into his possession and avertised for sale—that at the day of sale the plaintiff agreed with Alston, without the privity or consent of the defendants, that Alston should pay him a part of the judgment, and the execution returned, "indulged" for that time—that Alston having complied with the terms of this agreement, the property was permitted by the sheriff to remain with him, and the sheriff thinking the lien of the execution bound the property, no levy was endorsed upon the execution—that the plaintiff directed the clerk to issue the execution again, but this not having been done the judgment became dormant—that Alston made no further payments, became insolvent and removed out of the State. The case then added "if these facts constitute a defense to the *scire facias* judgment is to be rendered for the defendants, if not, then the plaintiff is to have execution against him."

Badger for the plaintiff.
Devereux for the defendants.

GASTON, J., after stating the case as above, proceeded: We concur with the Judge in the opinion that the facts stated in the case do not constitute a legal defense to the *scire facias*. By the judgment on the appeal bond the sureties became absolutely fixed with the debt. They were no longer bound that Alston should pay the plaintiff, but they became bound with Alston to pay the amount of the judgment to the plaintiff. Whatever, therefore, might yet have been the relation between the defendants and Alston, they were equally with him the
(353) debtors of the plaintiff, and nothing but satisfaction, or what was equivalent to satisfaction, could discharge them at law from the judgment. The proceedings upon the levy against Alston do not amount to a satisfaction as against him, and cannot therefore be a satisfaction as to these defendants. The case comes directly within the principles laid down in this Court. *In re King,* 13 N. C., 341.

By the terms of the case agreed, the facts furnishing no defense against the *scire facias,* execution is to be awarded against the defendants. But here we are met with a difficulty which has occasioned some perplexity. We are bound by the express enactments of the statute under which this Court is organized, to render such judgment as upon an inspection of the whole record, ought to have been rendered in the Superior Court. Alston is not a party to the *scire facias,* and no agreement between the parties to it could authorize the Court to issue an execution

against him and the defendants. Indeed we cannot but understand the agreement to be, that an execution, if awarded, is to issue against the defendants only, and we understand the judgment also, though not formally and precisely expressed, to award such an execution.

Although the *scire facias* to revive a judgment is to some purposes a new action, yet in the main it is to be regarded as the continuation of a former action. It is a proceeding to enforce a judgment already recovered. It creates nothing anew, but only reanimates that which had before existed, but whose vital faculties are suspended. If a judgment thereon be rendered for the plaintiff, it is not that he recovers anything (except his costs on the *scire facias*), but that he have his execution for the debt, damages and costs, according to the force, form and effect of the recovery set forth in the *scire facias*. If, therefore, this recovery has been had against more than one person, the proceeding to enforce it must be against all, unless there be some fact of record which shows that the whole judgment has survived, or which in law warrants the collection of the whole judgment against some of them only; for the execution ought to follow the judgment, and if this be joint, so (354) should be the execution. Nor do we think any agreement of the parties can authorize us to affirm a judgment, which upon an inspection of the record appears to be erroneous. This Court acquires jurisdiction, as a revising tribunal by *appeal,* and the extent of that jurisdiction as well as the manner of exercising it, must necessarily differ in many respects from that which is possessed and exercised by those tribunals which take cognizance of causes by writ of error. In these a release of errors may be pleaded, and on the plea being found, then the judgment is, not that the judgment below be affirmed, for they cannot affirm an erroneous judgment, but that the writ of error be barred. See 2 Williams's Saunders, 101, and the authorities there cited. A writ of error is considered as a new action in which the plaintiff may be nonsuited, and when it is brought contrary to an agreement the Court may compel him to submit to a nonsuit. But when a case is regularly brought before this Court by appeal, our duty is defined by law—to examine the record, affirm the judgment if it be correct, or reversing it as erroneous, render such judgment as in law ought to have been rendered in the Court from which the appeal was taken.

But we think that there is enough apparent upon this record to warrant the judgment which has been rendered. The *scire facias* recites indeed a judgment against three, and calls on all

of them to show cause wherefore an execution should not issue to enforce that judgment against them all. Two only are summoned, and they undertake to show cause. The truth of the matter alleged is admitted by the plaintiff, and a part of it is, that the person not summoned is out of the State and insolvent. Upon this record and between these parties the *facts* so admitted must be regarded as conclusively true, and if true, then in law the execution, notwithstanding the form of the *scire facias*, ought to issue against the defendants only. It is stated in 1 Rolle Abridgment, 890, pl. 1 and 2, and in Sergeant William's notes to 2 Saunders, 227, that if there be judgment against two, and a *scire facias* issue against both to have
(355) execution, if it be returned that one is summoned, and he makes default, and that the other has nothing, the plaintiff may have execution for the whole against him who was summoned and made default; and so likewise, if it be returned that one is dead and the other summoned, there shall be execution for the whole against the survivor. It appears then that the award of execution is not necessary to pursue the form of the *scire facias*, but may be accommodated to what shall judicially be ascertained to be in law fit for enforcing the judgment, and also that if it appear of record that one of the defendants to the judgment cannot be summoned, for that he has not the ability to be contributory to the payment of the judgment, the execution for the whole may rightfully issue against the other. A return of the officer declaring those facts, and the silence of the person summoned in regard to them, cannot place them upon the record more distinctly or conclusively than we find them here.

The judgment is to be affirmed with costs.

PER CURIAM. Judgment affirmed.

Cited: Eason v. Petway, 18 N. C., 46; *Shaw v. McFarlane,* 23 N. C., 218; *Smith v. Cheek,* 50 N. C., 213; *Walton v. Gatlin,* 60 N. C., 316; *McDowell v. Asbury,* 66 N. C., 447; *McDonald v. Dickson,* 85 N. C., 250; *Gatewood v. Burns,* 99 N. C., 360; *Aldridge v. Loftin,* 104 N. C., 126.

CHARLES E. JOHNSON v. PATTY TAYLOR.

In debt on bond, where the defendant offers a deed to the plaintiff in evidence, and relies on the consideration money therein expressed to be paid, as evidence of payment or satisfaction of the bond, it is competent for the plaintiff to prove, that notwithstanding the deed purported to be made for a valuable consideration, none was given or contemplated, but that a gift of property conveyed, was intended.

DEBT, on bond for $5,000. *Pleas*—Payment and set off, accord and satisfaction.

Upon the trial before *Norwood, J.*, at NASH Fall Term, 1832, the case turned entirely on the pleas of *payment* and *accord* and *satisfaction,* in support of which the defendant gave in evidence three deeds from herself to the plaintiff; one for lands in Tennessee, expressed to be for the consideration of $2,500 —another for land stating the consideration to be $2,250, and the third for other property, in which the consideration was stated to be $250. The bond bore date 9 (356) March, 1821, each of these deeds was dated 2 February, 1822. It was contended by the defendant that the property, conveyed by these deeds was in satisfaction of the bond.

The plaintiff proved that he married the daughter of the defendant, and offered to show by a witness present at the execution of the deeds, and by declarations of the defendant, at and after that time, that notwithstanding the considerations expressed, they were really intended as gifts, and were made without any valuable consideration. This evidence was objected to by the defendant and rejected by the Court. A verdict being returned for the defendant, and a new trial being refused, the plaintiff appealed to this Court.

The *Attorney-General* for the plaintiff.
Badger and *W. H. Haywood* for the defendant.

GASTON, J. On the trial of the issue upon the pleas of payment, and of accord and satisfaction, the defendant gave testimony tending to show that three tracts of land had, shortly before the day of payment named in the bond, been conveyed by her and received by the plaintiff in satisfaction of the money thereby stipulated to be paid. Each of the conveyances purported to be made for a valuable consideration, and the amount of all the considerations was the same with the amount of the bond. The plaintiff gave evidence to repel this inference, and offered as further evidence acts and declarations of the defendant tending to show that the conveyances had not been made on

account of the bond, but avowedly as an advancement to the plaintiff who was her son-in-law. The testimony thus offered, was rejected.

We think that there was error in rejecting this testimony. The issue between the parties was on a matter besides the deeds, and collateral to them, and involved no question, directly or indirectly, either of a claim under the deeds, or of a claim in opposition to them. The controversy was not whether
(357) the consideration remained unpaid, nor whether there was such a consideration as that recited. The dispute was whether the consideration had been paid in *the manner* which the defendant alleged, and endeavored to maintain by proof. This proof the plaintiff was at liberty to contradict if he could by evidence of the defendant's own acts and declarations. If these were inconsistent with the more solemn declarations expressed in the deed, this repugnancy was a circumstance fit to be weighed by the triers, but should not prevent them from being laid before the triers of the matter then in contestation. The testimony was relevant and material, and not forbidden, as we believe, by any principle of law.

The judgment is to be reversed and a new trial awarded.

PER CURIAM. Judgment reversed.

JOHN P. JORDAN v. JOSEPH W. TARKINGTON.

A bill drawn in favor of an agent for a debt due to his principal, may be declared on in the name of the principal, and will support an action in his name against the drawer, where the agency was known at the time to the drawer.

ASSUMPTIST tried before *Seawell, J.*, at TYRRELL Fall Term, 1833. *Plea—non-assumpsit.*

The plaintiff was a merchant; and had sold goods to one W. A. Tarkington, who being asked for payment, drew an order on the defendant, payable to Hathaway, the clerk of the plaintiff. The order was presented, and the defendant promised to pay it, and requested the clerk to charge it as an item in his account on the plaintiff's books, which was accordingly done. The defendant contended, that the plaintiff could not recover on this evidence, because the order which he promised to pay, was payable to Hathaway and not to the plaintiff. The Court charged the jury, that if the facts were true, and if the
(358) defendant understood the character in which Hathaway stood, it was evidence to support an action in the name of the plaintiff. The jury rendered a verdict for the plaintiff.

The defendant moved for a new trial, for misdirection, which was overruled and judgment rendered; from which, the defendant appealed.

No counsel appeared in this Court for the plaintiff.
Badger for the defendant.

DANIEL, J. The request made by the defendant, that the order which he had promised to pay, might be charged against him, as an item in his account standing on the books of the plaintiff, and the entry having been made accordingly, was a promise made to the agent, which enured to the plaintiff. 1 Chitty's Pleadings, 5. The acceptance of the order was an admission by the defendant, that he had funds in his hands belonging to the drawer. The jury have found that the defendant knew that the payee was the agent of the plaintiff. The consideration, therefore, which supports the direct promise made by the defendant to the plaintiff, is the extinguishment of his debt to the drawer, and the relinquishment by the plaintiff, and the payee his agent, of the demand on the bill and acceptance. We think the judgment should be affirmed.

PER CURIAM. Judgment affirmed.

ALLEN S. BALLENGER v. JOHN B. ALLEN.

In a suit brought by a sheriff against his collector for arrearages of taxes, a settlement between the sheriff and the accounting officer for the county, is not evidence for him.

ASSUMPSIT, tried before *Strange, J.*, at JOHNSTON Spring Term, 1833.

The plaintiff was sheriff of the county of Johnston, and for several years in succession had appointed the defendant to collect the taxes due in two districts in said county.

There were two counts in the declaration; one, for money had and received by the defendant to the use of the plaintiff—a second, on a special undertaking by the de- (359) fendant, to collect the taxes in the said two districts, and pay over the proceeds to the plaintiff, and for a default in not collecting as he had undertaken to do. The defendant pleaded the general issue and statute of limitations.

It was proved, that the defendant had been the collector of the taxes, in the two districts assigned to him by the sheriff,

for the space of nine years (from 1819 to 1827 inclusive), during which time, the public, county, and poor taxes of those districts amounted to $6,938; and that no final settlement had ever been made between the sheriff and the defendant.

The defendant then proved, that just before this suit was brought, on his being badly hurt, the plaintiff had said, if the defendant died, he should lose five or six hundred dollars by him.

The plaintiff then offered to prove (for the purpose of establishing a larger amount due him than $600, and also for the purpose of repelling the evidence offered by the defendant), that there had been no settlement for the county and poor taxes between himself as sheriff and the county trustee, and the wardens of the poor, for the last seven, of the nine years, that the defendant had been his collector. The plaintiff offered to prove further, the result of a settlement, made since the commencement of .this suit, with the accounting officers of the county, when the defendant was not present thereat, or a party to the same. The Court permitted him to prove that he had made no settlement for seven years, before the one which he had made since the commencement of the suit, but refused to permit him to give in evidence, the result of the last settlement. There was a verdict for the plaintiff for the sum of $600—the plaintiff moved for a new trial, because the Court had refused to receive proper and pertinent testimony. The motion was overruled, and judgment rendered, and the plaintiff appealed.

Devereux for the plaintiff.
Badger and *W. H. Haywood* for the defendant.

DANIEL, J. The only reason offered for a new trial (360) is, because the Judge refused to admit in evidence, a settlement of the taxes which the plaintiff had made, with the accounting officers of the county, since the suit was commenced; and, when the defendant was not present, or a party to that settlement. The counsel for the plaintiff has cited several authorities, none of which, in my opinion, bear him out in the position he has taken—As against himself, it is fair to presume every man's words and actions correspond with the truth; it is his own fault if they do not—but it would be in the highest degree, rash and unjust, to found such a presumption, generally, upon the acts, conduct or declarations of strangers, without any authority from the party whom they affect; as to him, they are *res inter alios acta*. 1 Stark., 51; 3 Stark., 1300. I cannot perceive how the admission of the plaintiff in his set-

tlement, that he was largely indebted to the county, would warrant an inference that the defendant had not paid him the monies, which he had received as the agent of the plaintiff, or was otherwise indebted to him. I think, the evidence was properly rejected by the Court. The judgment, therefore, must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Lewis v. Fort, 75 N. C., 253.

JAMES SHERROD v. JAMES WOODARD.

A surety who pays money for his principal, may maintain an action against his co-surety for his ratable part, without first making a demand, and the statute of limitations therefore begins to run from the time of the payment of the money.

This suit was commenced on 20 January, 1831, by a warrant returnable before a magistrate, and was carried by appeal first to the county, and then to the Superior Court of NORTHAMPTON. In the Superior Court a verdict was rendered, subject to the opinion of the Court upon a case agreed between the parties. The case agreed stated that the plaintiff and (361) the defendant were joint sureties for Miles Boon to John T. Binn; that the creditor obtained judgment against Boon and his sureties; that on 2 August, 1827, Boon being then insolvent, the plaintiff satisfied the whole amount of this judgment; that afterwards, and within three years before the suing out of this warrant, the plaintiff demanded from the defendant payment of the defendant's share of the judgment as paid off by the plaintiff, and that the defendant refused to comply with this request. The statute of limitations having been pleaded, the question and the only question submitted to the Court was, whether this statute began to run against the plaintiff's claim from the 2 August, 1827, when the judgment was paid by him, or from the day when he made his demand upon the defendant.

The case being submitted to *Daniel, J.,* at Spring Term, 1832, of NORTHAMPTON, and his Honor being of opinion with the plaintiff, rendered judgment accordingly, from which the defendant appealed.

Devereux for the plaintiff.
Badger for the defendant.

GASTON, J. It has been long settled that when one of several co-sureties has been compelled to pay the debt of his principal, he has a right in a Court of Equity to call upon the others for their contribution. This right to contribution was probably founded upon the maxim that equality between those whose obligations are identical, is equity, and that the creditor cannot be permitted at his choice, to impose on *one,* that burthen which on the principles of natural justice, ought to be borne by *all.* In modern times, the Courts of Law in England, assumed a jurisdiction over such demands, upon the ground that this principle of equality being settled, a contract by the co-sureties to contribute according to this principle might be inferred. The Courts of Law, however, in this case declined to assume this jurisdiction, considering it as belonging exclusively to a Court of Equity. The Legislature then interfered and by the (362) act of 1807 (Rev., c. 722), declared that when one of several sureties shall have been compelled to pay the debt of his principal, and such principal should be insolvent or out of the State, the surety so paying, should have and maintain his action on the case against the other surety or sureties, for his or their ratable proportion of the debts so paid, before any court of record, or justice of the peace having jurisdiction of the amount demanded. We regard this act as intended to remove the scruples of our Judges, and to make thenceforth, what had been supposed an obligation in conscience only, and proper to be enforced exclusively in a Court of Equity, a legal obligation for the cognizance of a Court of Law. Co-sureties, therefore, are to be regarded as having mutually contracted to make this contribution in the event of a loss being thrown upon either, in the manner designated in this act.

It is a general rule that the statute of limitations attaches, or commences its operation whenever there is a complete cause of action, and not before. If, therefore, a demand be necessary to consummate the cause of action, the statute will not begin to run until such demand is made. Thus in *Topham v. Braddick,* 1 Taunton, 572, where a merchant brought an action against a factor upon an implied promise to account for the goods consigned to him for sale, to pay over the proceeds of the sales, and to deliver the residue unsold *on demand,* inasmuch as there was no breach of the contract until a demand, it was held that the statute began to run from that time. So if a note be made payable at a specified time after sight, or after demand, the statute does not attach until that specified time has expired after presentment. Where the note is payable upon demand, there are contradictory opinions as to the time

when the statute comences its operation, though the better opinion seems to be that it commences from the date of the note, because an actual demand is not necessary to complete the cause of action. The question then in this case turns entirely upon the inquiry, whether the plaintiff's cause of action was complete when he paid off the judgment, his (363) principal being then insolvent; or was it imperfect and unconsummated, until his application to the defendant for reimbursement? If the first view be correct he is barred by the statute—but if the second be correct, he is not barred.

We are of opinion that the implied contract between the parties was substantially a contract for mutual indemnity, and that there was a complete cause of action whenever the injury was sustained against which indemnity was stipulated. They agreed to divide the loss, if any should happen to either by default of their principal, and relief was not to be had against him, because of his insolvency, or removal beyond the reach of legal process. When all these facts occurred, then the contingency happened upon which payment of a proportionate part was promised to be made. The only difficulty which we have found in coming to this conclusion was occasioned by the consideration that as well upon authority, as upon the principles of reason and fairness, the plaintiff ought to show an application to the defendant, or at least a notice to him of the happening of the contingency, before he instituted his action. It is stated in the elementary books, and the position is sustained by judicial decisions, that in an action by one surety against another, the plaintiff must show their common obligation as sureties, the payment of the debt by the plaintiff, and an application to the defendant for the payment of his share. It is right that it should be so. The defendant may be ignorant of the default of the principal, or of the payment by the plaintiff. He may be willing to pay his part without suit—or notice may be important to him, to procure the means of reimbursement. But on the other hand, to hold that the cause of action is not complete until after this application or notice, and that the statute does not commence its operation but from the time of such notice, would be to expose individuals to many of the mischiefs of stale demands, against which this beneficial statute intended to protect them. Notice is required not because the plaintiff's cause of action is imperfect, but because the matters or part of the matters, constituting the cause of (364) action lie only in the knowledge of the plaintiff, as when a man promises to pay such rate for wares as any other paid the plaintiff, notice must be alleged in the plaintiff's declaration

of the rate that another gave. (Com. Pleader, c. 73.) Where a man promises to pay ten pounds to J. S. upon a contingency, as when he comes from *Rome,* or when he marries—the right of action accrues from the happening of the contingency, and from that time the statute begins to run. (God., 437; 1 Lev., 48; 1 Hen. Black, 631.) If the contingency be one which lies as much in the defendant's knowledge as in that of the plaintiff, he must take notice of it at his peril; but if it lies more properly in the knowledge of the plaintiff than of the defendant, there, if the action be a *special* action of assumpsit, the declaration ought to aver that the defendant had notice thereof, and if the action be a general *indebitatus assumpsit,* such notice ought to be shown on the trial. (1 Chitty Pleading, 319, 320.)

It is the opinion of the Court that the judgment rendered below should be reversed, and that a judgment of nonsuit be entered.

PER CURIAM. Judgment reversed.

Cited: Adcock v. Flemming, 19 N. C., 227; *Reynolds v. Magness,* 24 N. C., 31; *Ponder v. Carter,* 34 N. C., 243; *Cox v. Brown,* 51 N. C., 101; *Parham v. Green,* 64 N. C., 438; *Craven v. Freeman,* 82 N. C., 363; *Bright v. Lennon,* 83 N. C., 190; *Leak v. Covington,* 99 N. C., 566; *Halliburton v. Carson,* 100 N. C., 109; *Smith v. Richards,* 129 N. C., 268.

LAWSON H. ALEXANDER v. WILLIAM SMITH.

1. Where A transferred to B, a note for $900, to secure the payment of $600, and it was agreed, if the $600 was not refunded within three months, the note should be the absolute property of B. Such contract, if intended as an absolute sale, is not void for the excess, for want of consideration; but whether intended as an absolute sale or a pledge only, should be left to the jury.
2. The interest of A in such a contract is not negotiable, and his assignee can not support an action at law against B, in his own name, without an express promise.

Upon an attachment issued at the instance of the plaintiff against one Kimble, the defendant, Smith, was sum-
(365) moned as garnishee. In his garnishment he stated that he had no money or effects of Kimble's in his hands. On an issue made up to try the truth of this garnishment, it appeared that one Elms borrowed from Smith $600, to be paid

in three months, and to secure the repayment, passed Smith a note of one Gibson (who was perfectly solvent), for $900. It was agreed, if the money was not repaid by the day appointed, the note should be the absolute property of Smith. After this, and before the expiration of the three months, Elms sold his interest in the note to Kimble, for a valuable consideration, Kimble agreeing to stand in the shoes of Elms.—Smith was immediately informed of this transfer, and assented to it. Kimble went to Virginia, where he was taken sick, and did not return, nor repay the $600 within the time prescribed. After his return from Virginia, Smith refused to treat with Kimble concerning the note, claiming it as his own. Smith collected the whole amount from Gibson.

Daniel, J., before whom the cause was tried, at MECKLENBURG Fall Term, 1831, instructed the jury, that upon the facts it made no difference whether the sale were absolute or conditional—that Smith had in his hands monies over the $600 and interest, for which he gave no consideration, and notwithstanding the agreement, the promise being without consideration for the surplus, was not binding. And if Smith expressly agreed with Kimble that he should stand in the shoes of Elms, and have the same rights, the law would say he, Smith, held the excess over the $600 to the use of Kimble, for which Kimble might maintain *assumpsit;* and, therefore, it would be subject to the plaintiff's attachment. Judgment being rendered for the plaintiff, Smith, the garnishee, appealed.

Winston for the plaintiff.
Devereux for the defendant.

RUFFIN, C. J. The case has been argued for the plaintiff upon the ground, that as the record states a loan to Elms, and the note was merely delivered without endorsement to Smith, the transaction was not a sale of the note, but (366) either gave him a lien on it, or at most an authority to receive the money; which as to all above the loan and interest, was money had and received to the use of Elms or Kimble. The position contended for is rendered immaterial by the instructions given by the Judge. He stated to the jury that it made no difference whether there was a sale or not, or whether it was conditional or absolute. This instruction was given upon the idea that as the sum paid or advanced by Smith, was only $600, there was no consideration extending to the excess of the bond above that sum. In this, the opinion of the Court is, there was error. As far as the validity of a contract de-

pends upon the consideration, one of any value, agreed upon by the parties, is sufficient. It need not be adequate or equal in value. If a bond for a larger sum be really sold for a smaller, the contract is not void as to any part of the sum mentioned in the bond. Whether this was a sale or only a pledge, ought to have been left to the jury, if Elms had been suing Smith for the surplus; and so also, if Kimble had been prosecuting an action for it.

In refernce to the right of Kimble to do so, the Judge further instructed the jury, that he might, if Smith expressly agreed that he should stand in the shoes of Elms. Such an action could be sustained by an express promise only; for the claim of Elms was not negotiable, and the assignment to Kimble gave him only an equitable right. That was sufficient as a consideration to support a promise by Smith, to deliver the bond, or pay the money to Kimble. But Kimble must bring himself within the terms of the promise as made. In this respect his rights may be very distinguishable from those of Elms. The latter may claim upon grounds independent of the particular agreement; the former cannot. That agreement, as stated in the case, was that Kimble should stand in the shoes of Elms, and if he paid the $600 at the day agreed on, Smith would deliver the note to him; if not, it should be the absolute property of Smith. Under this agreement Kimble could not claim
(367) the note or money, at law, unless he performed the acts stipulated on his part. His sickness and absence from home did not dispense with the payment of the money within the time. Whether Smith could justly insist on such terms, or whether they would have been obligatory on Elms at law, or are so on Kimble in another forum, is not the question. Kimble is obliged to abide by them at law; because they constitute an essential part of the promise to him, and without or beyond the promise, he has no legal right. As Kimble could not maintain an action for the money as a debt, it is not subject to the attachment of the plaintiff; and there must be a new trial. This is the less to be regretted as the case is very imperfectly stated, and upon another trial it may be better understood, whether Elms was to pay the money, if Gibson failed, and what was meant by Kimble's standing in his shoes, with or without repeating the terms of the original contract.

PER CURIAM. Judgment reversed.

MOSES JARVIS v. HYER & BURDETT & JOHN B. DAWSON.

On an attachment against one partner, for his separate debt, only the separate property of that partner can be seized—the partnership effects can not be taken.

ATTACHMENT, tried before *Donnell, J.*, at CRAVEN Spring Term, 1833.

There was a mercantile firm in the city of New York, composed of four partners, viz.: Garrett Hyer, Walter E. Hyer, Alexander Brimmer and Jacob Burdett; they traded under the name and style of "Hyers, Brimmer & Burdett." Dawson, as one of the firm of Platt L. Wicks & Co. (of North Carolina), became indebted to the said firm in New York. Garrett Hyer and Alexander Brimmer died, leaving Walter Hyer and Jacob Burdett, surviving partners—these two formed a new firm in New York, and traded under the name and style (368) of "Hyer & Burdett." The latter firm became indebted to the plaintiff, a citizen of North Carolina, who to recover his debt, sued out an attachment against the estate, debts and effects of "Hyer & Burdett." Dawson was summoned as garnishee; who admitted that he was indebted to the firm of "Hyers, Brimmer & Burdett." The question was, could the plaintiff have a judgment of condemnation of the money in the hands of the garnishee, to the satisfaction of his debt, against "Hyer & Burdett?"

Upon these facts judgment *pro forma* was rendered in favor of the garnishee, and the plaintiff appealed.

W. C. Stanly and *Bryan* for the plaintiff.
Devereux for the garnishee.

DANIEL, J., after stating the case, proceeded: On an attachment issued for a debt due from a separate partner, who has absconded, or resides out of the State, the sheriff can take only the separate property of the absconding or absent debtor; he cannot seize the partnership effects; for the other partner has a right to retain and dispose of them for the payment of the partnership debts, *Matter of Smith*, 16 John., 109. In *Lyndon v. Gorham*, 1 Gallison, 367, it was determined, that a debtor to a partnership, cannot be held, or made liable as garnishee, for the several or joint debt of one of the partners. The corporeal property of a partnership, cannot be taken in execution to satisfy the several debts of one partner, unless such partner would have an interest in the property after settlement of all

accounts, and then to the extent of that interest only. The sheriff, therefore, does not seize the partnership effects themselves; for the other partner has a right to retain them for the payment of the partnership debts, 16 John., 106; *Moody v. Payne,* 2 John. Ch., 548; *Fox v. Hanbury,* Cowp., 445. The sheriff can sell only the actual interest which such partner has in the partnership property, after the accounts are settled, or subject to the partnership debts, which are first to be
(369) paid. In *Fisk v. Herrick,* 6 Mass., 271, the Court said: "We have several times decided that a debt due to a partnership, is not necessarily goods, effects, or credits of *either* of the partners;" a creditor of an individual partner cannot attach such a debt, unless it shall appear on examination, that a balance is due from the firm, to such partner. In Massachusetts, they have no court of chancery, distinct from the courts of law; therefore, the accounts there, are taken in the courts of law, to prevent a failure of justice.

Partners are at law, joint tenants of their debts and merchandise, Gow., 66. But, *jus accrescendi,* or right of survivorship, does not hold, except *sub modo,* and for a special purpose, to enable the surviving partner to get in the debts and settle the affairs of the firm. For (subject to the liability of the surviving partner to pay the debts due from the firm, and his right to collect the debts due to the firm), the executor of the dead partner is a tenant in common with the surviving partner, of all the property in possession belonging to the firm; and the instant any joint *chose in action* is reduced into possession by the legal process of the survivor, the right of the executor to his distributive share attaches subject to the debts as aforesaid, Gow., 384; 3 Lev., 290; 1 Ld. Ray., 340. If the separate creditors of the surviving partner could seize and sell under execution, or could attach the supposed share of the survivor in the firm, for their satisfaction; so as to enable the vendee to take immediate possession of the property, unencumbered with the debts of the firm; the whole of the property and effects of the firm, might be swept away and exhausted by the private debts of the survivor; and then the creditors of the firm, would resort to the private estate of the dead partner, for satisfaction of their debts;—this would be most unreasonable. The private estate of the dead partner is liable to the creditors of the firm, only, in case the effects of the firm, in the possession of the surviving partner, are exhausted. The rule of law, there-
(370) fore, which subjects the whole of the partnership effects, first, to the payment of the creditors of the firm, is founded, not so much upon the rights of the creditors of the firm,

as for the purpose of protecting the private estate of the dead partner.

In this case, the debt due from the garnishee to "Hyers, Brimmer & Burdett," must first go to pay the creditors of that firm. We see that on a settlement of the accounts of that firm, there cannot be any part of the money now in the garnishee's hands, which will belong to "Hyer & Burdett." The case states that the firm of "Hyers, Brimmer & Burdett," was immensely indebted, and did a losing business, and that both of the defendants are indebted to it. We think that the cases on this subject are decisive of the question against the plaintiff. What is here said, is not to be considered as impairing the doctrine of set-off, as laid down in the cases of *French v. Andrade,* 6 Term, 582, and *Slipper v. Stidstone,* 5 *Ib.,* 493. We think this process of attachment was not intended to be applied to a case in which the Court is unable in its judgment, to do justice to all the persons interested, and much less to one in which a decision for the plaintiff is seen to do positive injustice to third persons, not before the Court.

PER CURIAM. Judgment affirmed.

Cited: Taylor v. Arthur, 33 N. C., 409.

MARY V. PROCTOR v. JOSEPH H. POOL.

If the description in a deed be so vague or contradictory that it can not be ascertained what thing in particular is meant, the deed is void. But different descriptions will be reconciled if possible; or if irreconcilable, yet if one of them point out the thing intended with certainty, a false or mistaken reference to another particular shall not avoid it.

This was an action of EJECTMENT, submitted to *Norwood, J.,* on a case agreed at Spring Term, 1833, of PASQUOTANK.

The action was brought for the half of two lots of land in Elizabeth City, known as lots No. 33 and 34. Eliza- (371) beth B. Proctor was seized in fee of the two lots mentioned in the declaration. The buildings, garden, etc., were on the eastern part of the lots, which was separated from the western part (used as a pasture), by a fence, but they were all rented out together and as one tenement, by Samuel Proctor, the husband of Elizabeth, during his life. Samuel Proctor died in March, 1831, having no real estate in Elizabeth City,

except the above lots; by his will he devised as follows: "I give and devise to my daughter, Ann Elizabeth Proctor, the house and lot in Elizabeth City." Elizabeth B. Proctor, having never conveyed her interest in said lots, on 8 April, 1831, and after the death of her husband, executed a deed, in which "after reciting the consideration to be the natural love and affection she had for her daughter, Ann E. Proctor, and for and in consideration of complying with the bequest, and last will and testament of her late husband, Samuel Proctor," she gave to Ann E. Proctor, "one lot of land lying in Elizabeth City, in Pasquotank County, containing one acre, more or less, which descended to said E. B. Proctor, by the death of her father, Frederick B. Sawyer, and purchased by the said F. B. Sawyer from John Bartie, reference to the deed will show the boundaries." Elizabeth B. Proctor afterwards died, having by her last will and testament devised to her youngest child, Mary Virginia, a tract of land called Tadmore; all her right, title and interest in the Juniper Swamp, as well as all her property of every kind and description, both real, personal and mixed.

The lessor of the plaintiff is the devisee named in said will. The defendant intermarried with Ann E. Proctor, who is still living.

The lots No. 33 and 34 were once the property of Margaret, the wife of Lemuel Moore. Moore and wife sold the eastern half of said lots to John Bartie, but no deed was ever executed to Bartie, and they being afterwards sold by the sheriff as John Bartie's property, the sheriff and Moore and wife
(372) executed deeds to Willis Wilson, the purchaser at the sheriff's sale, in which they were described as follows: "A certain lot of ground lying and being in the town of Elizabeth City, being part of lots No. 33 and 34, as designated and distinguished in the plan of said town, part commencing on the middle of the said two lots, No. 33 and 34, on Main Street, and running a straight line through to South Street, and being the east part of the square 33 and 34, so divided by a straight line from north to south." Wilson conveyed by the same description to Frederick B. Sawyer.

The other part of said lots were conveyed by Moore and wife to Benjamin Sutton, by the following description: "A certain piece of ground lying and being in the town of Elizabeth City, being part of lots No. 33 and 34, as designated in the plan of said town, commencing in the center of lots No. 33 and 34, on Main Street, and then running a straight line from north to south, to South Street, being the west part of the square No. 33 and 34, agreeable to the before mentioned dividing line,

containing one-half acre by estimation." Sutton conveyed to Frederick B. Sawyer by the same description. F. B. Sawyer died intestate, and all his real estate descended to Elizabeth B. Proctor.

The question submitted to the Court was, whether the whole of lots No. 33 and 34, passed by the deed from Elizabeth B. Proctor to Ann E. Proctor, or whether said deed conveyed only the eastern half of said lots, sold to John Bartie.

The Court being of opinion with the defendant, rendered judgment accordingly, and the plaintiff appealed.

No counsel appeared for the plaintiff.

Iredell for the defendant.

RUFFIN, C. J. The question is, whether the western half of the town lots No. 33 and 34 passed by the deed of Mrs. Proctor to the wife of the defendant.

I think that it cannot be doubted, that if Samuel Proctor, the father, had been the owner of the premises, the whole would have passed uder the will. It is plain he did not speak of the lot as a subdivision of the land forming (373) the town; for he gives *the* house *and* lot. What lot? Not No. 33, nor 34; for even within an indictment for burglary, the eastern half of both of those lots, forming the curtilage, would be part and parcel of the dwelling house, which is expressly devised. The plan of the town being thus put out of the way, as the means of identifying the estate devised, *"the house and lot in Elizabeth City,"* must mean all of the ground contiguous to the houses which were used and occupied with the tenement, as parcel of it. For the testator disposes of it, as one entire thing; and this was all he claimed in the town.

Upon the construction of the deed, I have as little doubt. It is a general rule, that if the description be so vague or contradictory, that it cannot be told what thing in particular is meant; the deed is void. But it is also a general rule, that the deed shall be supported, if possible; and if by any means different descriptions can be reconciled, they shall be, or if they be irreconcilable, yet if one of them sufficiently points out the thing, so as to render it certain that it was the one intended, a false or mistaken reference to another particular shall not overrule that which is already rendered certain.

Attempts have been made to establish artificial rules for discovering the intention; and the offices of terms of general and particular description defined. The truth is, no positive rule can be laid down; for as each subject differs in some respects from another, and each writer will be more or less precise or perspicuous in expressing himself, the whole instrument is to

be looked at, and the inquiry then made, can it be found out, from this, what the party means. In some cases it is clear that only that thing is meant in which all the particulars of the description concur. In others, the description may be by several particulars, and distinct things are found, of which one answers to the one description, and another to the other. It would seem in such case that the conveyance would be inoperative, because it was intended to pass one only, and it cannot be determined, which one; though there is most respectable
(374) authority, that both should pass, rather than neither. *Worthington v. Hylyer,* 4 Mass., 196. But there seems to be no danger of mistaking the intention of the parties, when a thing is given by a particular name, by which it is well known, or by any other description which completely identifies it, although another particular be added, which does not apply, it is true, to the thing as before described, but is equally inapplicable to anything else. In such case the effect of the true description ought not to be weakened by a further and unnecessary description which is false. As if one give his house in A, which formerly belonged to B, and have but one house in A, it shall pass, though it never belonged to B, for but the one could be meant. Or, as mentioned in *Reddick v. Leggat,* 7 N. C., 543, if one grant *White-acre* (by name), which descended from his father, *White-acre,* shall pass, though it descended from the mother; because it was sufficiently identified before.

In the case before us the description is, *one lot of land in Elizabeth City, containing one acre more or less, which descended to said E. B. Proctor from her father F. B. S.* The donor had no other land in the town but these two town lots. Of the whole as one tenement, this description and every part of it is true, and it is not true of any part, taking the parts separately. In respect of either end, the eastern or western, it is not *one* lot, for, divided from north to south, each end would be constituted of part of both town lots. So with respect to quantity; whether the division be from north to south, according to the conveyance to Sawyer, or from east to west, according to the plan of the town, each lot would not contain an acre, but half an acre. Now it is true that quantity is not generally descriptive, yet it may be so. If one own two lots in a town; one of half an acre, and the other of an acre, and grant his "acre lot" or his "lot containing one acre," it is not void, but will pass the larger lot, although it may upon admeasurement be a few feet over or under one acre; for
(375) the purpose is not to denote how much, but which parcel was meant—much more, if one have two lots, contiguous, each containing half an acre, and enclosed and

occupied together, and grant *one* lot now in his occupation, shall the whole pass. For *lot* is then used as *piece,* or *parcel,* or *tract* of land. Here, it has that sense. The gift is not of a lot of the town, but a *lot of land* in the town, that is, a certain piece then containing one acre, which descended from the donor's father.

But it is further identified by the reference in the deed to the husband's will. The donor declares, that the purpose of making the deed is to comply with the will. The land did not pass by it, not because the description there given was insufficient, but because the testator had not the title. The sole object was to supply that defect. The land then intended to pass by the deed, was *the* lot devised in the will, and the deed must be construed as if the words "which my husband gave to said Anne E. Proctor by will" had been inserted in the descriptive clause.

But the deed adds, *"which was purchased by the said F. B. S. from John Bartie, reference to the deed will show the boundaries."* On this it is admitted by the plaintiff, that the eastern half of the two lots will pass; but it is denied, that the other half does. Now if they form an essential part of the description, so that the estate cannot be ascertained without them, they cannot be rejected, and then the deed is void *in toto.* For as a description, this is not true of any part of the land; since Sawyer did not purchase from Bartie, nor take any deed from him. But in fact this is not an essential part of the description. The thing can be known without having this property. It is only a *further* description, of what had before been fully and sufficiently identified, and does not render that uncertain, nor the deed unintelligible.

PER CURIAM. Judgment affirmed.

Cited: Dodson v. Green, post, 491; *Belk v. Love,* 18 N. C., 73; *Mayo v. Blount,* 23 N. C., 286; *Smith v. Lowe,* 24 N. C., 461; *Ehringhaus v. Cartwright,* 30 N. C., 43; *Simpson v. King,* 36 N. C., 13; *Joiner v. Joiner,* 55 N. C., 72; *Roberson v. Lewis,* 64 N. C., 737; *Jones v. Robinson,* 78 N. C., 400; *Henley v. Wilson,* 81 N. C., 408; *Clark v. Atkins,* 90 N. C., 640; *Cox v. Cox,* 91 N. C., 263; *Harrell v. Butler,* 92 N. C., 23; *Scull v. Pruden, Ib.,* 173; *Tillett v. Aydlett,* 93 N. C., 20; *Leeper v. Neagle,* 94 N. C., 342; *Edwards v. Bowden,* 99 N. C., 81; *Shaffer v. Hahn,* 111 N. C., 11; *Buckner v. Anderson, Ib.,* 575; *Mortgage Co. v. Long,* 113 N. C., 126; *Cox v. McGowan,* 116 N. C., 134; *Peebles v. Graham,* 128 N. C., 221, 227; *Hawkins v. Lumber Co.,* 139 N. C., 164.

(376)

Doe ex dem. ASHUR ROSS v. SARAH TOMS.

A devise of lands to A for life and after her death to be equally divided among the male or female heirs begotten of her body, and for want of such heirs, then over, gives A an estate tail in the land, which by the Act of 1784 (Rev., c. 204), is converted into a fee.

EJECTMENT, tried before *Norwood, J.*, at PERQUIMANS Spring Term, 1833.

Joshua Skinner made his last will and testament, duly executed to pass lands; it was admitted to probate, at January session of the County Court of Perquimans in 1777. In, and by said will, he devised the lands now in controversy, as follows: "*Item,* I give unto my daughter Mary Skinner, the use and tillage of all my lands lying on Laker's Creek, which I bought of Benjamin Scarborough and Joshua Hobert, during her natural life; and after her death, I give the said lands to be equally divided among the male heirs lawfully begotten of the body of my daughter Mary; and for the want of such heirs, I give the said lands, to be equally divided among the female heirs lawfully begotten of the body of my daughter Mary Skinner; and for want of such heirs, I give the said lands to be equally divided between my two sons Joshua Skinner and John Skinner, to them and their heirs forever."

Mary Skinner married, first, Miles Harvey, and the defendant, a grand daughter of Mary, is the only issue left of the marriage. After the death of Harvey, Mary the widow, intermarried with Martin Ross; and from this marriage there was issue, an only child, by the name of Martin Ross, Jr. Mary, the devisee, died in the year 1824, her son Martin Ross survived her; who died in the year 1825, leaving a son by the name of William Ross, who died without issue in the same year, leaving the lessor of the plaintiff, a half brother of his father, and the defendant a sister of his grandmother, his only relations.

The question for determination was, whether the devise to Mary, in and by the will of her father Joshua Skinner, gave her an estate tail in the lands, which estate tail was converted into a fee simple by the act of 1784, and on her death
(377) descended to her son Martin Ross. Or whether her son Martin Ross, took an estate in remainder, under the aforesaid devise in his maternal grandfather's will, which in law, made him a *purchaser* of the lands.

His Honor instructed the jury that Mary, the devisee under the will of Joshua Skinner, took an estate tail, which by the

operation of the act of 1784 was converted into a fee. Under this charge the jury returned a verdict for the defendant, and a rule for a new trial being discharged, the plaintiff appealed.

Badger for the plaintiff.
Iredell and *Devereux* for the defendant.

DANIEL, J., after stating the case, proceeded: The lessor of the plaintiff being a brother of the half blood of Martin Ross, Jr., and uncle of the half blood of William, would be entitled to a moiety of the land by virtue of the 4th rule in the act regulating descents, passed in 1808 (Rev. ch. 739), provided, Martin Ross, Jr., took the aforementioned lands as a *purchaser*. But if Mary, the mother of Martin Ross, was the first *purchaser,* and on her death the lands *descended* to her son, and from him, descended, to *his* son William Ross; then the lessor of the plaintiff, who has none of the blood of Mary the purchaser, cannot be one of the heirs of William, so long as any relations of the blood of Mary can be found (Rules 4 and 5 in the act of 1808), and therefore cannot recover. In case the lands *descended* from Mary to her son Martin Ross, and from him to William, who died without issue; then the heir is to be found in the next blood relation of William, on the side of Mary his grandmother, who, it appears, is the present defendant, her sister. Rule 4, act of 1808.

Were it not for the words, "equally to be divided," which are contained in this devise; this case would be implicitly within the rule in *Shelly's* case, 1 Co., 89. The rule in this case may be thus stated: "That where in any instrument an estate for life is given to the ancestor, and afterwards by the same instrument the inheritance is given, either mediately or immediately to his heirs, or heirs of his body, (378) as a class to take in succession as heirs to him, the word "heirs" is a word of limitation and not of purchase; and the ancestor takes the whole estate." (*Perrin v. Blake,* 4 Burr., 2579. *Jones v. Morgan,* 1 Bro. C. C., 206. *Doe v. Burnsall,* 6 Term, 31. *Lindsay v. Colyer,* 11 East, 564. *Roe v. Bedford,* 4 M. and S., 362, note H. 5, to *Shelly's* case, 1 Co., 262. Thomas & Fraser's edition.) Do the words, "equally to be divided," which are contained in the devise made by Joshua Skinner, restrain Mary's interest to an estate for life, and enable her children to take in remainder as purchasers? The cases of *Doe v. Goff,* 11 East., 668, and *Gretton v. Howard,* 1 Eng. C. L., 320, are decisions, which if they had not been shaken and overruled in the House of Lords, in the case of *Wright v.*

Jesson, 2 Bligh., 2; 8 Petersdorff, Ab. 181, would have strongly supported such a position.

In *Doe v. Goff,* 11 East, 668, the testator devised one estate to his wife for life, and after her decease, to his daughter Mary and the heirs of her body begotten, or to be begotten, as *tenants in common* and not as joint tenants; but if such issue should die before he, she, or they attained twenty-one, then to his son Joseph in fee; and he devised another estate to his wife for life, remainder to his son Joseph and the heirs of his body begotten, or to be begotten; but if he died without issue, or such issue all died before he or they attained twenty-one, then to his daughter Mary, and the heirs of her body begotten, or to be begotten, such issue if more than one, to take as *tenants in common.* The testator died, leaving his widow and his daughter Mary, him surviving. Both these parties in succession entered and enjoyed the premises devised, and died; Mary leaving daughters (who were the plaintiffs in this action of ejectment), and a son who was the defendant; and the question raised was, what estate Mary took in the first devise. It was argued, for the defendant, that it was necessary Mary should take an estate tail, as well upon the legal effects of the subsequent limitations to the heirs of her body, as to effec-
(379) tuate what it was mentioned, was the general intent of the testator, that no part of the estate devised to Mary and the heirs of her body should go over to her brother, so long as any of her issue were in being, to which the particular intent that her children should take as tenants in common must give way. *Sed per Cur.* "Heirs of the body having to take as *tenants in common,* clearly demonstrate that children were meant, by that description, as heirs of the body would take by succession. This is rendered still more plain by the following words, 'that if such issue should depart this life *before* twenty-one.' Whom does the testator mean by such issue, but the persons to whom he had before referred, by the description of the heirs of the daughter's body? and when he is contemplating the possibility that he, she, or they, may depart this life before twenty-one, to whom can he be referring but the immediate children of his daughter? The obvious intention, therefore, of this part of the will clearly is, to give Mary an estate for life, and her children a distinct and independent interest as tenants in common; and it is too plain to be defeated by a mere conjecture, that the devisor might have a paramount intention inconsistent therewith." Judgment was given for the plaintiff.

The case of *Gretton v. Howard,* 1 E. C. L., 320, was this:

A devised all his real and personal estate of what nature and kind soever to his wife; and after her decease, to the heirs of her body, share and share alike, if more than one; and in default of issue, to be lawfully begotten by him, to be at her disposal. A died, leaving six children. *Doe v. Goff,* 11 East., 668, was cited in argument, and the doctrine of that case, that the testator having given the estate to the heirs of the body, share and share alike, could not have intended an estate tail, under which the eldest son would take the whole, was much relied upon. The Court certified that the wife took an estate for life only, and that each of the six children took a fee simple in remainder expectant on the determination of the mother's life estate, in one-sixth part, as tenants in common.

The case of *Wright v. Jesson,* 2 Bligh., 2, in the House of Lords, overruling *Doe v. Wright,* in the King's (380) Bench, 5 M. & S., 95, was as follows: A testator devised to W. W. certain premises for the term of his natural life, he keeping the buildings in tenable repair; and from and after his decease, he devised the same to the heirs of the body of the said W. W. lawfully issuing, in such shares and proportions as he, the said W. W. by deed or will should appoint; and for want of such appointment, then to the heirs of the body of the said W. W. lawfully issuing, share and share alike, as tenants in common; and if but one child, the whole to such only child, and for want of such issue, then over. It was held by the court of King's Bench that W. W. took an estate for life only, with remainder to his children for life, respectively, as tenants in common. Against this judgment, a writ of error was brought in the House of Lords. The principal error assigned was, that the Court below had decided that W. W. took only a life estate under the will, with remainder to his children for life; and that a recovery suffered by him, his wife, and their son, was a forfeiture of their estate; whereas the plaintiffs in error contended, that the testator intended to embrace all the issue of W. W. which intention could only be effected by giving W. W. an estate tail. After a very long and able argument at the bar, the House of Lords reversed the decision of the Court of King's Bench. *Doe v. Goff,* was expressly overruled; and *Gretton v. Howard,* was not cited, in the House of Lords. Mr. Petersdorff says, it is probable that *Gretton v. Howard,* would not be, at the present, considered as subsisting authority; if it had been cited in the House of Lords, it is probable it would have shared the fate of *Doe v. Goff.* It is now, established law, that a devise of lands to A for life, remainder to the heirs of the body of A, share

and share alike, as tenants in common, and for want of such issue, then over; does not prevent A taking an estate tail. So, in the case before the Court, a devise of lands to Mary Skinner for her natural life, and after her death, to be equally divided among the male or female heirs lawfully begotten of (381) her body, and for want of such heirs, then over, did not prevent Mary taking an estate tail. (*Doe v. Goldsmith,* 2 Eng. C. L., 75. *Doe v. Featherstone,* 20 Eng. C. L., 512.) Two intents are manifest in the will of Joshua Skinner; one, that his daughter Mary should have only an estate for life, the other, that the remainder over should not take effect, so long as any of her issue remained; the latter must be presumed to be the main intent and paramount purpose of the testator; his object was to provide for the family of Mary. This main intent, cannot be effected by giving Mary a life estate, and making her children take by purchase; because there being no words of inheritance added to the estate of the latter, they would take at that time, viz., 1777, only a life estate; and after the death of either, his or her share would go to John or Joshua Skinner. He intended, that on failure of the issue of Mary, and only on that event, his estate should go to John and Joshua Skinner in fee simple. In *Doe v. Smith,* 7 Term, 527, the Court said, that when it appears in a will that the testator had a general intention and a secondary intention, and they clash, the latter must give way to the former. In *Wright v. Jesson,* Lord *Eldon,* in moving the judgment in the House of Lords, said, it is definitely settled as a rule of law, that where there is a particular, and a general or paramount intent, the latter shall prevail, and courts are bound to give effect to the paramount intent.

We are of opinion, that Mary took an estate tail, which was by the act of 1784, converted into a fee; that the lands in controversy descended from Mary, the purchaser, to her son, Martin Ross, and from him to his son William. The defendant, being of the blood of the first purchasers, is entitled to hold all the lands, as heir at law to William Ross; in preference to the lessor of the plaintiff, who is no ways related to Mary the first purchaser. The judgment of the Superior Court is affirmed.

PER CURIAM. Judgment affirmed.

Cited: Allen v. Pass, 20 N. C., 213; *Ward v. Jones,* 40 N. C., 402; *Leeper v. Neagle,* 94 N. C., 343; *Jenkins v. Jenkins,* 96 N. C., 259; *Buchanan v. Buchanan,* 99 N. C., 311.

CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA

JUNE TERM, 1834.

(382)

PETER R. DAVIS and others upon the relation of THEOPHILUS SNOW v. JAMES SOMERVILLE.

A guardian bond taken according to the act of 1762 (Rev., ch. 69, sec. 7) is nothing but a common law bond payable to the individuals on the bench, and if executed by one of them, is void.

DEBT upon the following bond:

"Know all men by these presents, that we R. H. J. and James Somerville of etc., are held and firmly bound to Peter R. Davis, Richard Bullock and James Somerville, 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, their executors or administrators on trust, etc.," with a condition that R. H. J. should well and truly improve the estate of the relator, to whom he had been appointed guardian. On the trial at Warren on the last circuit, the only question made in the cause arose upon the plea of *non est factum,* and on that it was admitted that the defendant was the same James Somerville who was mentioned in the bond as an obligee, and who was one of the plaintiffs. It was also admitted that the defendant and the other obligees were the justices in court at the time the appointment of guardian to the relator was made. (383)

Upon these facts his Honor, Judge *Settle,* directed a nonsuit to be entered, and the plaintiffs appealed.

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

DANIEL, J. This guardian bond was taken under and by virtue of the act of 1762 (Rev. c. 69, sec. 7), which directs a guardian bond to be made payable to the "justices present in Court, the survivor or survivors of them, their executors or administrators." It has been argued by the plaintiff's coun-

sel that the justices who were present in Court (one of whom was the defendant), when the appointment of the guardian and execution of the bond took place, were a *quasi* corporation for that particular purpose, and although the defendant was one of the corporators, yet he in his individual character, might give a bond to the corporation, and it would bind him.

In *Justices v. Dozier,* 14 N. C., 287, where the case stated that Dozier was both obligor and obligee with others named in the guardian bond, this Court said, "a guardian bond according to the statute is nothing more than a common law bond payable to individuals and their personal representatives, in trust for another, that Dozier was both obligor and obligee, and the bond was void. It seems to us that the above mentioned case, and that of *Justices v. Bonner,* 14 N. C., 289, which is in all things similar, must govern the one now before the Court. This case comes within the rule laid down by the Court in *Justices v. Shannonhouse,* 13 N. C., 6, and *Justices v. Armstrong,* 14 N. C., 284.

PER CURIAM. Judgment affirmed.

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(384)

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

1. Where the bargainor, having signed and sealed a deed, said to the attesting witness, "I acknowledge that to be my act and deed:" *It was held* that these words, being addressed to one who was not intended to take possession of the deed, did not amount to a delivery.
2. And where, after the deed was thus executed, the agent of the bargainee offered to take it and carry it to him, he being out of town, but the bargainor objected, saying it might thereby be lost, and that he expected the bargainee back that night, and would himself hand it to him: *It was held* that this refusal of the bargainor to part with the custody destroyed the effect of his antecedent words.
3. *Held also,* that the jury could not infer, from the facts above stated, a delivery at the time of the bargainee's return, but only at the time when the deed was proven to be in his possession.
4. Where a deed of trust was duly proved but, because of the sickness and death of the register, was not registered within six months, but was registered as soon as a successor was appointed, it is void as to the creditors of the bargainor.

After the new trial granted in this cause at December Term, 1831, 14 N. C., 126, it was tried again on the Spring circuit of 1834, before *Norwood, J.,* at CHOWAN.

The statement of facts certified with the record, set forth the deed made by Creecy to the plaintiff, as it is stated in the before mentioned case; it is sufficient to say that it was executed to secure sundry debts of the bargainor, was dated the 15 September, 1829, proved at the term of Chowan County Court commencing the ensuing week, and the certificate of registration was dated 27 March, 1830.

To prove the execution of the deed, the plaintiff called Robert H. Smith, one of the attesting witnesses, who stated that on 15 September, 1829, he was requested by Thomas Benbury one of the *cestui que trusts,* to go to the house of Creecy, and attest the execution of a deed—that he went with Benbury and Dr. Matthias E. Sawyer, the other attesting wit- 385) nesses, and found there Creecy and William R. Norcum, the latter of whom was also a *cestui que trust.* That the deed was lying on a table in the room, that Norcum filled up some blanks in it, that in a short time Creecy went to the table and signed the deed, and the witness and Dr. Sawyer attested it. That the deed was left on the table, and immediately he and Dr. Sawyer withdrew, leaving Norcum and Benbury with Creecy. The witness further stated that the plaintiff was from home at this time—that he returned the latter part of the same week, and that he, the witness, neither saw nor heard anything more of the deed until the Tuesday following; which was the week of Chowan County Court, when he was called upon to prove it. Dr. Sawyer stated that Creecy, after he signed the deed said, "I acknowledge that to be my act and deed."

William R. Norcum was called by the defendants—upon his examination by the plaintiff, he stated that he and others of Creecy's creditors, among whom was Benbury, employed the plaintiff to draw the deed; that in a short time thereafter the plaintiff informed him that he was going out of town to attend the Superior Court of Washington, that the deed was drafted, and was in Benbury's possession for the purpose of being executed; that he, the plaintiff, was fearful that Benbury might be negligent and that he wished the witness would attend to its execution. That on 15 September, 1829, he, the witness, went with Benbury to the house of Creecy, where he found the deed, that he having filled up several blanks in it, Creecy signed and sealed it; that after the attesting witnesses had left the house, the deed was lying upon the table for the ink to dry; that as soon as this was done he went to the table, saying to Creecy that he was going to Washington Superior Court, when he should see the plaintiff, and that he would carry the deed and hand it to him; that Creecy remarked, he, the witness, might

miss the plaintiff on the way, and thereby the deed might not get to the hands of the plaintiff in time; that he, Creecy, expected the plaintiff back that evening or the next morning, when he would himself hand it to him. The witness
(386) also stated that Benbury was in an adjoining room nearly all the time he, the witness, was in Creecy's house; that he came into the room where the deed had been executed during the period which elapsed after the departure of the attesting witnesses, and the conversation above stated, and that they, the witness and Benbury, left the house together.

The County Court commenced on the next Monday, the 21st, and the minutes of Tuesday the 22d, contained the following entry, "Deed of trust from James R. Creecy to Augustus Moore was exhibited in open Court, the execution of which was proved by the oath of Robert H. Smith, and ordered to be registered (withdrawn by Mr. Moore)."

The Clerk of the County Court proved that after the probate of the deed, he made the usual certificate, and was about to file it when the plaintiff asked for it, and took it away, saying that he would hand it to the Register. It was proved that the Register did not receive the deed between four and six weeks after its probate, that the Register was then in very bad health, and died in December following, leaving the deed among his papers, but unregistered, and that no successor was appointed until the ensuing March Term of the County Court. It was also proved that the Register was the clerk of the defendant Collins, and usually attended to his business, and that he had a short time after the deed came into his possession, handed the original to Mr. Collins for the purpose of having it copied.

The defendant Rascoe being the sheriff of Chowan, justified under a writ of *fieri facias* against the property of Creecy, in favor of the defendant Collins, tested of the second Monday of September, 1829.

Several points were taken for the defendants, of which it is necessary to notice only the following:

1st. It was contended that the instrument relied on as the deed of Creecy, was void as against them, because it was not registered within six months after its execution, as required by the act of 1820 (Rev. ch. 1037).

2d. That no valid delivery of the deed had been made
(387) by Creecy prior to 22 September, the Tuesday of the County Court, at which time the lien of the execution in favor of the defendant Collins had attached.

His Honor instructed the jury that if the plaintiff within five or six weeks after the probate of the deed, delivered it to the Register for registration, and its registration was prevented by the ill health and death of the Register, and the delay of the County Court in appointing a successor, it should be considered as registered within due time, leaving the facts attending the execution of the deed to the jury, his Honor informed them, that if Creecy in the presence of the attesting witnesses and of Norcum, declared the instrument to be his act and deed, unaccompanied by any other declaration or act, at the time, manifesting that he was to retain the control and power over it until some future period, the declaration amounted in law to a delivery at that time; that if the jury should think that the fact of Creecy's declining to permit the deed to be taken by Norcum, and retaining it himself was, as he declared it to be, for the purpose of keeping it more securely until he could hand it to the plaintiff, his so refusing to surrender the custody of the deed, and retaining it in his own possession, did not do away the efficacy of his prior delivery of it, and that if the jury, should upon the testimony before them, come to the conclusion that the deed was not then delivered, it was for them to decide, upon the whole evidence, whether it was subsequently delivered before or after the *teste* of the execution.

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

The case was discussed at great length at the last June Term, by *Gaston* and *Badger* for the defendants, and by *Iredell, Devereux, Bryan* and *Kinney* for the plaintiff, and was continued under advisement until this term.

DANIEL, J. This was an action of TROVER, brought by the plaintiff to recover certain slaves and other property, mentioned in an instrument of writing, purporting to be a deed of trust, made by Creecy to the plaintiff. The defendants pleaded the general issue, and on the trial took (388) five objections to the recovery of the plaintiff. I shall take notice of the charge of the Judge of the Superior Court only on two of the objections. First: whether the instrument which the plaintiff calls a deed of trust, ever was delivered, so as to constitute it a deed, or if it was, whether it was delivered at a time subsequent to the lien created on the property, by the *teste* of the defendant's execution. Secondly, whether the deed of trust under which the plaintiff claims, was registered in six months, as is required by the act of Assembly passed in 1820.

The Judge who tried the cause, in his charge to the jury, told them that the words made use of by Creecy, at the time he signed and sealed the paper, would in law, amount to a delivery of the deed. I cannot agree with him in this opinion. The delivery of every deed must be proved as well as the sealing of it, being an essential requisite to its validity. The deed, if delivered, is good from the time of the delivery, and not from the date expressed on the face of the instrument. A deed may be delivered by words, without any act of delivery by the grantor, as if the writing sealed lieth upon the table, and the feoffor or obligor, saith to the feoffee or obligee, go and take up the said writing, it is sufficient for you, or it will serve the turn, or take it as my deed, or the like words, it is a sufficient delivery. (2 Thos. Coke, 235.) But the words must be addressed to the feoffee or obligee, or some person for them. The words must amount to an authority or license, in the person addressed, to take possession of the deed, and a reception of the instrument by the person spoken unto, must follow the speaking of the words. Whenever the words evidence an assent in the feoffor or obligor to part with the writing as a deed, and at the same time evidence a willingness that the person spoken unto should take the writing as a deed, and a reception of the writing by the person addressed follows the speaking, then the words amount in law, to a delivery. In the present case, the words spoken by Creecy before the
(389) witnesses attested the instrument, were addressed to the witnesses, and not to Norcum, the plaintiff's agent. If the words spoken by Creecy had been addressed to Norcum, the subsequent words and acts of Creecy, in refusing to let Norcum have the paper, destroyed the efficacy of the antecedent words. It does not appear that the paper purporting to be a deed of trust, was ever in Norcum's possession or power, or that it was intended he should receive it. It seems to me that there was not any delivery of the deed of trust, on the day it bears date, viz.: on 15 September, 1829. But say the counsel for the plaintiff, if there was not a delivery on the day the deed bears date, there was sufficient evidence in the cause for the jury to infer a delivery of the deed to the plaintiff, before the *teste* of the defendant's execution, which was on Monday, 21 September, 1829. The declarations of Creecy, that he intended to deliver the deed to the plaintiff as soon as he came to town, and that he was expected that evening or the next morning, and the evidence of Smith, that the plaintiff did come to town, the latter part of the week next before the week of the County Court, taken in connection with the fact that the

plaintiff had possession of the paper on Tuesday, in the succeeding week—all this evidence, say the counsel for the plaintiff, was sufficient to authorize the jury to find, that the deed had been delivered before Monday, the date of the defendant's execution. It is further contended on behalf of the plaintiff that as the jury have found the fact that the deed was delivered before the date of the execution, this Court cannot interfere with the verdict, and grant a new trial, nor disturb the judgment given thereupon, although the jury may have found contrary to the weight of the evidence, that belonged exclusively to the Superior Court that tried the cause.

It seems to me that there was evidence sufficient for the jury to have inferred, and so found, that the deed had been delivered. But I think there was no evidence that could authorize them to do more than barely to guess that it was delivered before the date of the defendant's execution. It appears to me that there was no evidence to establish the *isolated* fact that the (390) time of the delivery of the deed, was prior to the time of the issuing of the execution. There being no evidence to establish that point, the Judge should have directed the jury to have found for the defendant, and not have left it descretionary with them to give a verdict any way they might think proper. The *onus* of establishing the fact viz: of delivery of the deed before the *teste* of the execution lay on the plaintiff. (*Dickson v. Evans*, 6 Term, 60.) The other point in this case on which I deem it necessary to give my opinion, is, on the question, whether the deed having been left with the register in time for it to have been registered, is to be considered in law as registered.

The act of Assembly, passed in 1820, requires a deed of trust to be both proved and registered, in six months; or to be considered utterly null and void as against creditors and purchasers for a valuable consideration. The acts of Assembly usually passed every two years, giving further time to prove and register deeds and mesne conveyances, contain a proviso to the following effect, "nothing herein contained, shall be construed to exetend to mortgages, or to deeds or conveyances in trust." The Legislature has refused to give any further time to prove and register deeds of trust, than that contained in the act of 1820. If a deed of trust was offered to be read in a Court of Law, containing only a probate without a certificate of registration, could it be received? Could the person offering it, excuse himself for not having the register's certificate of registration endorsed on the deed, by alleging the fact that the register would not perform his duty, although the deed was left at his office a sufficient length of time to have enabled him to

have registered it? This is the question now, for us to decide. For I take it the actual registration of the deed by the new register after the six months had expired, was without authority of law and is a nullity. The register is certainly liable on his bond, to make good the damages that any person may sustain by his negligence and omissions. But is the deed in law
(391) registered, by leaving it at the register's office a sufficient length of time to enable him to enroll it, before the six months had expired? The plaintiff contends that it is, and many cases have been cited from the English law books, of decisions upon the navigation acts, the annuity acts, the mortmain act, and the act for the enrollment of deeds of bargain and sale of freehold estates in land. *Ridley v. McGehee,* 13 N. C., 40, and the decision of this Court, *Moore v. Collins,* 14 N. C., 127, have been cited. First, as to the ship registry act. A vendee of a ship in England must, under the statute of 34 G., 3, support his title by a bill of sale, or some written contract, but it is not necessary for the completion of his title that the bill of sale should be registered. When the ship is in port at the time of the sale, the law requires that the contract of transfer should be endorsed upon the certificate of registry, and a copy of the endorsement left with officer of the customs, at the port where the ship belongs, in a reasonable time after the transfer: and if the ship is at sea at the time the bill of sale is executed, that the vendee should within ten days after the vessel arrived in port, have the endorsement of the contract entered on the certificate of her registry, and a copy thereof delivered to the officer of the customs. Whenever the vendee of a vessel was able to show that he had taken a written transfer, and had complied with these provisions of the statute, his title was complete by the meaning of the Legislature, as is to be collected from the very phraseology of the 15th and 16th sections of the 34 G., 3 without his showing that the officers had made entries of the transfer, and memoranda or registration of the transaction in the books of his office, and sent a copy thereof, in the time prescribed to the commissioners of customs at London. The object of this statute was not to give notice of the transfer, or to prevent frauds upon creditors and purchasers, but to prevent foreigners participating in the tonnage and navigation of British vessels. The duties of the officer of the customs at the port, as well as the duties of the commissioners of the customs at London, as prescribed
(392) by the 34 G., 3, are only directory. Their entries were not intended to constitute any part of the title of the vendee. (*Hubbard v. Johnstone,* 3 Taunt, 176; *Heath v. Hub-*

bard, 4 East., 110.) I do not think that the cases cited, which have arisen under this statute have any bearing on the case now before the Court.

Secondly. As to the decisions upon the statute, 17 G., 3, c. 26, concerning the registration of the memorials of annuity deeds. This statute requires that the memorials shall be enrolled within twenty days from the date of the deed, and if it is not done in that time, the securities are avoided. The act requires that a particular roll shall be provided and kept on which such memorials shall be entered, and proceeds to enact that every such memorial shall be duly enrolled, in order of time as the same shall be brought to the officer, and that the clerks of the enrollments shall specify on the roll, the certain day, hour and time, in which the memorial is brought to the officer, and shall grant a certificate thereof when required. If a memorial of any annuity is carried into the office within the twenty days, and the clerk specifies on the roll the time that it is brought to the office, let the residue of the enrollment be completed when it may, the memorial enrolled shall be conclusive, and no averment or evidence, shall be received, to show that the date is incorrect, *Garrick v. Williams,* 3 Taunt., 540. The construction which the Courts have put on this statute, proceeds altogether upon the circumstance that the law requires the clerk of the enrollment to enter on the roll the day and hour the memorial is delivered into the office, and likewise from a disposition in the Courts to give to the act that operation intended by the Legislature. It was said by Chief-Justice *Mansfield,* that it might be impossible for the officers to put the entire enrollment of all the memorials on the roll every day, or even every month. Our act of 1820, has no clause directing the register to note in the books of registry, the day of the delivery of a deed of trust to the officer. A subsequent act passed in 1829, has required it to be done, but this case is governed by the act (393) of 1820. The Legislature in allowing the deed of trust to be proved and registered in six months, has given ample time. There is no danger to be apprehended of such a press of business in the office, as to deprive a party of the benefit of the act, if he uses ordinary diligence.

Thirdly. The statute of 27 H. VIII, c. 16, requires all deeds of bargain and sale for the conveyance of freehold estates in lands to be enrolled in six months after their date, or they shall have no effect. *Mansfield, C. J.,* in delivering his opinion in the case of *Garrick v. Williams,* remarked that since 16 *Elizabeth,* the date of enrollment had been entered, and the Courts look to the roll only, and no further. He cites *Hynde's* case (4

Rep., 71), and Gilbert on Uses. The same rule has been followed I suppose, as is laid down by the Courts, in the case, of the enrollment of the memorials of annuities. This explains the reason why we are unable to find any case in the books upon this subject.

No case can be found decided under the mortmain acts which throws any light on the subject. I think I may say there is nothing in the British authorities that can aid us in deciding this cause. We will advert to the decisions in this country. The case decided in Connecticut, and reported by Kirby (page 72), is in unison with the decisions of the British Courts under the annuity act. The law of that State requires the day when the deed is delivered to the registers, to be entered on the roll, and the Court would not permit parol evidence to be let in, to show a registration at a different day. In this State, there is *Ridley v. McGehee,* 13 N. C., 40. The principle decided by the Court in that case is very near being in point for the plaintiff in this. A majority of the Judges of the Supreme Court, when this case was before them at a former period, were of the opinion that the plaintiff had done all that the law required him to do. The Judge who delivered the opinion of the Court, rests the opinion on the ground that the Legislature had failed to provide an officer. The want of registration, he says, is not to be imputed to the grantee, nor ought the defendant to derive any benefit from the failure, because
(394) the Legislature enacted the provision of registration for his benefit; and if through its omission, there was no register, he cannot complain. It appears to me that the Judge mistook the facts. The deed was proved on 22 September, 1829, and the register lived until some time in the month of December, in the same year. The deed was placed in his hands five or six weeks after the day it was proved in Court. The first point insisted upon by the plaintiff was that his deed had not been registered in six months, not because there was no register, but because it had been prevented by the negligence of the register without the default of plaintiff. *Ridley v. McGehee, supra,* is a case as it appears to me, that stands on its own bottom. I know of no authority either in the English or American adjudications to support it. What was heretofore done in this case, I consider rather as a breaking of the cause than having a binding effect on the Court in this its ultimate determination. After giving the case all the attention and research. I am able, I am forced to say, sitting in a Court of Law, that the Superior Court should not have permitted the deed of trust to have been read as evidence to the jury without

registration, and that leaving it at the register's office, under the circumstances stated, was not in law, a registration. The reason made use of by the member of this Court, who dissented from the opinion delivered when the case was here before, is so strong and cogent as to convince my mind, and forces me to decide for the defendant—What a Court of Equity would do, if the case were there, we are not called on to say.

I am of the opinion a new trial should be granted.

RUFFIN, C. J. I feel that I am called upon to make some observations upon one of the points made in this case; and I propose to confine myself to that.

The Judge who tried the cause, held that the deed was duly registered. In that particular he delivered an opinion conforming to that of this Court in this case when here in December, 1831, and in opposition to that entertained by himself upon the first trial. Had I sat at the last (395) trial, I should certainly have acted as his Honor did. Indeed, I must say, that sitting even where I do, I have entertained the second argument with the greatest reluctance. A question on which the Court is divided must be admitted to be at least doubtful, and one purpose of a Court of final resort is, to render that certain which was before in doubt. This is one of the most useful functions of such a Court: to establish the rule, and settle the law. None assuredly can be more sensible than myself of the importance of respecting the decisions of this Court, as definitely fixing the precise point decided. It cannot surprise that I should privately entertain the opinion I formerly did, because nothing but a deep conviction could have prevailed on me to dissent publicly from the eminent men under whom I sat in 1831. Yet upon the motives alluded to, it would become me to yield my own judgment and conform to theirs, and so I should unhesitatingly, if the opinion entertained by the present members of the Court, did not make it necessary for me again to dissent from them, in giving my voice in conformity with the former decision. My brethren think, as the question is brought here for review in the very case in which it was decided, as the decision is itself recent, and has not become incorporated inveterately into our jurisprudence, so as to become a rule of property on which counsel and the community have acted to a great extent, that it may, if wrong, be corrected without introducing an evil in the remedy, greater perhaps than that constituted by the error itself. Being thus obliged again to express my opinion, and entertaining now, notwithstanding the unfeigned deference which I profess for the knowledge and

parts, and for the profound reverence which I cherish for the memories of those great men, the same sentiments I did then, I must express my real opinion, and act on it as it is.

The principle which governed me before was stated to be this. That the statute in *express* terms without any proviso, saving, or equity, declares a deed not proved and *registered* within six months *void.* The same principle governs (396) me yet, I cannot get rid of it. Nor have I been able to devise the means of controlling the direct and emphatic words of the statute, upon any reasons of the hardship of the case, supposed or imagined not to have been within the contemplation of the Legislature. My opinion is, that when a statute prescribes a ceremony as necessary to the legal validity of a contract or instrument, there can, *at law,* be no substitute for it, nor can it be otherwise dispensed with, on any pretense. The instrument would as a deed of trust be as effectual without a seal, as without registration. So, a parol contract, when one in writing is prescribed, as in the statute of frauds, has never been admitted at law to be binding, under any circumstances, though under many, such contracts are enforced in equity. Unless the prescribed ceremony exists, a Court of Law cannot hear the instrument as evidence. Like a stamp when that ceremony is required, registration impresses on the instrument its competency as evidence.

The principle is not impaired when its application is to an act to be done by a public officer, or other third person. It may be possible that it would be, as against the person himself on whom the duty is imposed. It is likewise true, that an act may be so framed as to make it apparent, that some of the provisions are addressed to a private person, and some exclusively to an officer; and in many instances the latter may, upon the intention, be held to be merely directory, and not as avoiding private contracts upon the non-observance of those directions by the officer. But this can never apply to a case, in which the statute is positive, *that for the want of those very things,* which the officer is to do, and which he alone can do, *and for the want of them only,* the instrument shall be void. It would render the statute contradictory and absurd upon its face. I cannot conceive a justification to the judiciary for refusing obedience to the plain words of a statute, which the Legislature is competent to pass. In the form of adjudication, I should consciously feel it in my own case, to be legis- (397) lation.

I do not think it necessary to enlarge upon the danger of such irresponsible legislation. But to the judi-

ciary itself it would be attended with interminable and distressing inconveniences. This law was intended to establish a clear and certain rule in every case, whereby the rights of general creditors and purchasers, as against deeds of trust might be determined by a single matter of fact, simple in its nature, susceptible of clear and explicit proof of record as it were, and not susceptible of any variations by the shades which surrounding circumstances might cast on it. But once admit a departure from the law and we shall let in a thousand questions upon diligence, accident, the fraud of the officers and others, and the acts of God, which it will take ages to settle, and which perhaps never can be settled until another statute should sweep down the cobwebs of the closet. Suppose these cases: that instead of the register dying, he should be sick, or that he should be contumacious and refuse to register the deed, or that the witness refused to prove it, or got sick and could not, and the party would not acknowledge it, or that it were mislaid by accident. In all these cases and the like, the hardship is the same; and in all, the law is alike to be left out of sight. Another case: Suppose the clerk had refused to deliver the deed to Mr. Moore, or to the register, or had burned it; surely, those cases would be within the reason of this, and proof of the contents of the deed, though unregistered, must be heard. Yet state the case on the other side, and it is obvious to our apprehension, that the principle cannot be carried out, and will itself, work injustice. If the deed had been delivered by Creecy to Mr. Moore on Tuesday, so that Mr. Collins' execution, tested of the day preceding, would have a preferable lien when sued out; but yet the clerk, by conspiracy with the plaintiff, had positively refused to make out a *fieri facias* until after the next succeeding term: Nobody will say, that at law, the lien would remain, or that upon suing out the execution four months afterwards, it could be carried back to the day, as of which it ought to have been tested. Why shall one of these creditors (398) suffer loss from the malfeasance of the same public officer, and the other not? How can this be done at law, upon a supposed equity, when in a Court of Equity the principle is, that creditors have equal equity, and that he to whom accident or diligence, or Providence, or any other means, except his own fraud, gives advantage, may keep it, it being a plank in a storm. The plaintiff does not pretend an equity against his antagonist. His complaint is against the law, and the officer of the law. A complaint of the former kind, a Court cannot redress; nor one against the officer in this form.

I need not repeat the references to the methods of pleading deeds enrolled, nor to the decrees in Chancery against a pur-

chaser with notice of a prior unregistered deed. I only remark, that they retain their former impression on my mind.

But cases have been cited for the plaintiff in the last argument, which do not tend as I understand them, to shake my opinion; but which it is proper I should nevertheless notice.

Those upon the British navigation acts do not require particular analysis, because they are less applicable than those on the statute of enrollments, and of annuities. Indeed a decision in any way, upon those voluminous and complicated navigation statutes, would be deemed but an authority on the construction of the very claims under consideration.

But the Statutes of Enrollment (27 Hen., VIII), and the Annuity Act (17 Geo., III), come nearer to ours. The former like ours, says that no use in an estate of freehold, shall pass by deed of bargain and sale indented, *except* it be enrolled within six months. The act of 1820, says no deed of trust shall be good, as against creditors and purchasers, unless it be proved and registered within six months; and then with an apparent purpose to make all believe the Legislature to be in earnest, it is repeated in the last sentence, that all deeds *not* so proved and registered, shall be held as utterly *null* and *void.*
(399) The 17 Geo., III, requires every memorial to be enrolled within twenty days and directs that a particular roll shall be provided for that purpose, and that each memorial shall be duly enrolled in the order of time it shall be delivered to the officer, and that "the clerk shall specify on the roll, the certain day, hour or time, on which the memorial is brought to the office, and shall grant a certificate of the enrollment when required."

It is supposed that it has been held under these acts, that a delivery into the office, satisfies the act, and as between the parties, amounts to enrollment. An authority to that effect, I should admit to be directly in point. Those adduced do not seem to be of that character, but to the contrary. They are *Hynde's* case (4 Rep., 68), and *Garrick v. Williams* (3 Taunt., 540.) I will consider the latter at once. The case was, that the memorial of an annuity was in due season, inaccurately enrolled, and some years afterwards, the clerk corrected it in the margin, by the original in the office, and before any attempt to vacate it Upon the ground of this error, the grantor moved to set aside a judgment taken under a warrant of attorney given to secure the annuity, and to vacate the warrant itself. To meet this case, the grantee produced a certified copy of the enrollment as corrected, and purporting to be as of the day of delivery into the office, within the twenty days. He also read the

affidavit of the clerk, explaining the error and its correction, and that it was the course of the office, thus to make corrections, and also upon receiving a memorial, and marking on it the time, thence to consider the enrollment complete, and afterwards to enroll it as of that time. The Court though, inclined to sustain the proceeding if possible, in respect to the course in the office, yet admitted the question to be attended with considerable difficulty, and took time to advise on it. The opinion was afterwards delivered by Chief-Justice *Mansfield* against the application. He confines himself to the single reason, that the Court would look to the enrollment as it then was, and to that only, and as that was correct, would inquire no farther. It is plain that the evidence in the affidavits was wholly disregarded, and that no attention was paid to the particu- (400) lar hardship or circumstances. How far the ground of decision is consonant to principle, or meets the views of the Legislature it is not for me to judge. But admitting it to be correct, the point decided is essentially different from that in question before us. Our case is, that it appears upon the registration itself, that it was made after the expiration of six months. Had that been so in *Garrick v. Williams*, 3 Taun., 540, the Court of Common Pleas must upon their own principle, have held it void, although the memorial had been deposited within twenty days. The fact was, the enrollment was not within twenty days, but it purported to be so. The Court say they will hear nothing against the statements in the enrollment. Why? Because, if they did hear it the whole would be avoided. The decision is not that the facts if shown were insufficient; but that the official certificates on the original rolls should not be contradicted. This implies that the case in support of the motion, if sustained by competent evidence, was in itself sufficient. For the reason for excluding the evidence was that it would prove the certificates to be false in respect of the time, and if thus false, the law avoided the whole.

Whether registration in our law by a person not an officer of a Court of record, and not purporting to be of any term of such a Court, can to any purpose be regarded as a record, not admitting of contradiction, it would be but a *dictum* now to mention. If it even be so then both upon the real fact, and upon the fact as appearing on the deed and registration, this case is against the plaintiff. Here the defendants aver nothing against the record, but rely on the fact as therein set forth. The registration was not within six months as stated in the registration. The evidence, therefore, comes from the plaintiff himself; not indeed that the certificate is false, but to

show that the deed, could and ought to have been registered sooner.

The Court of Common Pleas said that as the clerks might not be able to enroll all the memorials that were brought in, as they were delivered, the delivery into the office ought (401) to be considered the enrollment. The Judges could not deny that this was against the act of Parliament, and could not be carried through, if the real time of the registration appeared. To avoid that consequence, resort was had to artificial reasoning to establish the enrollment, by a fiction, to be at an earlier day than it really was. This is said to be upon the authority of decisions in the old law upon the statutes of enrollments, that the Court should look to the roll and no further. *Hynde's* case is also there referred to, and Gilbert on Uses and *Sir T. Howard's* case (Owen, 132.) Gilbert says, "as to averring an enrollment, this must be understood when the time was not entered on the record; but since 16 Eliz. the date of the enrollment has been entered." I have been unable to find the case stated to be reported in Owen, but I have no doubt the point is ruled there, as we find it mentioned in other books of authority. Chief-Baron *Comyns* lays it down (Bargain and Sale, B. 10), that before 16 Eliz. no day of enrollment used to be entered, and then it might be averred that it was not enrolled within six months, but since that time, it cannot be averred that it was not enrolled *at the day endorsed* for the enrollment, *for that is part of the record.* For this he cites with his approbation, 2 Roll., 119, 120. Those reports are not to be had here, but the case referred to, is *Worsley v. Felisker,* and is stated as from Roll. in 14 Vin. Abr., 443, Enrollment, A. pl. 4, as follows: An indenture of bargain and sale, was enrolled in Chancery, exemplified under seal, and at the end was a memorandum, viz: that it was enrolled, but no time mentioned when it was done, but the plaintiff offered to prove by circumstances that it was within the six months. Upon which great debate arose, but a clerk being sent to the enrollment office by the Court, to know their usage *as to inserting the time of the enrollment,* he certified on his oath, that they informed him that before the 16 Eliz. (at which time the enrollment office was erected), they did not use to insert the time, but they are used to do otherwise now; which was 17 Jam. I. (402) Mr. Viner says in the margin, that now it is constantly used, and to good purpose in respect to the more easy and readier proof of the enrollment upon any occasion, for credit is given to the endorsement *without any further proof,* as being made by a known officer, intrusted for that purpose.

From these authors it thus appears the certificate is evidence as well of the time, as of the fact of the registration, and moreover, that being there, to this purpose, considered in the light of a record, no direct averment can be received against it.

To a certain extent their rules have been received here. The certificate of the register is evidence of the registration of a deed, requiring it, on which it is read without other proof of the registry, and in a case in which the time of registry is material, doubtless the certificate to that fact is, at the least, *prima facie* evidence of it. Whether it be conclusive is not so clear, and has never been decided. If both the registry and the certificate on the deed be silent upon that point, it must of necessity be open to proof from any person whom the time affects. *Haughton v. Rascoe,* 10 N. C., 21.

But whenever it does appear by any of those means, legally competent in any particular case to bring the fact to judicial cognizance, that the registry was at a particular time, all advantage may be taken of the fact, either in giving effect to, or impugning the operation of the deed. *Garrick v. Williams* is itself authority to this point; for the Court to escape from the effect of the fact, would not hear evidence of it, because inconsistent *then* with what was called the record. To this case the principle was applied, that respects an entry *nunc pro tunc,* as being the original entry. But the general proposition just laid down is fully supported from the very authority (*Hynde's* case) cited there, and relied on in the argument here.

That case was that tenant in fee leased for years, and then made a bargain and sale of the reversion to the plaintiff on 7 May (30 Eliz.), on which the plaintiff declared in waste against the tenant, as being enrolled (within six months according to the statute) in C. B. T. Pasch, of that year. The defendant confessed the seizin, of her lessor, and the (403) lease to her, and pleaded that after 7 May, and *before the bargain and sale was enrolled,* the bargainor, 15 Pasch, in the same year, levied a fine to the plaintiff and his heirs, after which fine levied, the deed was enrolled in C. B., and that the defendant had never attorned: to which the plaintiff demurred. The whole case turned on the question, whether the actual time of the enrollment could be shown to be after the fine, both being stated on the record to be Easter Term. For, if it was not after the fine, or could not be so shown to be, the bargainee was in under the statute of uses, without attornment, and so could maintain waste; but if in by fine, then attornment was necessary. The Court held that the deed after enrollment hath generally relation back to the delivery, so as to avoid *mesne*

estates made to a stranger by the bargainor, but not so as to divest the estate settled in the interim by the fine in the bargainee himself; which made him in, in the *per*. There arose a question whether the true time could be averred. It was objected that it could not, because both must be taken to refer to the same time, namely the first day of the term, and was to be tried by the record, and not put in issue, as a matter *in pais* to be tried by the jury, and that it would be dangerous, as it might come after a long time when witnesses were dead. But the whole Court held that although the presumption was that the enrollment was in Easter Term, and on the first day of it, yet that it was but a presumption by fiction of law, and the precise time might be averred by any who had an interest to do so, and the true time here was *agreed by the parties, being confessed by the demurrer*. The averment, it was admitted, could not be made against a record, but this was in that case deemed to extend only to the enrollment, and not to the time of it.

It is to be remarked in the first place, that this case occurred seventeen years after the erection of the enrollment office in 16 Eliz. and no notice is taken of it. The particular day was either not generally inserted then in the registry
(404) and certificate, or had been omitted in this case; or if inserted, it did not appear in the pleadings, and had not been relied on by the plaintiff as an estoppel. An estoppel may be waived, and is waived when it may be, and is not relied on in the record, by the party entitled to the benefit of it; here the plaintiff declared on the deed, as enrolled generally within six months and made *profert* of it. The defendant confessed such an enrollment, but said that it did not pass the estate, because before it was in fact made, the bargainee had the estate in himself by a higher species of assurance, so that there was no seisin in the bargainor out of which the use could arise. True, the defendant could not by plea to the country, deny the enrollment; and it may also be true, that he would not by such plea, after 16 Eliz. have been permitted to aver the time different from that stated in the declaration, and there stated *as by the enrollment appearing*. But the plaintiff did not so declare, nor did he supply that defect by a replication, that the enrollment was before, or at the same time with the fine, *as by the enrollment and the record of the fine appearing*. On the contrary he demurred, and thereby admitted the fact as pleaded, insisting generally that he had made legal and conclusive proof of the true time upon the presumption that it was on the first day of the term. This the Court held otherwise, because his own demurrer admitted that in this case, the presumption was false.

The decision seems to be in point here. The particular matter ruled in it is, that even when the party can insist upon a particular fact, by relying on the evidence of it as an estoppel, yet if he will not so rely, but admit upon the record, that the fact is otherwise, the Court must proceed upon the truth; and where the admission is of the fact of enrollment, at a particular day, different from that presumed *prima facie,* whereby the deed is ineffectual in law, it shall be so held. The same consequence must follow when the party's own proof shows the day of the enrollment to be not within the time prescribed, as if that appeared on the enrollment, or if that be silent, upon other evidence. The farthest any case has gone is, that if the enrollment appear to be right, and in due time, (405) and the party rely upon the record as establishing the facts, by way of estoppel, and doth not leave it at large, by such pleading as puts the real time in issue nor confess it on the record, the Court will not hear evidence against the matter appearing on the enrollment. Such was the case of *Garrick v. Williams,* 3 Taun., 540; which being a motion in which there could be no pleadings, the grantee had a right to rely on the estoppel, as it arose upon the evidence. But if the enrollment had itself shown, that contrary to the legal presumption, that it was made on the day marked on the memorial, as that on which it was left in the office, it was in truth, enrolled after the expiration of twenty days, the decision must have been that it was not duly enrolled, and was void. That is the very case we are considering. This registry purports to be made after the six months. Upon the principle of the last case, and the rule said to have been adopted upon the course of the office after 16 Eliz. the plaintiff could not aver the contrary. Upon that I give no opinion. He does not attempt it, but insists that though not purporting to be made, nor in fact, made within six months, but afterwards, it is nevertheless as good as if it had been thus made. To that there is no authority, and the words of the statute are clear, direct, express and positive against it.

There is no room for construction; nothing in the act from which an intent can be collected, as distinguished from the import of the penal words, which embrace every case without exception. Indeed the very thing which according to the statute, avoids the deed, is the act—registration within a particular period—to which the officer alone is, and the party is not competent. I have had occasion before to remark and I now repeat, that in my opinion the unreasonableness, hardship, or injustice of a statute cannot, where the words are plain, and

denote unequivocally a settled intention, authorize the judicial repeal of it, under the name of interpretation. Here the terms are not obscure, nor the sense doubtful, but as plain as language can make it, and therefore they admit of no con-
(406) trol by way of exposition. There can be but one possible exception. As against the Register himself, a delivery to him might perhaps, be a registration. But as to third persons, they are not charged with the duty of performing any act touching the registry, and therefore cannot be affected by any omissions on the part of the plaintiff, or the officer.

Thus thinking I concur that the judgment of the Superior Court shall be reversed, and a *venire de novo* awarded.

PER CURIAM. Judgment reversed.

Cited: McKinnon v. McLean, 19 N. C., 82; *Clayton v. Liverman,* 20 N. C., 381; *Baldwin v. Maultsby,* 27 N. C., 512; *S. C.,* 29 N. C., 95.

RICHARD FELTON v. DUNCAN MCDONALD.

To prove a misdescription in a license to a coasting vessel, the license itself should be produced. A mistake in that part of the enrollment which recites a description contained in a former enrollment is not evidence of a similar mistake in the license.

CASE in which the plaintiff declared against the defendant, the collector of the port of Edenton, for so carelessly making out a coasting license of the plaintiff's sloop Martha Jane, that by reason of a mis-description, she was seized by the collector of Key West, and the plaintiff put to great costs and charges in defending her.

PLEA—not guilty.

The mistake alleged to have been committed by the defendant in the license, was in describing the vessel to be a schooner, when in fact she was a sloop, and to prove this, the plaintiff offered, 1st, a certified copy of the certificate of enrollment, in which the vessel was described, "as having been built at etc., in the year, etc., as appears by a certificate of enrollment issued at Elizabeth City on etc., now surrendered on account of a change of property; and the said certificate of enrollment having certified the said vessel has one deck and *two masts,* and that her length is etc., that she was a square sterned sloop,

has etc., and the said R. F. having agreed to the description and admeasurement above specified, etc., the said sloop has been duly enrolled at the port of Edenton." (407)

2d. A letter of the defendant to the collector of Key West, informing the latter, that the plaintiff had stated the Martha Jane to have been seized "in consequence of some informality in the papers issued at this office," and that "on examining the counterpart of the enrollment and license, nothing improper appears on the face of them, unless I may have called her a schooner instead of a sloop, if so it is a mistake of my own, and no improper conduct, either of the master or owner." The license not being produced, nor its absence accounted for, his Honor, Judge *Martin* thinking that no evidence of the mistake had been given, directed a nonsuit to be entered, and the plaintiff appealed.

Devereux for the plaintiff.
Iredell contra.

GASTON, J. We are of opinion that the nonsuit in this case was properly directed. The gravamen of the plaintiff's action, is that the defendant, collector of the customs for the port of Edenton, in issuing a coasting *license* to the plaintiff for his vessel, the Martha Jane, had made an erroneous description, by reason whereof she had been seized by the officers of the customs at Key West, and the plaintiff thereby damnified. In support of the allegation that the defendant had committed this error, the first testimony offered by the plaintiff was a copy of the certificate of *enrollment* granted at the same time with the license. This enrollment purports to be made in lieu of an enrollment formerly made at Elizabeth City the certificate whereof is surrendered, because of a change of property. The certificate produced states that in the certificate surrendered, the vessel is described as a square sterned *sloop,* with one deck, and two masts, that Richard Felton, the present owner agrees to that description as correct, and that the said *sloop* is now enrolled at the Port of Edenton. The error is that she had *one* mast, and not *two* masts. The plaintiff did not offer in evidence the license, nor any copy of the license, which he averred contained this erroneous description, nor the surrendered certificate of enrollment, nor a copy (408) thereof from which it might appear whether the same had, or had not been faithfully recited in the new certificate of enrollment.

Had the case stopped here, the propriety of the nonsuit

could scarcely have been disputed. The plaintiff complains of a mistake committed by the defendant in making out the *license,* but does not show that license, nor a copy of it, nor account for the non-production of a copy. Withholding this testimony, he calls upon the jury to presume, that because there was a mistake in the certificate of enrollment, *therefore* there was the same mistake in the license issued at the same time. Whether this inference could be made if the license itself and all traces of it had been lost, it is unnecessary to inquire, but it was inadmissible in this case, because well-founded *proof* to establish it directly was attainable by the plaintiff. Then to show that this supposed mistake was committed *by the defendant,* he relies upon his certificate, reciting a former certificate issued by an officer of the customs at another port, in which recited certificate the error appears, and setting forth that the plaintiff agrees to the description as therein recited. This *per se* not only furnishes no evidence of a mistake made *by the defendant,* but repels such an inference. It must be taken as true until the contrary appears.

The only other testimony offered as to a mistake by the defendant in making out the license, was a letter of the defendant to the officer of the customs at Key West, on hearing from the captain of the Martha Jane that she had been detained, because of some alleged irregularity in her papers. He expresses his surprise at this information, and his inability to conjecture what the irregularity can be. He adds, that possibly she may be called on those papers a *schooner,* and not a *sloop,* and that if this be the case then the mistake was his. How she is called in the *license,* the plaintiff does not show, but in the certificate of enrollment she is termed a *sloop,* and not a *schooner.* There is then no evidence that the case which the defendant supposed possible had occurred.

(409) Of the weight of evidence, the jury have the exclusive cognizance. But there must be evidence for them to *weigh,* and whether any competent evidence has been offered of a disputed fact, it is within the particular province of the Court to determine. We concur with the judge who presided at the trial, in the opinion that none such was produced, to establish the essential averment that the mistake complained of in the license, was made by the defendant.

PER CURIAM. Judgment affirmed.

JOHN C. GREEN v. JOHN V. CAWTHORN.

Whenever a conversation between two persons is proper evidence in an action against others, it may be proved by either or both of the parties between whom it took place, as where A communicated to B a statement made to him by C and, upon his examination, could not recollect its substance, C is a competent witness to prove it.

TRESPASS VI ET ARMIS, for an assault and battery. PLEA, not guilty.

On the trial before *Settle, J.*, at WARREN, on the last Circuit, the plaintiff having made out his case, the defendant offered to prove, in mitigation of damages, that the plaintiff had used very reproachful language of him, which had been communicated to him but a few minutes before the assault. This evidence was objected to by the plaintiff, but was received by the Judge. The defandant then called one Eaton, who deposed that the plaintiff had used very abusive language of the defendant on that day—that he, the witness, had communicated the words spoken by the plaintiff to the defendant, about half an hour before the assault, and that at the same time he told the defendant of other abusive words, also spoken by the plaintiff of the defendant, and which had been communicated to him, Eaton, by one Macon. Eaton could not recollect all these last mentioned words, but swore that he had communicated to the defendant the very words which Macon had told him were used by the plaintiff. The defendant then (410) offered Macon to prove those words; but his Honor refused to admit the testimony unless Eaton was impeached, and the counsel for the plaintiff disavowing any such intention it was rejected.

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

Devereux for the defendant.
Badger and *W. H. Haywood* for the plaintiff.

GASTON, J. The ground on which the case places the rejection of the testimony of the witness Macon, seems to us not tenable. The defendant was endeavoring to prove a communication made to him, of certain offensive remarks of the plaintiff. If this fact were one proper and material for his defence, he had a right to establish it by any of the means which the law allows for the ascertainment of truth. He might prove the fact, and all the particulars of it, directly by the person

who made the communication to him, or by any other person cognizant of, and recollecting it, or he might establish it by testimony of other facts, from which the inference of the controverted facts could fairly arise, or having proved it in part and in some of its particulars by one witness, he might supply the defect in this proof either by the direct testimony of another witness as to the omitted part, or by such indirect and presumptive evidence as warranted an inference of the existence of that omitted. Eaton had testified that he communicated to the defendant all the offensive terms which Macon told him had been used concerning the defendant by the plaintiff; that this was done when Macon's communication was fresh in his memory; that he now recollected a part only of what he had thus heard, and thus communicated to the defendant, and was unable to state, for he had forgotten the residue. Macon's offered testimony was to supply this chasm in the testimony of the former witness. Had he been permitted to state that part of his communication to Eaton which Eaton could not recollect, but which he was positive was made known to the defendant, then the jury would have had
(411) proof as to the whole of the matter communicated to the defendant; that is, full testimony as to the part by Eaton, and proof by the testimony of Eaton and Macon united, as to the other part. How far the accuracy of either, or of both, could be relied upon, was of course a question wholly for the jury.

But we are nevertheless, of opinion, that no error was committed by the rejection of the testimony, because the fact sought to be established by it was not admissible, either in mitigation of damages or as explanatory of the transaction. On the subject of damages the jury have a very extensive discretion, and while the law is anxious that they should possess the materials for a full exercise of this discretion, it is sedulous to keep from them what is ordinarily calculated to distract their attention, and to mislead their judgment. The law also desires to confine evidence to the matters put in issue by the pleadings, and which, the parties may be presumed to come prepared to investigate. The rule adopted and handed down to us as fitted to accomplish these ends, is, to permit all the circumstances accompanying and forming a part of the transaction, to be laid before the jury. These give a character to the act, and aid in ascertaining the nature and extent of an injury, which is very much modified by circumstances, and which it is always very difficult to estimate with precision; and as the parties come prepared to investigate the transaction itself,

neither can complain of surprise by testimony of circumstances passing at the time, and forming a part of the transaction. But antecedent matters of provocation not immediately connected with the assault itself, are rather calculated to turn the attention of the jury from the proper question the nature of the injury complained of and its adequate compensation, to a vague inquiry into the reciprocal wrongs of the parties, in which they can have no guide but capricious and ever varying opinion, which are not put in issue by the pleadings, which the parties are not prepared to investigate, and which never can be fully investigated without an indefinite and unlimited inquisition into the prior conduct of each of the parties in relation to the other. We believe the rule a wise one; (412) but be it wise or unwise, we find it existing as a rule of law, and it is our duty to uphold it. The provocation which the defendant wanted to show passed half an hour before the assault, did not immediately lead to it, and cannot be considered as a part of the transaction which was then under the investigation of the jury. The evidence of Eaton which was objected to by the plaintiff, would probably not have been admitted, had the Judge understood that it related to a matter so disconnected in act, and so remote in time from the assault, as by his statement it appeared to be. But at all events, after its objectionable character was manifested, the Judge acted right in refusing to continue and extend an irrelevant, and therefore improper inquiry.

It is the opinion of this Court, that there is no error in the judgment of the Court below, and that it must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Mills v. Carpenter, 32 N. C., 301; *Bunch v. Bridgers,* 101 N. C., 60; *Trust Co. v. Benbow,* 135 N. C., 306.

THE GOVERNOR upon the relation of BENJAMIN G. BARKER, v. NEIL MUNROE and others.

The act of 1777 (Rev., ch. 115, sec. 16) authorizes the sheriff to dispense with a bail bond upon executing mesne process; but he thereby becomes special bail, and the nonpayment of the amount with which he may be fixed is a breach of his official bond; and the act of 1810 (Rev., ch. 800), limiting the time within which actions may be brought upon sheriff's bonds, does not protect his sureties until six years after final judgment agaist him as bail.

This was an action of DEBT, upon the official bond of John Black, former sheriff of Cumberland.

The breach assigned, was, that Black, while sheriff, had become the bail of one Stephenson, by omitting to take a bail bond from him when arrested at the instance of the
(413) relator, and had neglected to render the body of Stephenson in his discharge as bail, or to pay the money in which he, Stephenson, had been condemned to the relator.

The defendants after *oyer,* pleaded performance of the condition of their bond, and the act of 1710 (Rev. ch. 800), limiting the time within which actions shall be brought upon sheriffs' bonds, to six years.

On the last circuit at Cumberland, the cause was submitted to *Seawell, J.,* on a case presenting the following facts:

The term of Black's office commenced on 9 March, 1826, when the bond bore date. In November following, the writ at the instance of the relator against Stephenson, came to his hands, which was executed by him, and no bail taken. Judgment in that action was entered in March, 1827, in favor of the relator, and a *ca. sa.* was issued, returnable to September term following, which was in all respects regular, but on which was indorsed as follows: "The sheriff will collect costs only." This writ was returned *"non est inventus."* At March Term, 1829, of the County Court, a *scire facias* against Black, as the bail of Stephenson, was returned, and final judgment was rendered thereon at September Term, 1832, by which he was fixed with the amount of the debt and costs due the relator. The writ in this case was issued 22 May, 1833.

At the request of the counsel below his Honor upon these facts, *pro forma,* gave judgment for the defendants, and the relator appealed.

Henry and *W. H. Haywood,* for the plaintiff.
Badger, contra.

GASTON, J. The right of the plaintiff to recover upon the facts agreed, is resisted on three grounds.

In the first place, it is insisted that the defendants were sureties for the official conduct of the sheriff for the year 1826, and that his refusal to surrender the body of Stephenson, or to pay the condemnation money adjudged against Stephen-
(414) son, when the same was demanded many years afterwards, was not a breach of *that* bond. Secondly, that if a breach was committed of the condition of that bond, action

was not brought against the defendant within six years thereafter, as required by the act of 1810. And thirdly, that no demand had been made of their principal, to render the body of Stephenson, or pay the condemnation money, in as much as a writ of *capias ad satisfaciendum* to take the body of Stephenson for the satisfaction of that condemnation money, was not issued or returned, as the law requires, before the *sci. fa.* sued out against their principal. The two first questions may be considered together, for the decision of the one necessarily involves the determination of the other.

*Laws 1777 (2 Sess.), ch. 2, s. 15 (Rev. ch. 115, sec. 16), directs the sheriff whenever a writ of *capias ad respondendum* shall come to his hands, to take from the defendant a bond with two sufficient sureties, in double the sum for which the defendant shall be held in arrest, and to return such bond with the writ; and declares that, in case the sheriff shall fail to take such bail, *he* shall be deemed and stand as special bail, and the plaintiff may proceed to judgment according to the rules thereinafter prescribed. Upon this statute a construction early obtained, that the sheriff had a right to become thus special bail in every case, and this construction has been ever since steadily adhered to, and followed out to its necessary consequences. We cannot now permit ourselves to question the propriety of this construction, but feel bound to consider it as settled, and as carrying with it the results which are legitimately to be deduced from it. We hold it therefore to be the law, that the sheriff commits no breach of duty by failure to take a bail bond; that by returning the writ executed without a bail bond, he becomes bail for the defendant, is liable to all the obligations, and clothed with all the rights of such; that this engagement is made by, and binding on him in his official character; that this engagement is not violated until he fail to pay the condemnation money, or surrender the defendant (his principal) upon a lawful demand, and that those who are bound as sureties for his official acts are responsible for (415) this violation. *Swepson v. Whitaker,* 2 N. C., 224; *Tuton v. Sheriff, Ib.,* 485, and *Governor v. Jones,* 9 N. C., 359.

The condition of the bond, "well and truly to execute the duties of his office during his continuance therein," is broken whenever an official act commenced during his term of office, and imposing upon him a *continuing* duty, shall fail of consummation by his default, at whatever time such default may happen. An ordinary instance of this is when an execution has come to his hands while in office, and the money been re-

*24 State Records, 52.

ceived by virtue of it after his term, had expired. There can be no question that the condition of his bond is broken by the non-payment of the money so collected. *Governor v. Eastwood,* 12 N. C., 157. Thus, also it was held in *Fitz v. Hawkins,* 9 N. C., 394, that the sureties on the official bond of the sheriff, executed in May, 1820, were responsible for the nonpayment of those taxes which, by law, he could not begin to collect until April, 1821, and which he was not bound to pay over until October, 1821. The *office* is regarded as continuing *quoad* any official obligation imposed or commenced during his term, until such obligation shall be completely performed or extinguished. We are of opinion then, that the sureties for 1826, were responsible for the engagement of their principal as bail, officially contracted during the year 1826, and that no breach of this engagement took place until the failure of their principal to surrender the body of Stephenson, or to pay the condemnation money, when he was thereunto afterwards lawfully required.

The remaining question is, has the bail of Stephenson been legally required to surrender his body, or to pay the condemnation money? The act of 1777, before referred to, enacts that all bail, taken according to the directions of that act, shall be deemed held and taken to be special bail, and as such, liable to the recovery of the plaintiff, but the plaintiff 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 (416) to the bail, and that the *scire facias* shall not issue until such execution hath been so returned. After the judgment was obtained in the original action against Stephenson, a *capias ad satisfaciendum,* formal and regular in all respects upon its face, did issue to the sheriff of the proper county, and was by him returned "not to be found." But on this execution was endorsed a direction "the sheriff will collect costs only." It is insisted by the defendants that this endorsement must be viewed as constituting a part of the execution, as much so as though it had been inserted in the writ, and that if it had been so inserted the writ would have been senseless, and necessarily nugatory. Such does not appear to us the effect of this endorsement. A writ of high efficiency, the import of which has been settled from remote antiquity, imposing well known duties, and followed by well known and important consequences, is not to be annulled, or modified by a mere memorandum, accompanying or endorsed upon it. This endorsement could be regarded by the sheriff as no more than

a personal instruction from the plaintiff, or his attorney, that the sheriff should forbear from executing the writ provided the costs were paid. The sheriff might probably, because of this instruction, have excused himself, if the costs had been paid, from proceeding to execute the writ. Unquestionably, however, the writ was a valid writ. It conferred *full power* to take and to hold the defendant's body for the satisfaction of the judgment. Had the body been *taken,* the bail would have been discharged. Had the body been taken and the prisoner discharged by the plaintiff, such discharge would have operated as satisfaction of the judgment. It being an execution which authorized the sheriff to take the body of the defendant, and the sheriff having made return thereon, that he could not find the body, all has been done which the law required as preliminary to the issuing of the *sci. fa.*

Although the jury have returned their verdict subject to the opinion of the Court upon a case agreed between the parties, yet that verdict has not found, nor the case (417) agreed stated, what judgment was to be rendered in the event of the law being, upon the facts agreed, in favor of the plaintiff.

The Court can therefore do no more than reverse the judgment below, and order a new trial.

PER CURIAM. Judgment reversed.

Cited: March v. Wilson, 44 N. C., 152; *Pool v. Hunter,* 49 N. C., 146; *Hughes v. Newsom,* 86 N. C., 426; *Comrs. v. McRae,* 89 N. C., 95.

JAMES CROW v. JAMES HOLLAND and others.

1. A grantor cannot under the act of 1798 (Taylor's Rev., Appendix, 193) maintain a *scire facias* to repeal a grant for the same land when the latter is older than the grant to him.
2. A grant can only be repealed at the suit of the State, or of a prior grantee.

This was a PETITION and *Scire Facias* to vacate a grant which issued to the ancestor of the defendants for land in Haywood, on 5 December, 1798. The petition set forth many instances of alleged fraud and false suggestion, and the cause was much litigated in the court below. Judgment was entered on the Spring Circuit of 1830, that the grant which issued to

the ancestors of the defendants, be vacated—from which, an appeal was taken to this Court.

As the cause was decided upon a point not noticed in the Court below, the only fact which it is necessary to state is, that the plaintiff claimed title to the land covered by the grant to the ancestor of the defendants, under a grant which issued subsequent to 5 December, 1798.

The case was argued at a former term by *Gaston,* for the defendants, and by *Badger,* for the plaintiff; and again at the last term, by *Winston,* for the defendants, and by *Badger,* for the plaintiff.

DANIEL, J. This is a Petition and *Scire Facias,* under Laws 1798, ch. 7, to vacate a patent granted by the State to James Holland, deceased. The petition is filed by, and the (418) *scire facias* sued out in the name of the plaintiff, who had obtained a subsequent patent for the same lands, and who suggests that the patent to Holland had been obtained by fraud and false suggestions, in violation of the laws prescribing the manner of entering, surveying and patenting lands.

Several grounds of defence have been taken, and among them there is one which is now for the first time, we believe, presented for adjudication in this State, and which as well on account of the principles which it involves, as of its extensive application, deserves to be fully and deliberately considered.

It is objected, that a *scire facias* to reverse or vacate a patent can never be sued out by a younger, against an elder patentee. Cases have occurred, in which the question might have been raised. In *Tyrrell v. Manney,* 6 N. C., 375, and *Tyrrell v. Logan,* 10 N. C., 319, junior patentees unsuccessfully attempted to vacate elder patents, and in *Greenlee v. Tate,* 12 N. C., 300, a junior patentee succeeded in such an attempt, but in none of them was this point made or considered. We much regret that it was not, as probably some inconvenience has resulted to the community from its having been formerly overlooked.

In England, the writ of *scire facias* to vacate a patent issues from the Common Law side of the Court of Chancery, where the patent is enrolled, and is there adjudicated, unless the pleadings terminate in an issue or issues of fact. If they do, then the pleadings are made up in the Rolls Office, and the record sent into the Court of King's Bench, to be tried by a jury, where on a verdict had, the judgment is rendered (1 Mad. C. P., 4, 5). As the office of the Secretary of State, where patents for land are enrolled, is an establishment distinct from any of the courts of justice in this State, and as it is a rule of

law that a *scire facias,* founded upon any record, must issue from, and be returnable into the court where the record is, legislation became necessary to give jurisdiction to the courts, on disputed questions relative to the obtaining of patents for lands. The Legislature therefore passed the act of (419) 1798 (Taylor's Rev. Appendix), for that purpose, which act directs a copy of the grant from the Secretary's office to be filed in the office of the clerk of the Superior Court of Law, with a petition by the plaintiff, by way of suggestion when he brings suit, whereupon the writ of *scire facias* issues, calling upon the defendant to show cause why the grant should not be vacated. The proceeding is a Common Law proceeding on the *scire facias,* and the defence should be at Common Law, and not as in Equity.

On reading the act of 1798, it appears that the first eight sections contemplate only the establishment of a Court of Patents, to be held in the city of Raleigh, and the regulation of proceedings therein. The State only had a right to bring suits in that court by way of *scire facias,* to try the validity of grants. The ninth section of the act gave a concurrent jurisdiction with the Court of Patents, to the Superior Courts of Law of all grants and patents issued since 4 July, 1776, for lands situated in the respective districts of such Superior Courts. The tenth section declares that when any person claiming title to land under a grant from the King, Lords Proprietors or from the State of North Carolina, shall consider himself aggrieved by any grant or patent, issued since 4 July, 1776, to any person or persons against law, such person so *aggrieved* may file his petition in the Superior Court of Law, with a copy of the patent, whereupon a *scire facias* shall issue to the patentee, or person, owner or claimant under such grant, to show cause why the patent should not be vacated.

Did the Legislature, when it passed the act of 1798, suppose that a junior patentee could be *aggrieved,* because the State had been imposed on or defrauded by an elder patentee? Was not the tenth section enacted for the benefit of those persons who held patents from the King, Lords Proprietors, or the State and should be *aggrieved* by their titles being clouded, or endangered by a color of title which might be set up, under a junior grant for the same land, obtained since 4 July, 1776?

In the English books, there are many cases, where a *scire facias* has been brought by the elder patentee, to (420) vacate the junior patent, and decrees and judgments rendered accordingly; but we have not been able to find a single adjudication to vacate a patent on a *scire facias,* in favor of

a junior, against an elder patentee. In *Bassett v. Torrington,* Dyer, 276 a, the Court *decided* that the last patentee could not bring a *scire facias* to vacate the eldest. The Court said, "it is contrary to the books of precedents, and the common course." This decision was made at Trinity Term, 10 Eliz. by the Master of Rolls, assisted by two Judges. There are *dicta* to the contrary of this decision, but no adjudication as we can learn.

The case in Jenkin's Centuries (page 126) was a *scire facias* by the first against the second patentee, to repeal the second patent, and the Court held that if the first patentee be ousted, he might at his election bring an assize, or a *scire facias,* if the patent be for lands, or an office for life. The compiler (a man of admitted ability), adds a note at the foot of this case, in which he says, "regularly the law is as aforesaid, but the younger patentee may have it against the elder." To support what he has said in this note, he cites Dyer 133, 198 and 15 E. IV. 3. We have examined the cases in Dyer, the first is *Daniel's* case, which was a *scire facias,* brought by the second pantentee, to reverse an elder patent to Daniel, on account of some irregularity; but it does not appear that any judgment in the case was ever rendered by the Court. The second case cited, does not support the principle laid down in Judge *Jenkin's* note; for the *scire facias* there, was by the elder patentee to vacate the younger patent. The case in the year book (14 E. 4, 3), we are unable to get, but if it supported the position for which it was cited, it would have been referred to in the subsequent case of *Bassett v. Torrington,* where the question came directly before the Court. It is not cited in that case, therefore, we conclude it is not a case in point. In *Jackson v. Lawton* (10 John., 23), the only point for the decision of the Court was, whether an elder patent could
(421) be set aside in an action for ejectment brought by the second patentee, on the ground of a mistake in the issuing of it. The Court determined that it could not, but in delivering the judgment of the Court, Judge *Kent* expresses his opinion that the elder patent may, by *scire facias,* be set aside at the instance of the junior patentee. The question now discussed was not argued by the counsel in that cause, and the opinion is avowedly extrajudicial. On examining the books referred to by the learned Judge, there is not to be found an adjudged case either in this country, or in England, to support his position. The Judge remarks that it would be difficult to assign a good reason why the second patentee should not have the writ. It seems to us that legal reasons of great weight not only may be urged, but have been urged under the sanction

of high judicial authority, in opposition to such a course. In *Overton v. Campbell,* 5 Hay. (Tenn.) 206, the learned Judge *Haywood* remarks that "the second patentee cannot have the *scire facias,* because he is not so prejudiced by the first grant when it issued, and because the right to bring a real action is not transferred by the second grant without a special recital." In a case nearly analogous, it was observed by an eminent Judge in Pennsylvania (4 Dal., 204, 5), "that innumerable mischiefs, and endless confusion would ensue from individuals taking upon themselves to judge when warrants, and surveys, and grants were to have validity." In the case of *Dodson v. Cooke,* 1 Tenn., 314, it was decided after full argument, that "a subsequent grantee cannot avoid a prior grant for fraud, misrepresentation or deception in the grantee, because that deception did not operate to his prejudice, having then no right to be prejudiced. *Res inter alios non nocet.*" In England, we must consider the question as at rest. In 4 Coke's Institute (page 88), we are told that the writ of *scire facias* to repeal letters patent, doth lie in three cases: 1. When the King, by his letters patent, doth grant by several letters patent, one and the self same thing to several persons, the *former* patentee shall have a *scire facias* to repeal the second patent. 2. Where the King doth grant anything upon a false sug- (422) gestion, the King by his prerogative, *jure regio,* may have a *sci. fa.* to repeal his own grant. 3. When the King doth grant anything which by law he cannot grant, he (the King) *jure regio,* may have a *sci. fa.* to repeal his own letters patent. Baron *Comyns* lays down the law thus (Comyn's Digest, Patent F, 4, 5): "If the King grant by his letters patent the same thing to several persons, a *scire facias* lies for repealing the second patent; and in such case, the *scire facias* shall be brought by the first patentee. A *scire facias* by the *last* patentee should *not* be allowed, though he seems to have the right with him. If the King grants the same thing to divers by two several patents, the *second patentee cannot* have a *scire facias* against *the first.*" The learned and correct Sergt. Williams, in his note to 2 Saunders (page 72 p.), lays it down: "If the King by his letters patent grants the same thing to two persons, *the first patentee* may have a *scire facias* to repeal the *second* patent, but the *second patentee* cannot bring a *scire facias* though the better right should be in him. Explaining the *first* part of this position, he adds, "where a patent is granted *to the prejudice of another,* he may have a *scire facias* to repeal it at the King's suit; as if a market or fair be granted to the annoyance and prejudice of an *ancient* market or fair of

another, in this case, the King is of right to permit the person *prejudiced* by the patent, upon petition to use *his* name for the repeal of it in a *scire facias,* at the King's suit to prevent multiplicity of actions upon the case which will lie, notwithstanding such void patent. And indeed it has been holden, that the person *prejudiced* by the patent may upon the enrollment of it in Chancery, have a *scire facias* to repeal it as well as the King."

Considering these authorites as decisive—satisfied that it is the established rule of the Common Law, that no one is prejudiced by the King's grant but he who had a prior grant for, or an ancient vested right in, the same thing—that no other subject could have a *scire facias* to repeal the King's grant—that in all the other cases the *scire facias* must (423) be brought by the King, *jure regio,* himself to repeal his own grant—it seems to us demonstrable on examining the whole act of 1798, that this broad, ancient, wise, and well established distinction, is observed and kept up by the General Assembly. The remedy is for the State, where the State has been defrauded, and *scire facias* may also be sued out by an individual, when such individual is *aggrieved. "Aggrieved,"* in the language of our Legislature, is synonymous with *"prejudiced"* in the text-books. This idea, if it could receive confirmation, is strengthened by the words used in the tenth section, setting forth *who* may be aggrieved, and *how* such injury may arise. "When any person or persons claiming titles to lands in this State, under a grant or patent *from the King of Great Britain,* any of the *Lords Proprietors of North Carolina,* or from the State of North Carolina, shall consider himself or themselves aggrieved by any grant or patent made since 4 July, 1776, etc." The two first classes of cases cannot include any but elder patentees aggrieved by younger patents; and the third class must be construed as applying to such as, like those embraced in the first and second classes, are entitled to the *like remedy,* because they suffer the like grievance—that is to say, they are prejudiced, or in danger of being prejudiced, by a grant to another of the lands previously granted to them. If this point had ever been distinctly brought to the notice of the Court, and had received a different determination, we would hesitate long before we consent to change the rule. But as we understand the previous cases, this is the first time the question has been stirred. We, therefore, feel the less reluctance in delivering this opinion, satisfied that it is consonant to the will of the Legislature, in conformity to fundamental principles, and conducive to the security of titles, and the repose of the community.

Judgment is to be reversed, and judgment to be rendered for the defendants with costs.

PER CURIAM. Judgment reversed.*

Cited: O'Kelly v. Clayton, 19 N. C., 247; *Miller v. Twitty,* 20 N. C., 10; *Hoyt v. Rich, Ib.,* 677; *Holland v. Crow,* 34 N. C., 282; *Ray v. Castle,* 79 N. C., 584; *Carter v. White,* 101 N. C., 33; *McNamee v. Alexander,* 109 N. C., 236; *Kimsey v. Munday,* 112 N. C., 830; *Wyatt v. Mfg. Co.,* 116 N. C., 682; *Henry v. McCoy,* 131 N. C., 588.

(424)

THOMAS FOSTER v. JAMES FROST.

An insensible condition to a bond renders it single; but unmeaning words in the condition shall be rejected, so as to give the obligor the benefit of it. As where a forthcoming bond, dated in April, was for the delivery of the property the fifteenth Friday before May court, the figures were rejected, and the County Court having a term in May, the delivery was held to be on the Friday before the ensuing term of that court.

DEBT upon a bond, for the payment of two thousand dollars dated 8 April, 1829.

Upon *oyer,* the condition was as follows:

"Whereas, the said Thomas Foster, deputy sheriff, hath levied an execution at the instance of Wales & Erwin, on certain property of John Cook, consisting of one negro, named, etc. (seven in all), which said property, at the request of said John Cook and James Frost, is left in their own care and possession until the same shall be sold. Now, if the said James Frost shall well and truly deliver the said property hereinbefore enumerated, to the said Thomas Foster, deputy sheriff, at Mocksville, on or before the 15th Friday before May Court without damage or further hindrance, then, etc."

Pleas—First. *Non est factum.* Second. *Performance.*

The plaintiff then replied, taking issue upon the first plea, and setting out as a breach of the condition, the non-delivery of the slaves at Mocksville, on the Friday before May Term, 1829, of Rowan County Court—Rejoinder, taking issue as to

*Two other cases, viz.: *John Bradley v. Joshua Souther,* from Rutherford, and *Samuel Greenlee v. Samuel C. Tate,* from Burke, which were, as to the dates of the several grants, similar to the above stated case, were also decided upon the same grounds.

this breach. At the trial before *Norwood, J.*, at ROWAN, on the last circuit, the plaintiff having made out a *prima facie* case, in order to strengthen it, produced a bill of sale made by one Richard J. Cook to the defendant, whereby two of the negroes were conveyed to the defendant, with the following defeasance: "The condition of the above obligation is such that whereas the aforesaid James Frost having become surety for the delivery of seven negroes on, etc., at, etc., levied on as the property of John Cook, and the said Frost having given up to the above bounden R. J. Cook, the above mentioned seven negroes to make the money by that time. Now, if the said (425) Cook shall well and truly pay off said execution without further damage, then, etc." The defendant objected to this bond or bill of sale, going to the jury, but his objection was overruled by his Honor.

The defendant then insisted that the bond declared on was void, because of the uncertainty for the time of the delivery of the slaves. But his Honor overruled the objection.

In order to reduce the damages to a nominal sum, or at most to the amount of the sheriff's commissions, the defendant then proved that the judgment in favor of Wales & Erwin, had been entered up in the Superior Court of Iredell, and that at the time when it was so entered, the defendant, Cook, prayed an appeal to the Supreme Court, and gave Samuel King and James M. Morrison, as sureties to the appeal bond. *Wales v. Cooke*, 13 N. C., 183; *In re King, Ib.*, 341; that the appeal not having been carried up in time, the execution under which the seizure had been made, and the delivery bond executed, had issued from the Superior Court of Iredell; that afterwards Cook had obtained a *certiorari* to that Court, upon the same bond, and that the judgment below had been affirmed. That after the execution of the bond declared on, the debt and costs, as well as the costs of the Supreme Court, had been satisfied under process, issuing from that Court. The plaintiff in reply to this evidence, proved very clearly that the amount thus paid, had been advanced by two persons not parties to the judgment, at the instance of King and Morrison, the sureties, and that an assignment of the judgment and execution had been taken by those persons in trust for them.

His Honor instructed the jury, that the plaintiff was entitled to recover such damages as he had subjected himself to in consequence of his having levied on property sufficient to satisfy the judgment, and that the money advanced at the instance of the sureties, not being intended as a satisfaction, but the judgment and execution having been assigned to strangers in trust

for them, the amount of damages to which the plaintiff was entitled, was not thereby reduced.

A verdict being returned in favor of the plaintiff, for the amount of the judgment against Cook, including the costs and interest, the defendant appealed. (426)

Pearson for the defendant.
Nash for the plaintiff.

GASTON, J. The plaintiff declared against the defendant in debt upon his bond, and after *oyer* of the obligation and condition, the defendant pleaded the general issue, and also performance of the condition, whereupon the plaintiff assigned a breach, and upon this assignment issue was also joined. Upon the trial of these issues the defendant objected that the condition was insensible, and the obligation therefore void; which objection the Court overruled. We are of opinion that in this the Court decided correctly. Were the condition insensible, the consequences would be, not to make the bond void, but to make it a bond without condition. But the condition was sensible, and could well be understood, and any words by which the intent of the parties can appear, are sufficient to make a condition of an obligation. The condition is inserted for the benefit of the obligor, and to enable him to save himself from the penalty. If the words of a condition however improper, should be pronounced senseless, then might the penalty be enforced against the obligor notwithstanding he had fully executed the condition according to the intention of the parties. *Butler v. Wigge,* 1 Saun., 65; *Cromwell v. Grumsden,* 1 Ld. Ray, 335. Any uncertainty or mistake therefore in the condition may be supplied and corrected by a reasonable intendment, and words which by themselves have no distinct meaning, and which serve but to perplex and embarrass the meaning of the residue of the condition, should be altogether rejected. *Holmes v. Ivy,* 2 Show., 16; *Maulevever v. Hawxby,* 2 Saun., 78. Let these rules be applied to the construction of the instrument in question. It is executed in Rowan County, is payable to the plaintiff as deputy sheriff of that county, and is dated in 8 April, 1829. The condition recites that the said deputy sheriff hath levied an execution at the (427) instance of Wales and others on certain personal property of the obligor, Cook, which at the request of the said Cook and his co-obligor, the defendant, has been left in their care and possession until the day of sale. After this recital it proceeds to declare, "that if the said Frost shall deliver the said

property to the said deputy sheriff, at *Mocksville,* on or before
15 Friday before May Court, then the above obligation shall be void, but otherwise in force." The word fifteen, or rather the figures 15, standing by themselves, convey no definite meaning. They cannot without absurdity and absolute nonsense qualify the succeeding words "Friday before May Court," for but six Fridays could intervene before that Court. We are bound judicially to know when the terms of our courts are held because these are fixed by the public law. It is the May Term of Rowan County, that is referred to in the condition, for the bond is executed in that county, is payable to an officer of that county, and to secure the re-delivery to him of goods levied on for the purpose of a public sale in that county. And it must be the May Term of Rowan *County,* and not of Rowan *Superior* Court that is meant, because the County Court is held in May, and the Superior Court is not. Let the figures 15 then, be rejected as by themselves unmeaning, and when connected with others which are intelligible, producing nothing but absurdity, and we see distinctly on the face of the condition, that its design is to afford the obligors an opportunity of discharging themselves from the penalty, by a re-delivery to the officer of the property, on or before the Friday preceding the next May Term of Rowan County Court.

We also approve of the instruction which the Judge gave to the jury on the subject of damages. If an officer levy an execution on goods of a defendant, sufficient to satisfy the judgment of a plaintiff, the property in those goods, for the purpose of satisfying that judgment is vested in him, and if he permit the same to be eloigned so as to defeat the execution, it is not to be questioned but that he thereby becomes debtor to the plaintiff for the amount of the judgment. The act of 1807
(Rev., c. 731), allows an officer when property is levied
(428) on, and permitted by him to remain with the possessor until the day of sale, to take a bond for the forthcoming thereof, to answer the execution, but declares that the officer shall nevertheless remain liable as theretofore in all respects, to the claims of the plaintiff. Of course an action cannot be brought on this bond until there be a breach. But when there is such a breach, the damages ought to be commensurate to the injury sustained, and surely the value of his property thus withheld—the amount of the *debt* or *liability* thereby thrown upon him, is as definite and capable of being measured before, as after he shall have paid this *price,* or satisfied this *debt* to another. When a mayhem or a battery is committed, the doctor's bill is a proper item to be regarded by the jury in the

estimate of damages, although it may remain undischarged at the moment of the trial. Damages comprehend the immediate injury, and the direct, obvious and ordinary consequences of it. And for all these the injured person is entitled to recover in an action for the wrongful act or omission, because they are its necessary results.

We see no ground for reversing the judgment, because of the admission in evidence of the conditional bill of sale or bond (whatever it may be termed), executed by Cook to the defendant, in which Cook acknowledges to have received from the defendant the negroes levied on in order to *pay off* the execution, and and thus discharge the delivery bond. It must be regarded at least in as strong a light as a declaration of facts made to the defendant, and by him admitted to be true. It is, therefore, competent evidence against the defendant, if the facts which it declares, or tends to establish be relevant. These facts are relevant, because from them it appears that the defendant had disabled himself from performing the stipulations in the condition, by a delivery of the property to Cook for the purpose of being sold, and upon an engagement of Cook, and adequate security from him to pay off the judgment, for the satisfaction of which this property had been seized. It has been objected that this testimony may have been injurious to the defendant, because it showed that he had the means of indemnity against recovery by the plaintiff. But it (429) is impossible that this objection can be well founded, unless we presume that the jury should be reckless of their obligations, or wholly destitute of intelligence. The most that can be said against proof of such facts in the present case is, that it was unnecessary, for the performance of the condition was to be shown by the defendant, and was not required to be established by the plaintiff. But the exhibition of evidence *merely* superfluous and unnecessary, and which cannot mislead the jury, furnishes no legal cause for exception.

Upon the remaining question raised by the defendant it is enough to say that after the decisions in *Carter v. Sheriff,* 8 N. C., 483; *Governor v. Griffin,* 13 N. C., 352; *Hodges v. Armstrong,* 14 N. C., 253; and *Sherrod v. Collier, Ib.,* 380; it is hopeless to contend that an advance of money upon, and assignment to a third person of the judgment against Cook, purposely made to keep that judgment alive for the use of his sureties, did or could operate to *extinguish* such judgment at law. The whole argument of the defendant upon this point is founded on the assumption that this judgment had been paid. But no part of the judgment has been paid or satisfied. The

monies received by the plaintiff, were the consideration for an *equitable* transfer of his interest therein to the assignee. The judgment itself is wholly unaffected by such transfer, and remains since, as it was before, *in law,* the judgment of him in whose name it was obtained. The whole of the evidence in relation to this equitable transfer, and the consideration advanced upon it, was irrelevant in this case, and should not have been admitted. But having been received the Court very properly instructed the jury that it did not affect the plaintiff's right to recover, or the amount of that recovery.

We see no error in the judgment below, and direct it to be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Killian v. Harshaw, 29 N. C., 498; *Harrison v. Simmons,* 44 N. C., 81; *Grier v. Hill,* 51 N. C., 574.

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(430)

ALECIA REDMOND and others v. JOSIAH COLLINS and others.

Where a will giving the executors power to sell land, and directing them to pay the interest of the personalty to a married woman for her life, and after her death to divide the whole and the rents of the land between her children, was propounded by the executors, and upon the *caveat* of her husband was rejected, the sentence is conclusive both upon her infant children then in being and those born afterwards.

This was a petition originally filed in the County Court of EDGECOMBE against the defendant Collins alone. The plaintiffs stated that Francis Perie died in the year 1810, having duly made and published his last will, whereof he appointed Bennet Barrow and James Southerland executors. That the testator left Elizabeth Redmond, the mother of the plaintiffs, his only child. That the said will was offered for probate by the executors at the May Term, 1810, of the County Court of Edgecombe, when a *caveat* to its probate was entered by Daniel Redmond, the father of the plaintiffs, which was tried *instanter,* "when by some unaccountable infatuation or corruption of the jury impaneled to try the same, or by some fraudulent combination between the said executors and the said Daniel Redmond," the issue was found against the executors, although both the due execution of the will, and the sanity of the testator were proved by the clearest testimony. That the plaintiffs having no one to protect their interest, and the executors

fraudulently refusing to appeal, the judgment upon the verdict remained unreversed, and as a consequence of this judgment, administration upon the estate of the defendant was committed to Daniel Redmond, who wasted the whole of the personalty, which was very valuable and together with his wife, Elizabeth, above mentioned, conveyed a part of the land of which her father died seized, to the defendant.

The prayer was for process against the defendant, and for a re-probate of the will.

A copy of the will was attached, the material parts of which are as follows:

"My will and desire is, that my houses and lots, to- (431) gether with my plantation, be rented out at the discretion of my executors for the term of eighteen years, the said houses, lots, and plantation to be sold by my executors at public sale on a credit of twelve months.

"My will and desire is, that my executors pay to my daughter, Elizabeth Redmond, yearly, all the interest that may accrue upon the whole of my estate in their hands, exclusive of the value of my houses and lots and plantation, until the term of eighteen years.

"My will and desire is, that my executors shall hold all the residue of my estate in their hands for the term of eighteen years, at the end of which said term of eighteen years, my will and desire is, that two-thirds of the estate, including the houses, lots, and plantation, and all other things so remaining in the hands of my executors, shall be equally divided, or belong to the lawful heir or heirs of her body begotten, which my said daughter, Elizabeth, may have at the expiration of the said term of eighteen years, and the balance of one-third is to be retained in the hands of my executors during the natural life of my said daughter, Elizabeth. The said executors paying her yearly all the interest that may accrue on the said balance of one-third until her death, at which time, if she shall have living another child of children, which of course will be after the first division of two-thirds of my estate, my will and desire is, that the last child or children shall have all the balance of the one-third of my estate remaining in the hands of my executors at the death of my daughter, and in case there is no increase of my daughter after, the first division of two-thirds, that the balance of one-third shall descend in the same manner as the first two-thirds."

By an amendment made at a term subsequent to the filing of the petition, Bennet Barrow and James Southerland, the executors, were made defendants.

The defendant, Collins, in his answer denied that the verdict against the supposed will was the result of corruption in the jury, or of a fraudulent combination between the exe-
(432) cutors and Redmond, the father of the paintiffs, and averred that he was a purchaser for value, and without notice. He also insisted that the sentence upon the *caveat* of Redmond was conclusive of the rights of the plaintiffs.

The answer of the executors unequivocally denied all fraud and all combination between them and Redmond; they stated that they procured respectable counsel to offer the will for probate, and furnished him with testimony which they were advised was sufficient to establish it, and that the issue was found against them in consequence of some mistake made by the jury, and not from corrupt motives. They admitted that they were dissatisfied with the verdict but declined taking an appeal as the matter bid fair to be extensively litigated, and they had no fund from which they could be idemnified in case of failure, in which event they were advised they would be liable to pay them. The County Court directed the will to be propounded anew, and the defendants appealed.

On the Spring Circuit of 1833, the cause was submitted to his Honor, Judge *Martin,* upon the petitions and answers, together with a statement of facts which set forth the death of Porie—the propounding of the will for probate—the result of the trial, and the terms of the will as stated in the petition. The case also stated that at the time of that trial, the plaintiff, Alecia, was in being, but was an infant of very tender years, and that the other plaintiffs were the children of Daniel and Elizabeth Redmond, born since the trial, but before the expiration of eighteen years from the death of Porie. That Alecia came of full age a few months before the filing of the petition, and that the other plaintiffs were still infants. That the verdict was probably wrong, owing to a misapprehension of the nature of the issue, but was not the result of any combination between the executors and Redmond, or of a fraud on the part of the former. That one William Ross had purchased a part of the real estate of which the testator died seized, from Redmond and his wife, and had sold it to the defendant, Collins, who was a purchaser for value, and without notice of any
(433) defect in the title of his vendor, and had been many years in possession.

His Honor dismissed the petition, and the plaintiffs appealed.

The case was argued at the last term at great length, by *Hogg, Devereux* and *Mordecai* for the plaintiffs, and by *Badger* for the defendant, Collins, and was continued under advisement until this term.

REDMOND *v.* COLLINS.

RUFFIN, C. J. This is an application by petition, to prove a paper as the will of Francis Porie, deceased. It is not made by persons who claim an interest under the paper, as legatees and devisees. It comes before this Court on appeal from the decision of the Superior Court dismissing the petition, and the questons here arise on the pleadings, and a case agreed by the parties in the record.

This is not an original application. It is stated in the petition that Barrow and Southerland named in the paper as the executors, did in that character offer the same paper for probate in 1810, to which Daniel Redmond, the father of the petitioners, and the husband of Elizabeth, the only child of Porie, entered a *caveat.* That thereupon an issue of *devisavit vel non* was made up, on which the jury found, that the paper was not the last will and testament of the party deceased, upon which the Court pronounced against the paper as a will, and granted administration to Redmond, the caveator. The petitioners allege that the verdict was the result of some unaccountable infatuation or corruption of the jury, or of a fraudulent combination and contrivance between the executors and Redmond, and they found the charges on the circumstances that the *factum* of the will, and the sanity of Porie were indubitably proved, and that the executors neglected to appeal.

The paper is exhibited and contains the following provisions: "My will is, that my houses and lots, together with my plantation be rented out by my executors for eighteen years, and then to be sold by my executors." The profits of the whole, except the real estate to be paid to his daughter by his executors for that term. The paper then goes (434) on, "my will further is, that my executors shall hold all the residue of my estate in their hands for the said term of eighteen years, and at the end thereof my will is that two-thirds of the estate, including the houses, lots, plantation and other things so remaining in the hands of my executors, shall be equally divided or belong to the heir or heirs of her body, which my said daughter may have at that time, and the other third to be retained by my executors during the life of my daughter for her use, and at her death to go to such children as she may then have," in certain proportions.

Redmond disposed of all the personal estate (which was a large one), to persons unknown, and he and his wife conveyed the lands in fee, and they have since come by purchase, for valuable consideration, to Josiah Collins, who is in possession claiming title. It is admitted in the case agreed, that he had no notice of any defect of title when he purchased.

The petitioners are the only children of Mrs. Redmond, of whom one was born and of very tender years, at the former trial, and the other soon afterwards, and this proceeding was instituted soon after their coming to full age. Both their father and mother are dead.

The prayer is that the paper may now be admitted to probate, and that a copy of the petition may be issued to Collins, and he required to answer, and afterwards it was amended by having copies served on the executors, and calling for an answer from them.

The answer of Collins states the circumstances of his purchase, as already mentioned. Those of the executors explain the details of the trial, and admit that the verdict was in their opinion erroneous, but they deny any fraud on their part, and state that they employed respectable counsel and offered all the necessary proof, and under advice did not consider themselves bound to appeal, and incur the risk of costs without any interest of their own.

The case was argued at the bar upon the footing that the executors were bound to appeal, after having under-
(435) taken the office, and that their neglect in that respect was a distinct ground of fraud or *laches* on which this application ought to be sustained. The Court is certainly not satisfied with the correctness of that conclusion, if the premises were admitted. The misconduct of the executors might subject them, in the proper Court, to the demand of those whose rights as legatees, had been prejudiced by their errors, omissions or frauds. That would be upon the idea, that the effect of such errors, omissions or fraud, was a sentence upon the will itself, by which those rights were lost. But that sentence itself, as between the parties to it, or considering it as a proceeding *in rem,* as to those bound by the thing done, can be impeached only on the ground of *collusion* between those charged with taking care of the interests of the applicants, and the opposite party. What rule the Court might feel it necessary to adopt in such a case of collusion—playing into each others hands—it would be premature now to mention. In the case before us, it would be deemed clear by us on the proofs, that there is nothing like it, and probably we might conclude in like manner, that the *laches* of the executors in not appealing was not fraudulent, that is *mala fide,* to abandon the legatees, but arose from a misapprehension of their duty and of their personal liability for costs. But we do not enter into those inquiries at all because the record contains a statement of facts on which the Superior Court decided, and which is inserted in the record

as a *"case agreed on by the parties,"* for this Court. In that it is expressly stated that the finding of the jury was probably wrong, owing to a misapprehension by the jury of the nature of the issue, but was *not* the result of any combination between the executors and Redmond, or of fraud on the part of the executors. The trial was therefore fair, and the executors kept back none of the proper proofs. They made a case on which the paper ought, as they then said, and as the petitioners now say, to have been pronounced a good will. The error was that of the tribunal, and not that of the parties. The case is therefore now to be considered as one, in which the legatee propounds the will a second time, and asks his allegation (436) to be sustained and admitted to proof; upon the sole ground that the former verdict and sentence was in itself wrong. It does not appear indeed what were the proofs offered before, nor can it be expected according to our mode of proceeding by jury trial upon *viva voce* testimony, that it should easily be made thus to appear. But it must be taken, that no new proofs are to be offered, because there is neither a case made, that proofs then existing were held back by the executors, or that other proofs have since been discovered by the present parties. The application then is to the same Court of probate, which formerly pronounced against the will, now to pronounce in favor of it upon the same evidence, or to open the case for evidence at large, without showing that such evidence was not before given, or could not then have been given.

In whatever tribunal such an application shall be made, whether of law, of equity, or of ordinary, it must be rejected upon one general principle of universal and necessary application, that there must be an end of litigation, and that where the *same case* has been once appropriately and judicially examined and decided, the decision is conclusive.

The case before the Court it is contended is without that principle, because the persons now propounding the will, were not parties to that proceeding, and their interests ought not to be bound by the judgment.

The question is somewhat novel in the Courts of this State, but much of its difficulty has been removed by the researches of the counsel on both sides, into the adjudications of the Courts of probate, from which the idea of our own has been derived, and the course of proceeding, and principles of action adopted by those Courts. These have all been considered by the Court, assisted by the arguments of real ability offered at the bar. The summary of the doctrine touching those peculiar jurisdictions, is that they proceed according to the civil law.

Their action is *in rem,* and hence when a matter is not within their jurisdiction, their sentence is void, and when within it, it is conclusive upon other Courts, and upon all persons (437) until vacated in the Court itself which passed it. But as every judicatory having any pretentions to administer a code of law so as to make it practically a just system, having respect to the rights of persons in the thing, these tribunals do not hold those bound by the sentence, who had no notice of the pendency of the proceedings on which it was pronounced. At the instance of one thus situated and concerned in interest, the former decree is called in, and the matter again taken *sub judice.* Proceeding *in rem,* it has peculiar modes by which persons are to be affected with notice, or may contest an application before it may be made, or may become parties, as we express it, at common law. When a will is offered for probate *an allegation* in writing is exhibited, stating the will, the circumstances of the party deceased, the *factum* of the will, the intention that it should be testamentary, its attestation, and all the proofs of persons propounding the allegation, can and expects to make. There are no parties made, that is, none stated in the allegation itself, on whom process is to be served, to constitute an adversary contest. If the case made in it be insufficient to establish the will, the opinion of the Court is expressed thereon in the first instance, and the allegation propounding the will is rejected. If it be sufficient, it is admitted to proof by sentence; and the person who puts in the allegation is thereby allowed to examine the witnesses mentioned by him, to the points stated in the allegation, and if the proofs support the allegation, the decree is of course. To these proceedings no individual is necessarily a party but the person propounding the paper, nor is any bound conclusively by them, but those who are privy to them, that is, have knowledge of them either actual or presumed. But all may become parties and will be heard upon making an interest in themselves appear. To enable the propounder to bind others a decree is taken out by him authorizing him to summon all persons, "to see proceedings," not to become parties, but to witness what is going on, and take sides if they think proper. If the propounder does not (438) choose to adopt that course, he may at once take his decree; which in relation to this subject is called proving the will in common form. If he take out a decree and summon those in interest against him, "to see proceedings," they are concluded, whether they appear and put in an allegation against the will or not, and as against those summoned this is called probate in solemn form.

But besides these methods, there is another, by which persons may be heard and concluded. If the propounder will not take out a decree "to see proceedings," a person in interest is not bound to wait the result of that proceeding, and then prefer an allegation to call in the decree made on it, and asserting his own rights; but he may at once "intervene" by a counter allegation, because the proceeding is *in rem* and all shall be heard. Upon which intervention each of the persons are of course bound by the sentence as before. But in none of these cases, is the sentence re-examinable at the instance of one who before propounded the allegation, or who intervened, or who was summoned to see proceedings, or who is represented in fact or in legal contemplation by one thus situated. Differing somewhat in the forms of proceeding, yet in substance these courts thus appear to act upon the same great fundamental principle of justice, which guides the courts of common law, in determining who shall or shall not be bound by their adjudications. The latter courts being courts of record, look only to the record for the parties, and the obligation of the judgment. The court of the ordinary is not a court of record, and therefore, in each case, the inquiry is open, who was, and was not privy to the proceedings. Privity is established by the allegation filed, whether of propounding or of intervening, and by the summons on file "to see proceedings." Thus far the privity is shown by similar, though not by the same means. But the ecclesiastical courts take a further step, and allow the privity to be proved by the testimony of witnesses, or otherwise *in pais*.

The whole doctrine of probates was gone into upon the argument more at large than we deem it necessary to pursue it. It may be useful, however, to advert to the obser- (439) vation, that probate in common form may be called in at any time according to the cases of *Satterthwaite v. Satterthwaite*, 3 Phillim., 1, and *Finucane v. Gayfere*, 3 *Ib.*, 405. Upon the principle of common justice before mentioned, this is generally true, because a probate in that form implies that there was no privity in the next of kin, and even the receipt of a legacy under the will by one of the next of kin will not in all cases, bar his right to call for a probate in solemn form. *Core v. Spencer* in *Bell v. Armstrong*, 1 Add., 365. But an acquiescence for a long time not accounted for, would bar him, either as implying a waiver of right, or notice of the former proceedings. *Bell v. Armstrong.* And it is settled that one of the next of kin is barred from calling in a probate by being cognizant of a prior suit, in which the will was contested by others of the next of kin, though not himself an intervener, nor sum-

moned to see proceedings. *Newell v. Weeks,* 2 Phillim., 224; *Wood v. Medley,* 1 Hagg, 645. The cases of *Dickerson v. Stewart,* 5 N. C., 99; *Moss v. Vincent,* 4 N. C., 298; and *Jeffreys v. Alston, Ib.,* 438, adopt the same principle here.

But the case of a probate in common form, and the proceeding to call it in, is very different from, and has very little application to that of calling in administration, and of a second attempt to prove the same paper as a will. The proper solution of the latter question in our law, renders it necessary to consider the paper first as a testament, and then as a will. In each point of view, the present applicants appear to have an interest, in the first as legatees of a part of the personal estate, and in the latter as entitled either to the legal estate in the land as heirs of their mother, or as *cestui que trusts,* under the provisions of the will of the proceeds of the sales of it. As a testament undoubtedly the executors themselves could not repropound the paper. First principles forbid that, since if they could the sentence would not be final in the court pronouncing it, for any purpose. It may be yielded that upon newly discovered evidence they might. If they could in that case, it would be allowable only when applied for in due
(440) season, and under such circumstances as would induce a Court of Equity to order a verdict at law, obtained by fraud or surprise, to be set aside and the issue retried. The restort to equity is in that case rendered necessary by the inability of a court of law to reform its judgments after they are rendered. The ecclesiastical courts are not under that restraint, and therefore the parties affected need not apply to equity. But the principle on which equity relieves against a judgment is a sound one, and is the only one on which the ecclesiastical court can regulate its own discretion. Hence it seems agreed that upon facts *navita perventa,* and only in that case, an executor might re-propound a will before pronounced against *Wood v. Medley,* 1 Hagg., 645. The question is whether one claiming as a legatee can do in this respect, what the executor himself cannot. It is laid down both by common law, and ecclesiastical authorities that the person alone by whom a testament can be proved is the executor named in it. Salk., 309; Swimb, Pl. 6, s. 12, and that he may be summoned by the ordinary to produce the testament, prove it, and take on himself its execution, or refuse the same. This summons, the ordinary will issue at the instance of any person having an interest, even a creditor of the party deceased, and much more one to whom a legacy is given in the paper, and it is required by our act of 1777 (Rev., c. 114, s. 52), to be issued by the County Court.

Doubtless if the executor renounce, any other person interested may propound the will. Thus far the executors and legatees are viewed as persons having distinct rights and duties. But if the executor of his own accord, or on citation propound the paper himself as a testament we find no case or principle which requires that the legatee shall also propound the paper, or intervene, or be cited, in order to make a sentence of rejection obligatory on him. Although not formally or apparently upon the files of the Court, personally privy to the proceedings, he is so substantially through the executors. The executor is called *pars principalis* or *legitimus contradictor* who is bound and authorized to act for all persons entitled as legatees (441) under the testament, nay in *Wood v. Medley,* Sir John Nicholl said he was more. He was the person especially selected by the party deceased to carry his will into effect. In that case there were two papers, in one of which Cundy was named as executor, and in the other not; by the latter alone the interest arose to Wood. Cundy propounded both, and his allegation was rejected. Afterwards Wood propounded an allegation to call in the administration, on which the administrator appeared under protest, which was allowed to stand over, in order that the legatee might, on showing that he was not cognizant of the former proceedings, bring in an allegation on the testament under which he claimed, because the two papers were distinct, and the legatees claimed under that in which no executor was named. Wood then put in an allegation propounding both papers and praying probate to Cundy, which was not admitted to proof, but rejected on its own terms and the affidavits annexed. This was upon two grounds: the one, that although the interest of Wood arose on one of the papers only, yet he did not swear that the facts alleged by him were newly disovered, and that he believed he should make due proof of them, which had been the condition on which the allegation was admitted, without deciding on the protest. The other, that without proof of collusion, the legatee was bound by the former sentence upon those papers, when both of them were propounded by Cundy, then alleged, and also again in this proceeding, alleged to be the executor of both. The Judge expresses a doubt whether considering the form in which the allegation is brought in, alleging Cundy to be executor, and probate to be made by him, he ought to consider any but the last point. But assuming that not to be law, he thinks the case for the administrator, because the affidavit was insufficient as to new discoveries, and because the facts alleged did not make the paper a will. But he lays down the doctrine gen-

erally in this case and in the previous one of *Colvin v. Frazier,* 1 Hagg., 107, that the legatees are bound by the acts of the executor in respect to probate, unless there be collusion. (442) What would be the effect of collusion upon the proceedings in that Court, or how the legatee could be redressed therefor,—whether in that Court or in a Court of Equity— he does not then say: nor, as this is not a case of that sort, is it necessary we should say.

There is a privity between the executor, and legatees, and creditors, which causes the latter to be *prima facie* bound by the acts of the former in respect of proceedings to establish the testament, and obtain probate. By the appointment the executor takes in the first instance, the whole legal estate in the personal property. He is delegated by the testator to carry his will into effect, to guard the interest of his legatees, and especially those under disabilities, and of his creditors, against all other persons. He is therefore the *pars principalis* through whom all the others derive their interest, and who, in a controversy with third persons upon the validity of the instrument by which his office is constituted, and their interests conferred through him, he is a necessary, and the only necessary actor. Hence he is deemed the legitimate allegator or contradictor, and all other persons are bound by his acts, as his is the primary interest, and theirs are dependent upon, and deduced from his. This is in truth, but another application of a well known principle both of common law and of equity. An executor is not obliged to plead the statute of limitations. He may confess judgment to creditors. The legatees are bound at law, and also in equity, unless in the latter case they can show the debt not to be due, and collusion between him and the pretended creditor. So the executor alone brings a bill for an equitable money demand of the testator, and is the only necessary party to a bill by creditors for an account of the assets; neither the particular nor the residuary legatees being required, although the amount of assets to satisfy them may be affected. It may be taken then as the settled doctrine of the ecclesiastical courts, that unless under special circumstances the legatees though not intervening nor cited, are bound by a sen- (443) tence rejecting a testament. They take benefit by a sentence pronouncing for the paper, and must submit to the consequences of a contrary one. No case is found, that infancy or coverture or non-residence, or that the legatee was even not *in esse,* are of themselves such special circumstances. It would be most unreasonable that it should be, for it would expose the administrator to successive attacks from each lega-

tee as he came of age, or into being, and there would be no security for property bought under the warrant of an apparent legal authority, as an administration granted when there is a will, is void, and no title can be made under it. What might be the effect of a mere attempt of the executor *ex parte* to obtain probate in common form in our courts, which was not at first allowed, might admit of question, as respected either his own right to offer the testament a second time, or that of a legatee to summon him to do so. Our practice is so very informal, having no vestige on record of such an application, as to render it probable that the sentence would not be considered in itself definitive to any purpose. But we think clearly that a verdict and judgment upon an issue formally made up between the executor and one of the next of kin, upon which if found for the executor, the probate, as between those parties would be in solemn form, and settle the rights of the legatees under the will, is also when found against the paper, and without collusion, conclusive against the legatees, whether parties or not to the issue. Our statute which orders the issue and jury trial did not intend to alter the law in this respect. Under it the practice has been to dispense with the formal allegations in writing required by the ordinary, and to make the allegation *ore tenus,* in general terms, and thereupon the Court directs an issue, upon which the whole matter is tried by the jury. Yet as before only a person in interest can be heard against the will, and all such persons may be bound either by making themselves parties, *nominatim* of record to the issue, or by being cited by either side, or by being duly represented. The proceeding was not intended to be strictly one at common law, with its process, pleadings and judgment between parties. The sole object was to alter the mode of trial, (444) substituting that of a jury with *viva voce* testimony as most approved, for the former one of writ allegations and examination upon interrogatories, and a decision by a single Judge. The next of kin may therefore yet require, if he was not cited, conusant of the proceedings, that a probate by the executor may be revoked, and a re-probate had. His right does not arise out of that of the executor, and therefore is not subordinate to it, but primary and in opposition to it. But a legatee is as it were, the *cestui que trust* of whom the executor is the trustee, and the trust goes with the legal title to which it is attached, the remedy of the *cestui que trust* being primarily against the trustee, and exclusively against him, unless there be collusion between him and the person in possession.

Merely as a testament, our opinion therefore is, that the re-

jection of this paper is, in the case stated and agreed, conclusive on the executor and the petitioner, in the Court of Probate, as in other Courts.

The applicants, however, insist upon their rights in the real estate as entitling them to this relief, because as to the land, they are not represented by the executor as such. This is clearly correct at common law, for the Ordinary cannot take probate of a will of lands, and if he does, it does not operate to establish the will as a devise. It is insisted that our law has altered that, by giving that power to our Courts of Probate, and it is argued by the counsel on both sides, that the grant of the power makes its exercise indispensable to render the devise effectual. From that position, however, very different and opposite conclusions are drawn by the respective counsel. Those opposed to this application contending that thereby the act of the executor becomes as binding on the devisee as it was before on the legatee; while those for the petitioners urge that they must have a right themselves to prove the will as to the devisees, because they were not as to them, represented by the executor, and will therefore be condemned unheard.

(445) The Court cannot concur in the opinion that devisees are concluded by the sentence against the will when propounded by the executor alone, without citation to, or intervention by the devisees. We do not think the relation between the executor and devisees was intended to be altered in any important respect by our statute, any more than that pre-existing between the executor and the legatees, especially in the essential particular of concluding the devisee. But we do not on the other hand deem this the proper remedy of the devisee, nor think that he may, as devisee, re-propound the paper both as a will and a testament, and ask probate thereof as such. We confess we should think so, if the devisee had no other redress. It is a sacred principle that every person must be heard either by himself, or through one legally representing him, before he shall be concluded in his rights. This principle is of such universal utility and application that it cannot safely be violated in any case. It must be respected whatever inconveniences may arise from it to third persons; but it may and ought to be so respected, as to produce as little inconvenience to third persons as possible. The question as to the lands is between the devisees and the heir; to which the executor and legatees are in no wise parties, nor can the executor meddle with the land at all. Papers to pass land and personalty are to be executed in different manners, and sustained by different proofs, and they may be revoked by different means. Until 1784, wills of land

were proved here, as in England, upon ejectments, or upon an issue out of Chancery. The statutes of that year (Rev., chs. 204 and 225) prescribe the ceremonies to make a good will of lands, as to their formal execution; and the previous acts of 1715 and 1777 (Rev., chs. 10 and 115), having required wills to be proved and *deposited* in the County Courts of Probate, the sixth section of the act of the second session of 1784 makes such probates, as well made before as those to be made thereafter, sufficient evidence of the devise of lands, and also attested copies evidence in the same manner as the originals, with a proviso that upon the suggestion of a fraud in the drawing or obtaining it, or any irregularity in the execution or attestation, the original shall be produced. This act did (446) not, we think, render the rejection of the paper as a will, when offered by the executor, more conclusive on the devisee, than its probate would be on the heir. As to the latter it is clear it is not conclusive, but must be again proved on the trial upon a proper suggestion, for as Judge *Haywood* asked in *Ward v. Vickers,* 3 N. C., 164, why is it to be produced but to enable the Court and jury to decide whether the former probate was right. A proved will is therefore only *prima facie* evidence against the heir. So one not proved is not conclusive evidence against the devisee. The act does not require wills for lands to be proven and recorded in order to pass the estate, as the statute of uses, or our act of 1718 (Rev., ch. 7), does as to the enrollment and registration of deeds. A will is not pleaded as being proved and recorded, but only duly executed; the circumstances of probate and recording are alleged to dispense *prima facie,* with further proof, but not as constituting the validity of the instrument. A devisee, it seems to us, may therefore yet bring his action of ejectment upon the will before probate or after the rejection of it at the instance of the executor, and establish the will on the trial, or in a proper case, prove it in Chancery as before the act of 1784. The object of that act was to ease the devisee in his proofs in ejectment. We should so think upon the words of the act; but no doubt is left in our minds when we consider the effects of an opposite construction. We set out with the principle that the devisee is not concluded by the act of the executor. If he be not, how is he to avoid the consequences of a refusal of probate to the executor? That is the question. It can only be in one of two ways; either to allow him to prove the will as at common law, or that at his mere pleasure, the former administration is to be annulled, and a re-probate had. In the latter case, the whole personal estate and its administration to creditors and next of

kin, is thrown into confusion, and the greatest injustice done to persons who cannot, in any mode be heard in the proceedings for re-probate. Besides there is a contradiction in the
(447) thing itself. A party claiming under the will cannot ask probate for himself, but for the executor only. Hence the executor would get by means of another person with whom he is in no privity, the very thing which he is precluded from asking for himself; this follows certainly as it seems to us. For the jurisdiction is, as it were *in rem*, and the probate is an entire thing, and can not be set aside but *in toto*. Between these inconveniences the election is not difficult, and we are led without doubt to choose that which is confined to those persons, whose interests alone are concerned in the pending contest, and which may thus be kept distinct from those of all others. For these reasons the Court cannot concur in the conclusion to which Judge *Haywood* arrived in his note to *Ward v. Vickers,* and we agree in the judgment given by Judge *Johnston* in that case, though not precisely, as will be seen for his reasons. In support of the opinion entertained by us *Henry v. Ballard,* 4 N. C., 397, is in point. The probate of the will in the County Court was objected to, because the certificate did not state that it was proved to have been attested by two witnesses; but the will was thus proved on the trial of that action by two witnesses. The court held the will sufficiently proved, and admissible without reference to the certificate to the former probate.

The only doubt that can be raised upon this subject is suggested by the act of 1789 (Rev., ch. 308), which gives the issue and jury trial in all cases, as well of the wills of land as of testaments. But we do not think that a serious one. It so far modifies the law as to allow the heir and devisee to be parties to that issue, and doubtless those who are parties to it are bound as in other cases. It is made a mixed proceeding, partly partaking of the nature of one before the Ordinary, and partly of an action of ejectment, or issue out of chancery. Persons may take benefit by it who are not strictly parties to it, and they make themselves parties by intervening, if the expression may be allowed, that is by taking sides upon record, and they may be bound by being cited and not appear-
(448) ing, or by refusing to take either side upon appearance. Hence, the principal effect of the act is to render unnecessary the resort by the devisee to a Court of Equity, because in most cases the will can be conclusively established against the heir by one trial at law. But if the heir cannot be cited to appear at law, or, if as here, the case is in such a state that

the devisee cannot directly make up, at law, the issue of *devisavit vel non,* there seems to be no reason why he should not have the usual relief in equity to establish the will, while proof is in his power.

The question has been thus far considered in the most favorable manner for the petitioners; as if they were the devisees of the land. If that were the case, we think they could not succeed in this application, because they would have another remedy more appropriate to that right, and exclusively against those claiming in opposition to it, and unattended by consequences to the prejudice of third persons.

Upon the will before the Court, the petitioners are not devisees. It may be a question of some nicety whether the legal estate in the land is vested in the executors or trustees, or whether a power only is given to them, and that the land descended to the heir, Mrs. Redmond. We do not examine the point, because in either event it would not help the petitioners.

Unquestionably, a court of probate, as such, cannot regard secondary equitable interests arising out of a legal estate in land given in a will, as distinct from the legal estate itself, for the purpose of determining whether the proper persons have had notice. The question before such a court is, whether the paper is duly executed to pass the legal estate. It has no concern with the trusts upon which it is given, or the construction of the will, which must be enforced in this, as in other respects, in another court. If the trustee has violated his trust by misapplying the estate, or refusing to establish the will, or colluding with the heir, the *cestui que trust* must seek his redress against him and the party colluding, where his own rights are recognized, and can be enforced. (449)

If the land descended subject to a power, it is liable to the same observations. Those equitably entitled under the power must establish the will, and assert their equity as against the executors in chancery; where it may be, they may be compelled yet to execute the power, so as to try the legal title at law, or may be required to make good the loss to the petitioners, as the merits or demerits of their conduct may be made there to appear. But it would be absurd to say that the executor, whether the devisees of the land, or the depositories of a legal power, are not bound in respect either of their estate in, or authority over the land, by the verdict to which they were parties of record. If they are concluded, so we think upon all the principles applicable to trusts, the *cestui que trusts* must be as to all persons but the trustees themselves,

and their confederates, in a court of equity, and as to all persons in every other court.

The detail into which this discussion has gone, was deemed necessary from the novelty of the inquiries, and the extent to which the argument was carried at the bar. It is important that the subject of probate should be more generally understood, and particularly the effect of the rejection of a will, when offered by the executor, upon the rights of legatees and devisees respectively in our law, as modified by statutes. The Court has therefore thought it a duty to examine those questions minutely, that the grounds might be made plain, on which we feel bound to affirm the judgment of the Superior Court dismissing the petition.

PER CURIAM. Judgment affirmed.

Cited: Harvey v. Smith, 18 N. C., 191; *Edwards v. Edwards,* 25 N. C., 84; *Morgan v. Bass, Ib.,* 248; *St. John's Lodge v. Callender,* 26 N. C., 343; *Gash v. Johnson,* 28 N. C., 292; *Armstrong v. Baker,* 31 N. C., 112; *Leigh v. Smith,* 38 N. C., 448; *Crump v. Morgan, Ib.,* 99; *Etheridge v. Corprew,* 48 N. C., 19; *Wood v. Sawyer,* 61 N. C., 271; *Osborne v. Leak,* 89 N C., 435.

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(450)

WILLIAM H. GOODMAN, admr. of LEMUEL GOODMAN, v. EDWIN SMITH, admr. of HENRY COPELAND.

The fourth section of the act of 1789 (Rev., ch. 308), barring creditors of a decedent who do not bring their actions within two years after the qualification of the executor and administrator, is a defense as well to the next of kin as the personal representative, and the latter in pleading it need not aver that he has delivered the assets to the former and taken refunding bonds.

This was an action of DEBT upon a single bond executed by the intestate of the defendant, to the intestate of the plaintiff, dated 2 January, 1817, and payable one year thereafter.

The defendant pleaded that the action was not commenced within two years of the time when letters of administration issued to him. The plea did not contain an averment that the defendant had handed the assets of his intestate to the next of kin, and taken refunding bonds.

On the trial at GATES on the Fall Circuit of 1829, before *Daniel, J.,* the evidence upon the issue taken upon this plea, was, that the action was commenced on 30 March, 1829, that

letters of administration issued to the defendant at the November term of 1823 of Gates County court, that within two months thereafter he duly advertised his qualification as administrator at the courthouse, and at other public places in the county. The Superior Court of Gates sits on the first Monday after the fourth Monday of March, and the proof of the advertisement being posted at the courthouse during the term of that court next succeeding the grant of administration, consisted of the fact that it was thus posted before Christmas, 1823. Both the intestates resided in Gates County. It was contended by the counsel of the plaintiff that the plea and proof were defective, in that it was not averred or proved that the defendant had paid over the assets in his hands to the next of kin of the intestate, and taken the refunding bonds required by the second section of the act of 1789; and also that there was no proof of the defendant having advertised (451) at the *district* courthouse, during the term of the *District* Court next succeeding the grant of administration to him. His Honor ruled that it was not necessary for the defendant to aver or prove that he had paid the assets in his hands to the next of kin, and taken refunding bonds, and that since the passage of the act of 1806, establishing Superior Courts in each county of the State, the advertisement required by the act of 1789 to be made at the district courthouse, at the Superior Court next following the grant of administration, might be made at the courthouse of the county during the next Superior Court. His Honor left it to the jury to find whether there had been an advertisement at the courthouse in Gates County during the Spring Term, 1824, of the Superior Court, and a verdict being returned for the defendant, the plaintiff appealed.

Iredell for the plaintiff.
Badger for the defendant.

GASTON, J. The principal question presented to our consideration in this case is, whether an executor or administrator can plead, in bar of the action of a creditor, that he has not exhibited his demand within the time required by the fourth section of the act of 1789 (Rev., ch. 308), without an averment that the defendant has paid over all the assets remaining in his hands to the legatees, or to the next of kin, and has taken from them refunding bonds for the benefit of creditors, as directed by the second section of the same act.

The plaintiff contends for the necessity of this averment, and argues that the second, third, fourth and fifth sections of

this act are parts of an entire system devised for the purpose of securing to creditors the satisfaction of their just demands against the estates of deceased persons, and of providing a speedy and safe settlement between the representatives of such estates, and those entitled to the surplus after satisfaction of the creditors. That to carry this system into effectual execution, it is indispensable that all the provisions contained in these sections shall be construed with reference to each (452) other, and that it is clearly to be collected from a construction thus made that no protection was intended to be given to an executor or administrator against the demand of a creditor, unless he had performed the duty enjoined in the act of securing for the creditors the means of legal redress against the legatees, or next of kin of the deceased. The Court is always solicitous to give to a statute such an interpretation as is best calculated to carry into effect the intention of the Legislature, and for the purpose of ascertaining the intent of any provision in a statute, it will attentively consider every other provision, not only of that statute, but of all the laws on the same subject. Being declarations of the legislative will in regard to the same matter, the meaning of imperfect or obscure expressions in one part of the law may be frequently explained by reference to more exact or intelligible expressions in another part. But it is never to be forgotten that the words which profess to declare any *specific purpose* of the lawmakers, are the ordinary *signs* by which that purpose is indicated, and that when these are clear and intelligible, it is exceedingly perilous to overrule their import by resorting to words elsewhere used, and bearing directly upon some other, and but indirectly on this specific purpose. The immediate text, if unambiguous, furnishes the surest means of explication, and cannot be controlled by a context not more certain than itself. Though the whole of the law relates to one subject, yet this subject has its integral parts, and confusion and perplexity must be the unavoidable result of an interference among these parts where a separate action is assigned them. The first section of the act of 1789 is preceded by a preamble declaring its object to be the cure of those irregularities which had crept into practice, and of those precipitate and injurious decisions in relation to the probate of wills and granting letters of administration, that had arisen from the want of precision in the former laws, which directed the (453) method of proceeding with respect to such probates and grants. In its enactments this section is entirely confined to the remedy of these evils, and is no further connected

with the next, or with any other subsequent sections, than as all of them relate to the estates of deceased persons. The second section is preceded also by its appropriate preamble, from which we collect its purpose to be to speed creditors in the collection of their debts, and to facilitate the settlement of estates by executors or administrators. For this avowed purpose it directs that the executor or administrator, at the end of two years from his qualification, shall deliver over to the legatees, or next of kin entitled to distribution, whatever estate of the deceased may then remain in his hands, after deduction of his necessary charges and disbursements, and such debts as he shall have legally paid, taking bonds from those to whom such delivery over is made, with sufficient sureties, payable to the chairman of the court and his successors, and conditioned to refund ratably what has been thus received, to the payment of any debt or debts of the deceased which may be afterwards sued for and recovered, or otherwise duly made to appear; that these bonds shall inure to the sole use of the creditors, and that they shall have a *scire facias* against the obligors *in the manner* thereinafter directed. The fourth section has no preamble, and is evidently ancillary to the third, for it simply provides the manner in which this *scire facias* is to be had. It directs that the bonds so taken shall be returned to court, and made a record thereof, and that when an executor or administrator shall plead to the action of any creditor a full administration of the assets, or a want of assets to satisfy his claim, and such plea shall be found true, the creditor may ascertain his demand, and sign judgment, and then sue out a *scire facias* upon these refunding bonds, calling on the obligors to show cause why execution should not issue against their proper goods and chattels, for the amount of the judgment thus signed. Thus far the system seems sufficiently distinct. The executor or administrator at the end of the two years is to settle with those who may be entitled to the estate, after satisfaction of, or subject to the satisfaction of the creditors. On doing this he is to take refunding bonds for the benefit of creditors subsequently claiming, which he is to file in (454) court for their use, and which to that end become records of the court. Thus delivering over the assets, he may show a complete administration against any creditor who shall thereafter sue him, and upon his showing this, the creditor may ascertain his debt, have his judgment therefor, and sue out a *sci. fa.* upon these bonds to collect it. The executor has thus a simple and easy mode pointed out, by which he can settle the estate that has come to his hands, while an expeditious remedy is pro-

vided for the creditor against that property which ought to be liable to his demand.

The fourth section is introduced without preamble or recital. It enacts that the creditors of a deceased person residing within the State shall, within two years, and those residing out of the State shall, within three years from the qualification of the executor or administrator, make demand of their respective claims, and "if any creditor shall fail to demand and bring suit for the recovery of his debt, as above specified, within the time limited, he shall be forever debarred from the recovery of his debt in any court of law and equity, or before any justice of the peace within the State." It has two provisos—the one excepting infants, *femes covert,* etc., from the operation of this bar, provided they bring suit in one year after the removal of their respective disabilities—the other making an exception also for creditors delaying suit at the request of the executor or administrator. The fifth section is as evidently subsidiary to the fourth as the third was to the second. It begins with the preamble, "And in order that all creditors may be *duly* apprised of the death of any person indebted," and then proceeds to make it the duty of every executor and administrator, upon his qualification, to advertise, in the mode therein pointed out, for all persons to bring in their claims agreeably to the foregoing directions. The propriety of considering these two last sections as intimately connected with each other, and as forming together one provision seems to us evident. The first of them (455) makes the *laches* of a creditor in not preferring his claim within a prescribed time after the qualification of the executor or administrator, a bar to his recovery, while the other provides that the executor or administrator shall give the creditor public notice of such qualification. There is no such *laches* as the law contemplates, unless there be the notice which the law requires, and it would be obviously unreasonable for the executor to set up the delay of the creditor as a bar to his claim, when such delay may have been the consequence of his own omission of duty, in apprising him of the necessity to make his claim. The executor shall apprise the creditors of the time within which the claims must be preferred, and doing so he may plead this notification in bar to those creditors who shall disregard it.

But we perceive no such intimate connection between this part of the statute creating a bar against the recovery of the demands of defrauding creditors, and the former part making provision for the satisfaction of creditors who shall make recovery. We can see no cause why either shall be considered as

depending upon or regulating the other. They appear to us to be made *diverso intuitu,* and for different sets of creditors, the former for the benefit of the diligent, the latter for the punishment of the dilatory creditors. He whose claim is not barred has a right to satisfaction out of the assets of his deceased debtor, against the executor, if in his hands, or not legally paid over to the legatees, and against the legatees, not the executor, if delivered over to them in the manner prescribed by the act. He whose claim is barred by his own default has lost all right to satisfaction from these assets, whether in the hands of the executor, or lawfully delivered over to the legatees. To free the executor from *personal* liability to the former, it is enough to show that the assets have been delivered over, and refunding bonds taken. To *bar the action* of the latter it would seem to be sufficient to establish the *laches* which creates the bar. The successful creditor has no interest in the inquiry, whether proper advertisement has been made to protect the estate (456) against defaulting creditors, and the defaulting creditor has no interest in knowing whether adequate provision has been made for those who are not in default. The *former* cannot object to a plea of a proper administration of the assets, because advertisement has not been made for creditors to prefer their claims in due season, and the latter, it would seem, can as little object to the plea in bar, that refunding bonds had not been taken for those who are not barred.

It is insisted, however, on the part of the plaintiff that the executor or administrator is not bound to deliver over the remaining assets in his hands until the expiration of two years from the time of his qualification; that the same period is prescribed for the creditors within which to prefer their claims; that the bonds are to be for the benefit of the creditors who shall thereafter bring suits and recover, or whose debt shall be thereafter duly made to appear; and that these provisions show that the bar spoken of in the fourth section is not properly a bar to the action of the plaintiff, but a personal defense to the executor or administrator. The language used by the Legislature in declaring the effect of nonclaim by the creditor scarcely leaves room for construction. It is, "that such creditor shall be forever debarred from the *recovery of his debt,* in any court of law or equity."

It is scarcely possible to suppose that such terms could have been employed for the purpose of protecting an executor against personal liability who had faithfully administered the assets, and who by force of such administration was adequately protected, and therefore stood in no need of this additional shield.

An exposition so inconsistent with the obvious import of the words employed, and leading to a result so nugatory, cannot be admitted unless it be supported by irresistible argument. Is that which we are considering of this character? Two years is, indeed, the period at which the Legislature directs the representative of the deceased person to deliver over to those entitled under his will, or by the law, whatever remains of the estate, after payment of the debts which have been duly demanded; and the same period is assigned for the creditors—inhab-
(457) itants of the State—to make such demand. But infants, insane persons and *femes covert* are at liberty to prefer their demands after this period, and until the end of one year from the termination of their disabilities. Persons without the State, though under no disability, have three years within which to claim and sue. The Legislature directs the executor and administrator to settle with those whose claims are next in order to the demands of creditors, at the time when in general these may and ought to be satisfied. It protects him in doing so against such as may nevertheless be legally exhibited afterwards, while it secures to the creditors the means of payment, by requiring refunding bonds to be taken, and recorded for their benefit. It is well known that great doubts were once entertained by the profession whether this fourth section of the act of 1789 did not constructively operate a repeal of the seventh section of the act of 1715 (Rev., ch. 10), which forever barred *all* creditors of a deceased person, whether under disability or not under disability, whether bringing suit against the personal representatives, or against the heirs of the deceased, and whether advertisement had or had not been published, by a failure to make claim for seven years after the death of the debtor. The Federal Circuit Court of this district and the Supreme Court of the United States held that the act of 1789 did repeal the act of 1715; while the courts of this State held that both might and did stand in force. During this controversy, which so perplexed the profession and divided the tribunals of justice, this exposition of the fourth section, showing that in truth it created no *bar* to the creditor, but only gave a *personal* protection to the executor, that it prescribed no limitation to the action, but regulated the administration of the assets, was never urged, or, as we believe, thought of. Had it been admitted to be correct, all pretense for a conflict between the acts would have been at an end. The old act would not only have been reconcilable with the new, but could not have been regarded as within the purview of the new act. The two acts would be then distinct actions of legislative will upon different *cases*—the one barring the cred-

itor not claiming within seven years, the other securing to him so claiming an appropriate remedy.

We concur, therefore, in the opinion of the judge who presided on the trial of this cause in the Superior Court, (458) that it was not necessary for the defendant to aver in his plea, and of course not necessary for him to prove on the trial, that he had delivered over the assets to the next of kin, and taken refunding bonds.

Two other exceptions were taken by the plaintiff to the charge of the judge, and have been here assigned as errors. The last section of the act of 1789 requires, besides other notice for the creditors to bring in their demands within the prescribed time, "to advertise at the district courthouse, at the next district Superior Court of law and equity held for the district in which such county *may* be." The judge determined that, since the act of 1806, which substituted Superior Courts of law and equity for each county in the lieu and stead of Superior Courts for large districts embracing several counties, an advertisement at the courthouse of the county, at the next Superior Court of law and equity for that county, was a compliance with this requisition. We see no ground for exception to this instruction. The district Superior Court contemplated by the act was that district Superior Court which then existed. If a later law has abolished, the courts at which the advertisement by an older law was required to be made, so as to render a compliance with that injunction *impossible,* this change of legislation removes the injunction. When the law imposes a duty, the citizen must obey; when a subseqeunt law renders the performance of this duty impossible, the Legislature releases the obligation. *Lex neminem cogit ad impossibilia.* The Court, however, adopts the construction of the judge below, that the effect of the general substitution by the Legislature of county Superior Courts for district Superior Courts is to render the former the appropriate place for performing acts which were theretofore required to be done at the latter.

The remaining exception is to that part of the judge's (459) instruction which left it to the jury to decide upon the evidence of an advertisement at the Superior Court, after the qualification of the defendant. The term of this court was on the first week after the fourth Monday of March, 1824. The testimony offered was that of a witness, who declared that some time before Christmas, 1823, he saw the advertisement at the courthouse. This testimony seems to us so slight that, unsupported by any other circumstances, we should have little hesitation in pronouncing it insufficient to warrant the conclusion of

fact which the jury have drawn, were this a tribunal that had a right to set aside verdicts because of a finding on insufficient proof. But this jurisdiction is exclusively given to the court below. No application can be made here for a new trial because of a verdict there against evidence or without evidence, but solely for misdirection on a question of law. No specific instruction was prayed for on the subject of the admissibility, or of the effect of this evidence. To reverse the judgment we must see an error in law. The advertisement at the courthouse, *four* months before the Superior Court, was, perhaps, *some* evidence of an advertisement there at the court. It was evidence or not, and if evidence, weaker or stronger, according to circumstances with which the jury was familiar and which were, no doubt, known to *all* at the trial, but are not stated in the record—that is to say, accordingly as the advertisement was slightly or strongly attached to the courthouse, was on the inside or external wall of the building, whether the courthouse was in a town or in a thin neighborhood, was well or ill secured, or was much or little frequented in the vacations between the terms of the courts. Upon the whole, we do not feel ourselves authorized to say that there was *no* evidence to be left to the jury respecting the fact of an advertisement at the Superior Court. This exception, therefore, is also overruled.

As no sufficient reason has been shown for reversing the judgment rendered below in favor of the defendant, we are of opinion that it should be affirmed with costs.

PER CURIAM. Judgment affirmed.

Cited: Terrell v. Wiggins, 23 N. C., 173; *S. v. Gallimore,* 29 N. C., 148; *Reeves v. Bell,* 47 N. C., 254; *Cooper v. Cherry,* 53 N. C., 325; *S. v. Smallwood,* 78 N. C., 562; *Rogers v. Grant,* 88 N. C., 444; *S. v. Best,* 111 N. C., 643.

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(460)

NEAL W. HORTON v. SAMUEL CHILD.

Where a partner executed a bond in the name of the firm, and upon being informed it did not bind his partners took it back and, with the consent of the obligor, removed the seal and redelivered it with an intent to bind the company, it is effectual as their promissory note.

ASSUMPSIT, in which the plaintiff declared against the defendant, as a partner in the house of William D. Murphy & Co. in two counts:

1st. Upon a promissory note, dated 20 November, 1829, payable at twelve months, for $251.73.

2d. For goods, wares and merchandise, sold and delivered.

PLEA—*Non assumpsit.*

On the trial before *Norwood, J.*, at ORANGE, on the last circuit, the plaintiff produced, in support of the first count of his declaration, an instrument signed by William D. Murphey & Co., in all respects similar to that declared on, excepting that after the signature it had a scrawl and the word "seal" written within it, which had been erased by drawing a pen through it; and adduced testimony tending to prove that Murphey had declared that he executed the instrument as a bond, not knowing that one partner could not bind the firm by deed, and that in order to obviate this objection he had drawn a pen through the word "seal" written within the scrawl, and had handed the instrument to the plaintiff as the promissory note of the company.

The proof upon the second count in the declaration was perfectly clear.

For the defendant it was contended, 1st. That the instrument was a bond upon which this action could not be sustained; and that the question whether the instrument was a bond or a promissory note, was one which must be determined by the judge, upon inspection, and that parol proof could not alter its character.

2d. That if the instrument ever had been sealed, and the seal afterwards destroyed, the whole was annulled.

3. That although the jury might believe that the goods had been bought by the copartnership, yet that the simple contract which arose therefrom had been merged in the (461) specialty, and therefore this action could not be maintained.

His Honor declined deciding, upon inspection, whether the instrument was a deed or not, but submitted that question, upon the evidence, to the jury, informing them that if they should find that the scrawl made on it had originally been a seal, and that Murphey afterwards drew a pen through it with an intent to destroy it as a bond, and then delivered it as a promissory note of the firm, it was valid as a note. He also informed them that if the goods were purchased by the firm, the several bond of Murphey, given for their price, did not merge the debt as to the copartnership.

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

J. W. Norwood for the plaintiff.

Nash, Winston and W. A. Graham, contra.

DANIEL, J., after stating the case, proceeded as follows: If the instrument declared on in the first count had originally been the bond of Murphey, and he had, with the consent of the plaintiff, taken off the seal and then delivered the writing as a promissory note to pay a partnership debt, with the name of the firm signed to it, we can see no reason why it should not be good in law to bind all the partners of the firm. There is no evidence to show that the plaintiff took the sole bond of Murphey in payment of, or as a complete discharge of the debt due from the firm, the circumstance of the name of the firm having been originally signed to the paper, negatives any inference that the plaintiff meant to look to Murphey alone for the payment of the debt. Whether the instrument is in the form of a deed, is certainly a question of law, and must be decided by the court. Usually the court can determine by inspection whether the instrument be or be not a deed; but if it be doubtful whether that which hath the resemblance of a seal, be in truth such, or whether the seal has been destroyed, or if destroyed, whether such destruction was designed or accidental, the judg-
(462) ment of the court must then depend on facts not discernible by inspection, and of course these facts must be found by the proper tribunal, the jury. Cancellation or destruction is an equivocal act, and depends on how much is done, and the *quo animo* with which it was done. There must be an act accompanied with an intention. If the intention be to destroy, and the whole act be done, which was intended as an act of destruction, there is a cancellation or destruction, although a part of the thing remains. But if the act done be not all that was intended to be done for that purpose, then is the attempted destruction wholly ineffectual. *Windsor v. Pratt,* 6 Eng. C. L., 299; *Perkes v. Perkes,* 5 *Ib.,* 353; *Bibb v. Thomas,* 2 *Black.,* 1043. The circumstance that the scrawl which surrounded the seal now appears untouched by the obliteration, did not in law prevent that act from being a destruction of the seal, and of course a cancellation of the bond of Murphey. Suppose, in this case, instead of a scrawl surrounding the word "seal," there had been a distinct impression of wax affixed to the paper as the seal of Murphey, and it had been agreed by him and the plaintiff that the seal should be torn away and the paper redelivered as a promissory note, and in the act of destroying the seal a minute portion of the wax had still adhered to the paper, can it be doubted that, these facts being ascertained, the instrument would be declared no longer a deed? We think that the judge acted correctly in refusing to decide upon inspection whether the instrument was a deed or not, and in leaving the evidence

of the disputed facts connected with the alleged destruction of the seal to the jury, and in the instructions which he gave, respecting the operation of the law upon the facts, as the jury should find them to be. The jury found in favor of the plaintiff on both counts in the declaration.

It has been contended here, though not with much earnestness, that the simple contract arising upon the sale of the goods had been merged in the specialty which had been given by Murphey, and that the action of assumpsit could not now be maintained, and that the plaintiff should not have (463) been permitted to recover on the second count. The principle is certainly correct, that when a person indebted by simple contract gives a bond for that debt, the simple contract is merged in the specialty, which is an instrument of higher dignity, in the eye of the law. But it is perfectly settled that the giving of a bond by one copartner for a debt of the firm does not extinguish the original debt as to any other copartner. The bond merges the simple contract only as to him whom it binds, and a partner cannot by deed bind others beside himself. *Spear v. Gillett,* 16 N. C., 466; Gow., 76. We therefore are of opinion that the judgment should be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Willis v. Hill, 19 N. C., 232; *Fisher v. Pender,* 52 N. C., 484.

THE BUNCOMBE TURNPIKE COMPANY v. SAMUEL NEWLAND.

A carriage used for the transportation of the mail and of passengers is a pleasure carriage within the act of 1824 (Rev., ch. 1258), incorporating the Buncombe Turnpike Company, and subject to a toll of $2.50.

ASSUMPSIT, "in which the plaintiffs declared against the defendant as the contractor or owner of the mail stage, for tolls alleged to be due for the passage of the said stage along the Turnpike Road. But the court, *Strange, J.,* being of opinion that the plaintiffs were not authorized by the terms of their charter to charge any toll for mail stages, and there being no evidence of any special agreement, nonsuited the plaintiffs, who appealed."

The following is a copy of that section of the act of incorporation which authorizes the collection of tolls:

"And it shall and may be lawful for the president and directors, during the said term, to demand and receive at some convenient toll gates, to be by them erected, the following
(464) tolls, to wit: On every four-wheel carriage, two dollars and fifty cents; on every gig or sulkey, one dollar; on every six-horse wagon, two dollars and fifty cents; on every four-horse road wagon, two dollars; on every three or two ditto, one dollar and fifty cents; on every peddler's cart, one dollar and fifty cents; on every road cart, fifty cents."

The *Attorney-General* for the plaintiffs.
No counsel appeared for the defendants.

RUFFIN, C. J. This is a case so shortly and imperfectly stated, that we are not certain that the only point presented is really the only one which it was intended to present. As the record speaks, the single question is, whether by the terms of the charter, the plaintiffs can recover in this action a toll on a carriage belonging to the defendant which is called a *mail stage*.

There might possibly be a question whether a carriage engaged in the service of transporting the mail is not privileged. Although not made on the trial, if it were clear for the defendant, it would be useless to send the case back to a new trial, and the judgment might be affirmed as it ought to be on the whole record. Supposing, however, that the United States can use any road established by Congress as a post road, yet the use by persons employed in a particular civil service must be deemed to be intended to be on the terms prescribed to all persons, unless the law under which it is performed declares the contrary. We have found no act of Congress exempting persons or carriages engaged in the business of the post office from the payment of tolls for passing ferries, bridges or roads. As such tolls are granted as the price of constructing and repair-
(465) ing those public accommodations, and are necessary for those purposes, and to no establishment are such facilities more indispensable than to the post office itself, it is probable that no such act ever has been or ever will be passed. Without a statute, no exemption can be inferred or allowed. It may be true that the progress of the mail cannot be arrested by distraining the carriage or horses for the tolls, although private property. That, however, only affects that particular remedy. The question recurs, whether the owner, being a private person and transporting the mail under contract, be not liable for the tolls, to be recovered by action, like any other debt contracted by him. Upon that we see no reason to doubt until the con-

trary, if it can be, shall have been enacted. In truth, however, the Court does not consider that question open upon the record. It does not appear, even, that the defendant was transporting the mail, or was otherwise actually engaged in the public service, at the times of passing the road; and the decision was confined to the other point, namely, the construction of the statute of this State. Upon that, this Court does not concur with his Honor, and must therefore award a new trial.

The act of incorporation gives a toll on every four-wheel carriage of pleasure, of $2.50; on every gig and sulkey, on every six-horse wagon, four-horse wagon, two-hourse wagon, peddler's cart and road cart, the several sums mentioned in it. In the enumeration, "mail stages," or any other carriage transporting the mail, are not included by specific name and as a distinct class of vehicles. On this ground the decision seems to have been founded.

The construction is very strict, and can only be sustained by regarding the road as primarily a public highway, and the grant of tolls as an invasion of the prior and common right of the citizen. This seems to us not to be the proper principle of construction. It is true, the road is a highway, but not a common and free highway. It was constructed by the plaintiffs at their own expense, and is to be kept in repair by them for a long period under heavy penalties. As a compensation for their services, and as a reimbursement of their expendi- (466) tures, the tolls are granted. It is also true that only such tolls can be exacted as are granted. But in ascertaining the extent of the grant, the words are to receive a fair interpretation, according to the meaning of the Legislature, and the sense in which they are commonly understood. It is not to be presumed that passage to any person or thing was intended to be toll free, unless either there be a special exception, or they cannot reasonably be brought within the meaning of general terms descriptive of the subjects made liable to tolls. The presumption, especially when only general terms are used, is the other way—that everything which those terms will include shall pay the toll. The owners of the road have a fair right to remuneration from all who derive a benefit from their labor. Besides, by another section of this act, the annual profit is limited, so that the exemption of particular persons may operate as a burden on the rest of the community, which is not to be favored or implied.

Here only a very general description is found: *carriages of pleasure,* for instance, embrace a great variety of kinds known by different names. If the vehicle in question be of the charac-

ter of any of those mentioned in the act as four-wheeled carriages of pleasure, gigs, sulkies, or any of the several sorts of wagons or carts, it is, in our opinion, within the act, although the Legislature did not descend so far into particulars as to call it a stage or a mail stage.

The case does not set forth its construction as to the number of wheels, or as to its adaptation to such uses as contradistinguish a carriage of pleasure from one of burthen, so as to enable us to determine the particular toll chargeable on it. Indeed, it does not seem that the plaintiffs reached that part of their case, as the court, as we understand, ruled that whatever might be the construction, the case was for the defendant, because the act did not expressly mention a mail stage. If it be included among and under any of the terms used according to the true construction of the act, the judgment is erro-
(467) neous. We think it certain that it must come within one or other of the descriptions, although for the reasons stated we cannot tell which. If a "stage" or "mail stage" had been used, it would not have been a proper term, for it is not descriptive of any species of carriage, but of a particular use and mode of traveling of every species. A *stage coach* or *stage wagon,* does not mean a particular kind of coach or wagon, but that the coach or wagon of any kind journeys at regular periods from one point, post or *stage,* to another. We cannot give our opinion conclusively as to the character of the vehicle in question, but as it may enable the parties to conclude their controversy by another trial below, without again bringing the case here, we consider it our duty to express what we clearly think is the construction of the charter. Under the terms of the statute the vehicles are to be understood, as those on the one hand, which are of the construction ordinary and proper, and which are commonly used for the transportation of produce, merchandise, and other heavy burthens on roads and farms; and on the other, those used for the transportation of persons and their traveling baggage, and constructed with a view to such transportation in a speedy and comfortable manner, after the general form and workmanship bestowed on carriages in which persons are usually transported. From our knowledge of the carriages commonly employed as mail coaches, under contracts, including the transportation both of the mail and passengers, we should not doubt that this vehicle is subject to the toll as a carriage of pleasure.

PER CURIAM. Judgment reversed.

(468)

THOMAS J. HAMPTON *et ux.* v. JOSHUA WILSON.

The repetition of a slanderous report is actionable, and the defendant can not justify by proving the existence of the report without also proving it to be true.

Per RUFFIN, C. J., *arguendo.* The rule that one who repeats a slanderous report, and gives the name of his author, may justify by pleading that fact, has been doubted, and must depend upon the intent with which the report and the name of the author are mentioned. It *seems* that it does not obtain in actions for libels.

CASE for slanderous words spoken of the *feme* plaintiff before her marriage. PLEAS, *not guilty, and a justification.*

On the trial before *Strange, J.,* at LINCOLN, on the last circuit, the evidence was that the defendant had said that it was reported the *feme* plaintiff was incontinent. The defendant offered proof of the existence of such a report, but of no fact or circumstance in any way impeaching her character.

His Honor charged the jury that if there was such a report in circulation, it could not avail the defendant upon his special plea justifying the words. A verdict was returned for the plaintiff, and the defendant appealed.

The case was submitted without argument, by *Badger* for the defendant, and *Devereux & Pearson* for the plaintiffs.

RUFFIN, C. J. The only question in this case is whether the defendant's plea of justification is a bar, without an averment in it, and proof that the report propagated by the defendant was true in fact. The learned judge held that it was not, unless the matter was true as reported, and the defendant excepted to his opinion.

The case of the *Earl of Northampton* (12 Rep., 132) is the leading authority upon this subject. It is there laid down, that in slander of a private person, if J. S. publish that he hath heard J. W. say that J. S. was a thief, if the truth be such, he may justify. But if J. S. publish that he hath heard generally, without a certain author, that J. S. was a (469) thief, then an action lies against J. S., although in truth he might have heard those words, for this, that he hath not given to the party grieved any cause of action against any but himself. It is believed that the position of Lord *Coke,* which bears upon the present question, has never been doubted, but has been deemed settled law ever since. The first of those rules has indeed been several times questioned and with apparent reason, but the grounds on which the correctness of that has been scru-

pled, serve but to confirm the latter, and evince entire satisfaction with it. Indeed, it would seem impossible to assent to the first proposition, to the extent of its terms, without some qualification. For it cannot be denied that the repetition of a slander may in fact be highly detrimental, and it is easy to imagine, nay, it is the natural inference from the act, that the reception of slanderous words, even as those of another, vouched at the time, may be upon the intent to circulate the scandal and cause it to be believed; and such intent and effect are apparently injurious. Yet the rule taken literally, denies redress by allowing the repeater to justify by a plea which avers only the truth of *his* words, without also averring the truth of those of his informer, thereby putting in issue the imputed guilt of the plaintiff, or that the repetition was upon an occasion shown in the plea to be necessary and innocent, thereby rebutting the bad motive implied. This would be to establish the privilege of circulating, under the name of another, a false charge, although the party knew it to be false, and withheld that circumstance. Again: Suppose one to say, "A told me that B was a thief, and desired me to tell all I should see that he said so," and he accordingly makes it his business to publish it in the words and upon the authority of A. It is obvious, that in intention and by his actions, he gives the accusation his own sanction; and in point of fact, may injure the accused as much as if he professed to affirm what he merely declares another to have affirmed, and perhaps more, as in effect, there are two accusers instead of one—since all will ask, why
(470) so anxiously publish the words, if he does not believe them. Yet, in words, the propagator expresses no opinion, belief or accusation of his own, so as to render him liable to an action, if the truth of his words merely will justify them. Such a doctrine is against good morals, and would destroy the peace of society. He who publishes slanderous words even as those of a third person with the intent (to be collected from the mode, extent and circumstances of the publication), that the charges should be believed, does an injury in fact to the person slandered and ought to answer for it. Without undertaking to settle the mode of pleading, we consider it safe to say, that as a plea in bar by itself, the justification is not in all cases complete, merely upon the allegation that he did hear from A the words which he repeated as those of A; but that the truth of the charge, the circumstances of the publication, the motives of the propagator do enter materially into the questions of injury to the plaintiff, and of the defendant's responsibility therefor. To that extent it must be understood

that Lord *Coke* meant his words to be modified. The justification does not consist merely in the facts, that the defendant heard the words and gave up his author; for that gives him no right to repeat them, if false, especially if he knew them to be false, and with intent to cause the guilt of the plaintiff to be believed. Such conduct makes him the endorser of the slander, and gives the party grieved a recourse against him, or the author, or both. It has been strongly intimated that the broad doctrine of Lord *Coke* as applicable to libels, is altogether inadmissible. *Lewis v. Walter,* 6 Eng. C. L., 535, and *Dole v. Lyon,* 10 John., 447, were cases where the defendants, the editors of newspapers, sought to justify by the allegation that they copied the publication from another newspaper, which they named as the authority. But the Court thought that if the original publisher had been designated instead of his journal, it did form a bar, by reason of the motive which ought to be the subject of inquiry by the jury, and the mischievous consequences of an enlarged publication. Indeed there is a familiar case from which it is apparent (471) that the printer is neither justified or excused by rendering the author. I mean an original libelous publication made as a communication with the author's name to it—certainly both the writer, and the printer are liable for the latter aids in scattering the firebrands, and every printing of the scandal is a new publication.

In principle, I do not perceive a difference between oral and written slander in this respect. The injury is the same in its nature, though it may not be in degree. It is remarkable, too, that, although the first part of the rule found in the *Earl of Northampton's* case, is often mentioned in reports and treatises, yet no adjudication is found, which directly affirms it, but in each instance, where it came under discussion, it is denied to be true in its utmost latitude or doubted, and the case then under consideration distinguished out of it.

Certainly then we are not at liberty to adopt that as a substitute for the latter part of the proposition, but are bound to receive and sustain in its integrity the latter rule itself, in all cases which fall within it. If we did not, a person slandered might lose the whole benefit of this action. He could neither recover past damages, nor re-instate his character. Everyone might alike justify upon common report, and the plaintiff could not put the fact, constituting his imputed guilt, in issue in any suit, which he could possibly bring.

Upon the matter of the exception, therefore, this Court con-

curs in the opinion of his Honor, and no other error is perceived in the record, of which the defendant can complain.

PER CURIAM. Judgment affirmed.

Cited: McBrayer v. Hill, 26 N. C., 138; *S. v. White,* 29 N. C., 182; *Johnston v. Lance, Ib.,* 455; *S. v. Hinson,* 103 N. C., 376.

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(472)

GOVERNOR upon the relation of AQUILLA OXLEY and others v. ISAAC C. FREEMAN.

Where one residuary legatee who had hired a slave, part of the residue, from the executor for a year, sold him tortiously, in the pretence of a joint legatee who did not disclose his title, the executor cannot maintain trover against the latter.

This was an action of DEBT upon the bond given by the defendant, to secure the discharge of his duty as administrator with the will annexed of William Rayner. The breach assigned was, that the defendant had not accounted to the relators, who were some of the residuary legatees of Rayner, for a negro slave named General, who was of the assets of his testator, and who had come to his possession.

The defendant pleaded *performance,* and upon the issue presented by that plea, the cause was tried before *Martin, J.,* at BERTIE, on the last circuit, when the following facts appeared in the evidence:

The defendant had hired the slave to Amos Doughtry, one of the residuary legatees of his testator, for a year; that during that year Doughtry had sold the slave to one Reddick, who had removed him out of the State. That the defendant had immediately commenced actions against Doughtry and Reddick, and had recovered judgment for the full value of the slave, but had not been able to procure satisfaction, because of their insolvency. That when the sale to Reddick was made, John and Daniel Doughtry, brothers of Amos, and also residuary legatees of Rayner, were present, and did not object to it. That William Doughtry, another brother, and also a residuary legatee, having heard of the intended sale the day before it was made, had advised Reddick against it, but after it had taken place had seen Reddick in the possession of the slave, and was present when the latter had carried him out of the county; and had taken no steps to prevent it, neither did he then object

to the sale made by his brother. It was in proof that William and Daniel Doughtry were solvent, and for the relators it was contended that John, Daniel and William by (473) being present at the sale to Reddick, and not objecting to it, or by permitting the slave to be removed, had made themselves equally liable with Amos to the plaintiff for the conversion, and that he had not brought actions against them, he was liable to the relators for the value of the slave.

His Honor instructed the jury that when persons having a title to property were present at the sale thereof, either by a joint owner or by a person who had no title, it was presumptive evidence of an assent to the sale. That if a person after objecting to a sale of property to which he had title, was shortly thereafter to see the property in the act of being removed by the purchasers, under circumstances which enabled him to make known his dissent to the sale, and he neglected to do so, that his assent to it might be inferred from these facts, and that if an assent by John, Daniel or Wm. Doughtry to the sale made by Amos was inferred by the jury, then they were liable for the conversion, and the defendant should have taken steps to subject them.

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

No counsel appeared for either party.

DANIEL, J. The plaintiff was permitted to recover in this case on the ground that the defendant might, by an action of trover against John, William and Daniel Doughtry, have recovered the value of the slave General from all or some one of them, and that he negligently omitted to bring such action, whereby the price of said slave has been lost to the relators. The question presented is, could he have recovered if he had brought such an action? In trover, the conversion of the property is the *gist* of the action, and in general, evidence of some tortious act as essential to a conversion. What will amount to a conversion when proved, is a question of law. In this case it was in evidence that Amos Doughtry, who had hired the slave of the defendant for the term of one year, sold the said slave out and out to Reddick, and that John and Daniel Doughtry, his brothers, who had some equitable interest in the slave, were present at the time and place (474) of sale, but they neither said nor did anything relative to the transaction. William was not present at the sale, but had knowledge that Reddick was about to carry the slave away,

and did not forbid nor prevent his doing it. Amos having the legal estate in the slave for the year, had, of course, the whole control and management of him for that space of time, John and Daniel being present at the absolute sale of the slave, and neither saying nor doing anything, was evidence either of an admission that they had no title to the slave, or a relinquishment of such title as they might have. An acquiescence and endurance, when acts are done by another which, if wrongfully done, are encroachments, and call for resistance and opposition, are evidence as a tacit admission that such acts could not legally be resisted (2 Starkie, 37, 38). A sale of property by one who has no title, in the presence of the owner, without objection on his part, has been said to estop the latter from impeaching the transaction on the ground of his better title, *Bird v. Benton,* 13 N. C., 179. Perhaps the more accurate phrase would be, that this conduct is strong evidence of a waiver of such title. But whether it amounts to a technical estoppel, or to a virtual relinquishment, we know of no rule of law which declares that the bare presence of a person, neither doing nor saying anything when another person does an illegal act, makes, of itself, the former a confederate in the illegal act so done by the latter. The owner being present when a sale of his property is made by another, if he makes no objection, and fails to disclose his title, may rightfully be precluded from setting it up afterwards. But the law does not go further, and from that circumstance declare that he makes the sale, particularly if that sale is to be held a tortious and illegal act, as relating to the rights of third and absent persons. We think, from the case stated, that the defendant could not have recovered the value of the slave from either of the three brothers of Amos Doughtry, and that a new trial must be granted.

PER CURIAM. Judgment reversed.

Cited: West v. Tilghman, 31 N. C., 165; *Lamb v. Goodwin,* 32 N. C., 322.

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(475)

ALEXANDER GRAY and others v. GEORGE HOOVER.

The act of 1777 (Rev., ch. 115, sec. 69) makes the sheriff special bail when he neglects to return a bail bond, and to charge him as such no notice to him of his liability is necessary.

SCIRE FACIAS against the defendant, the sheriff of Randolph, seeking to charge him as special bail of one Joshua Cox, whom

he had arrested, and discharged without taking bail. The *sci. fa.* set forth the judgment in favor of the plaintiff against Cox, the fact that it remained unsatisfied, and that the sheriff had not returned a bail bond with the writ, but it did not set forth the issuing of a *ca. sa.* against Cox, and a return of *non est inventus.*

PLEA—1st. *Nul tiel record.* 2d. That at the return term of the writ against Cox, no exception for want of bail was taken by the plaintiffs, and no notice given to the defendant to justify, or that he was held to be responsible as bail.

The plaintiffs took issue on the first plea, and demurred generally to the second. *Norwood, J.,* at RANDOLPH, on the last circuit sustained the demurrer, and the issue in fact being found for the plaintiffs, judgment was entered according to the *sci. fa.,* and the defendant appealed.

Winston and *Mendenhall* for the defendant, in this Court moved in arrest of judgment, because the *sci. fa.* did not aver the issuing of a *ca. sa.* and a return of *non est inventus.*

Nash for the plaintiffs.

DANIEL, J., after stating the case as above, proceeded: The defendant contends that the plaintiff's demurrer to his special plea should have been overruled, because, he says, section 79, ch. 2, *Laws 1777 (Rev., ch. 115) subjects the sheriff as special bail only on certain conditions, one of which is that when he shall arrest any person on a bailable writ, and shall fail to take a bail bond and return the same with the writ, then he shall be held, and deemed special bail on the plaintiffs' giving him notice that he looked to him and considered him (476) special bail; otherwise he is not special bail.

We cannot give such a construction to that section as the defendant contends for. The section contemplates making the sheriff special bail in two cases: first, when he has not taken any bail bond; secondly, when he has taken insufficient bail, and exception shall be taken thereto the same term the writ is returnable, and notice given that term to the sheriff to justify, and he does not justify, then he becomes special bail. When the sheriff fails to take any bail bond, he is special bail himself, without any other notice than that which he receives from the law. There is a *proviso* which enables the defendant to put in new bail before the time given him to plead has expired, and then the sheriff is discharged, and also authorizing the sheriff to surrender in discharge of himself. When the sheriff

*24 State Records, 69.

has not taken any bail bond, he is not entitled to any notice from the plaintiff in order to subject him as bail. This point has been decided by this Court after an objection similar to the one now made. *Governor v. Jones,* 9 N. C., 363. We think the demurrer was properly sustained by the court.

Secondly. The defendant in this Court moves in arrest of judgment, because the *scire facias* does not recite that a *ca. sa.* had issued on the judgment, and had been returned *non est inventus.* He contends that, as the act of Assembly expressly requires a *ca. sa.* shall issue and be returned before a *scire facias* shall go against the bail, it is necessary that it should be recited in the *scire facias.*

In England, the *scire facias* only recites the recognizance of bail and the judgment against the principal, and that he has not paid it or rendered himself; it does not recite the *ca. sa.* or the return of *non est inventus.* Archb. Appdx., 253, 554. If the *ca. sa.* has not issued, or has not been returned *non est inventus,* the defendant must take advantage of the omission by a special plea. Lutw., 1825, 1 Archb. Prac. B. K., 319; *Philpot v. Manuel,* 16 Eng. C. L., 244. He cannot take the objection on the plea of *nul tiel record,* for that refers only to
(477) the record of the judgment. *Handy v. Richardson,* 3 N. C., 138. In England, the practice is to issue the *ca. sa.* and lodge it in the sheriff's office, where it must be the four last days exclusively before the return. The sheriff then returns *non est inventus* as a matter of course, without making any attempt to arrest the defendant, the *ca. sa.* being intended merely as a notice to the bail of the plaintiff's intentions to proceed against them. *Hunt v. Cox,* 3 Bur., 360; Archb. P., 320. The act of 1777, which requires that a *ca. sa.* shall issue against the principal, and be returned *non est inventus* before a *scire facias* shall issue against the bail, is to be considered only as re-enacting the rule and practice in the English courts, with this exception, that the sheriff must make a diligent effort to execute the *ca. sa.* It has been determined in this State that it is not necessary to recite the *ca. sa.* against the principal in a *scire facias* against the bail. *Langdon v. Troy,* 3 N. C., 15; *Arrenton v. Jordan,* 11 N. C., 98. We are of the opinion that the motion in arrest of judgment should be overruled, and that the judgment of the Superior Court should be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Trice v. Turrentine, 32 N. C., 551.

JAMES M. OTT v. JAMES M. GRICE and others.

Where a house under lease is pulled down by a trespasser, the owner can maintain a case for the injury done to the freehold, and is in law entitled to recover damages, the amount of which depends upon the circumstances of the case.

CASE for an injury done to the plaintiff's reversionary estate in a house and lot in Elizabeth City.

PLEA—*not guilty.*

On the trial before *Martin, J.*, at PASQUOTANK, on the last circuit, the case was that the plaintiff had title to the premises, which were leased out by the month; that the house was old, but not dangerous to persons passing by it, and that the defendants had in the night pulled down a shed attached to it, injured the chimney, and torn off some (478) of the weatherboards. The defendants attempted to show that the house was worthless, and succeeded in proving that the rent for the ground alone would be worth more than that which the plaintiff obtained for both the house and ground. But it appeared very clearly that the house would have stood for two years without repair, and that during that time the plaintiff might have leased it for two dollars a month.

His Honor informed the jury that if the defendants had done a permanent injury to the freehold, which rendered it less valuable to the plaintiff, they ought to find for her; but if no such injury had been done, they ought to find for the defendants.

The jury rendered a verdict for the defendants, and the plaintiff appealed.

Iredell for the plaintiff.

Kinney for the defendants.

DANIEL, J., after stating the evidence and charge as above, proceeded: The law authorizes the reversioner to maintain an action on the case, and to recover damages for an injury done, if the injury was sufficient to prejudice his interest in the reversionary estate, or for any act injurious to the reversion. 1 Chit. Plead., 51, 142. The charge "that if there had been a *permanent injury* to the freehold," explained by saying "an injury which rendered it less valuable to the owner of the freehold, the plaintiff might recover." was a charge not in the main erroneous. But when considered in reference to the testimony before the jury, and the points contested by the parties,

we think it erroneous as tending to mislead the jury. The plaintiff was entitled to recover if her reversionary interest had sustained any injury. If the evidence given on the trial was true, even that evidence only which the witness for the defendants gave, still the plaintiff was in law entitled to recover. We think that the plaintiff (the reversioner) had a right to have the house and lot of land in such a plight (479) and condition as she thought proper or fit to put them in herself, or caused to be put or placed in by others, provided that neither the public nor other persons were injured thereby. And we think that it is no answer to an action brought by a reversioner for an injury to the inheritance for the defendant to say, "To be sure, I pulled down your house, I cut down your grove, or I destroyed your forest of timber; but your lands will rent for as much or more now than they did before the act was done." If a tenantable house containing a tenant rendering rent is torn down or dilapidated, so as to render it untenable, this act, in law, is such an injury to the reversionary estate as to enable the owner thereof to maintain an action on the case to recover damages. We think the judge should have told the jury that if they believed the evidence, then the plaintiff was in law entitled to recover some damages, and that the only thing for them thereafter to do would be to assess the amount. Upon the whole case, we think the judgment must be reversed and a new trial granted.

PER CURIAM. Judgment reversed.

HARDY BRYAN v. JOHN WASHINGTON and others.

The act of 1820 (Rev., ch. 1045), and of 1829, ch. 32, do not give justices of the peace jurisdiction beyond sixty dollars, except when the debt is secured by a bond or note, or a liquidated account, and an attachment founded upon two former judgments for a sum exceeding that amount is void, and is not a justification to an officer acting under it.

TRESPASS, for seizing and taking out of the possession of the plaintiff three slaves.

The defendants justified under process against one Sears Bryan, whose property they contended the slaves were. Upon his plea the following facts were in evidence: The process was an attachment, dated 13 April, 1833, upon two judgments in favor of the defendant Washington, each for $46.50, which were dated 9 June, 1813, and returnable before a justice of

the peace. The plaintiff contended that a justice had no jurisdiction of a debt for a sum exceeding sixty dollars, unless secured by bond, note or liquidated account; and as (480) both the judgments were included in the attachment, it was void, and did not justify either of the defendants. The presiding judge being of that opinion, a verdict was returned for the plaintiff, and the defendant appealed.

Mordecai for the plaintiff.
J. H. Bryan contra.

DANIEL, J., after stating the case as above, proceeded: By the act of 1803 (Rev., ch. 627), a single justice of the peace has jurisdiction of all debts and demands of £30 and under, of such things as are specified in the act, and among the demands specified is that of a judgment which may have been granted by a single justice, and no execution issued on the same for twelve months. In the case before the Court, the justice has taken jurisdiction of a demand of $93, made up by joining two justices' judgments (each of which singly was within the jurisdiction of the magistrate) in the same attachment. The justice had no jurisdiction, in our opinon, to issue an attachment returnable before himself, and to render a judgment for the sum of $93, unless the same had been due by bond, note, or signed account as mentioned in Laws 1820 (Rev., ch. 1045) and 1829, ch. 32. Only in these three cases has the law given a justice of the peace jurisdiction of debts or demands beyond the sum of thirty pounds. And as the Legislature has been so particular as to make an express enumeration of the description of cases where the jurisdiction of a justice should be raised above thirty pounds, we think that all nonenumerated cases were intended to be excluded. We do not feel ourselves authorized to add another case to the list, although it is one strongly within the reason of the Legislature or making out the three enumerated cases. The magistrate, therefore, having no jurisdiction in this, the attachment and proceedings under it were void, and could be no justification to the (481) defendants in taking the slaves from the possession of the plaintiff. We do not mean to be understood as declaring that a judgment rendered in a case clearly within the jurisdiction of a justice when signed, will be out of his jurisdiction if the growing interest shall make the demand above £30 after twelve months shall have elapsed from the date of the judgment. We think a warrant may be brought before the justice of the peace, and the plaintiff may declare on his old judg-

ment, although the principal and interest may amount to more than £30. It is a jurisdiction incidental to and necessarily growing out of that which authorized him to give the first judgment and enforce its payment—it permits him to complete that which he had a right to begin. The second warrant on the old judgment is in the nature of a *scire facias* to revive it, and is cognizable before the magistrate. But the plaintiff has no right to join several old judgments, although each singly is within the jurisdiction of a justice so as to warrant for and recover a sum exceeding £30, by means of such consolidation. We are of opinion that the judgment rendered in the Superior Court should be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Morgan v. Allen, 27 N. C., 159.

SARAH BROOKS v. SPARKMAN BRITT.

A swamp is a natural boundary, and if a deed calls for one, the course and distance must be disregarded. But in such a call, whether the margin of the swamp or the run of it is intended, is a matter of fact which is, upon the evidence offered, to be found by the jury.

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

PLEA—*not guilty.*

There were several points made in the case which it is not necessary to state, the only one discussed in this Court (482) being the following: The defendant claimed under a patent which described the land thereby granted as "lying on the northeast side of Swift Creek Swamp, on the east prong of said creek, beginning in the said swamp on Earl Granville's line, running with said line east ninety-six poles to a pine; thence south forty degrees east four hundred poles; thence west to the said swamp, then up the said Swift Creek Swamp with the windings thereof to the first station." His Honor informed the jury that where a natural boundary was called for in a grant, the course and distance were disregarded and the line was extended to the natural boundary—that a swamp was a natural boundary, and that if there was a certain and known channel for the water of the swamp to run in, the call in the defendant's deed went to the said swamp, and should be extended to that channel without

regard to course or distance. A verdict was returned for the defendant, and the plaintiff appealed.

Mordecai for the plaintiff.
The Attorney-General for the defendant.

GASTON, J. We have not the right to examine nor the disposition to inquire whether the verdict of the jury be correct or incorrect. Our duty confines us to the propriety of the instructions which were given by the judge, and which have been excepted to by the appellant. Although in the main we approve of these instructions, we think there is one error in them which may have had a material influence upon the jury, and which requires that the judgment be reversed and a new trial awarded.

The matter in controversy depended upon the ascertainment of the boundary of the defendant's grant. This was described as "lying on the northeast side of Swift Creek Swamp, or the east prong of said creek, beginning *in* the said swamp, on Earl Granville's line, running with said line, east ninety-six poles to a pine; thence south 40 degrees east four hundred poles; then west *to* the said swamp; then up the said Swift Creek Swamp with the windings thereof to the first station." (483) His Honor was unquestionably correct in laying it down as a principle in law, that the swamp was a natural object more certain, and therefore more worthy of reliance than the distances called for in the grant; that this swamp was in law a boundary of the patent, and that the defendant's grant must be extended to it, if the distances would not reach, and restrained by it, if these distances overreached it. But we are of opinion that he erred in pronouncing that if there was a certain and known channel for the water to run in said swamp, the call of the grant was for that run. Whether the run in the boggy and sunken land, or the margin of such boggy and sunken land, was the call of the grant, depended upon facts fit to be proved, and proper to be passed upon by the jury. If, when the grant issued, the low grounds were known as the Swift Creek Swamp, and the run or channel was not termed the swamp, but had another appellation, such as Swift Creek, or east prong, or any other distinctive name, then the call of the grant was for those low grounds, and not for the run. If, on the contrary, the run was then known as Swift Creek Swamp, and the bottom lands were distinguished from it as the low grounds of that swamp, then indeed, the call was for the run, and not for the low grounds. If each were known by the same appellation, and indiscriminately called Swift

Creek Swamp, then there were two natural objects, either of which corresponded with the call of the grant, and *which* of these was intended, might and ought to be determined by reference to other matters of description in the grant, or to extrinsic facts, rendering the one or the other more probable.

PER CURIAM. Judgment reversed.

Cited: Becton v. Chestnut, 20 N. C., 482; *Mizell v. Simmons,* 79 N. C., 193; *Strickland v. Draughan,* 88 N. C., 318; *Redmond v. Stepp,* 100 N. C., 219; *Rowe v. Lumber Co.,* 128 N. C., 204; *Ward v. Gay,* 137 N. C., 401; *Rowe v. Lumber Co.,* 138 N. C., 466.

(484)

DANIEL SHIPMAN v. JONATHAN MEARS.

A justice of the peace may, under the act of 1803 (Rev., ch. 627, sec. 3), postpone a cause pending before him, for thirty days, excluding Sundays.

This was an action commenced by a warrant in the common form, in which the plaintiff sought to recover the amount of a former judgment. The warrant was dated 8 May, 1832. On the second of June following, an endorsement on the warrant was made of the following purport: "Postponed until 4 July next, then to be tried in Elizabethtown." On that day the justice nonsuited the plaintiff, reversed the former judgment, and issued a *supersedeas* to the constable, and process to the parties to appear and litigate the matter anew; and within thirty days thereafter, the first judgment was affirmed, and the defendant appealed to the County Court; where the judgment of the justice was affirmed, and the defendant appealed to the Superior Court.

On the last circuit at BLADEN, before his Honor, *Seawell, J.,* the cause was tried on *nil debet,* and the plaintiff had a verdict. The counsel for the defendant then insisted that the plaintiff was not entitled to recover, because the justice having continued the cause for more than thirty days, by the postponement from 2 June to 4 July, the warrant became thereby inoperative, and all subsequent proceedings thereon were void. But his Honor held that the third section of the act of 1803 (Rev., ch. 627), restricting continuances of causes before single magistrates to thirty days, was to be construed in connection with section 6 of the act of 1794 (Rev., ch. 414), whereby warrants were to be returned within thirty days, "Sundays excepted," and that as

there were not thirty judicial days between 2 June and the 4th of July following, the warrant was properly constituted at the time the judgment was rendered. His Honor was further of opinion that the jurisdiction of the magistrate did not depend upon the continuance being for a period not exceeding thirty days; that the act was directory to prevent a sur- (485) prise upon either party, and if after a postponement of more than thirty days a judgment should be confessed, or if the postponement should be by consent, that the justice would have jurisdiction to act, and the parties would be bound, and therefore it was incumbent upon the defendant to plead such matter in abatement, in order that the plaintiff might by his replication show how the postponement had taken place. Judgment was rendered upon the verdict, and the defendant appealed.

No counsel appeared for either party.

DANIEL, J. The judge below was of opinion that the continuance of the trial of the warrant from 2 June, 1832, to 4 July following was what the justice had a right to do, by virtue of the act of 1803 (Rev., ch. 627, sec. 3).

We agree with the judge in the above opinion—although the words *"Sundays excepted"* are not incorporated in the third section of the act of 1803, yet from what is in the preamble to that section, we must understand the enacting part to mean that a justice of the peace shall have power to enter a continuance or postponement of trial of any civil matter before him to any period of time within thirty judicial days from the date of the entry; that is, *"Sundays excepted,"* for *dies dominius non est juridicus.* The preamble to the aforesaid section informs us that "doubt had arisen whether any investigation or decision can be legally had on a warrant in any case *after thirty days from the date thereof,* although the same may have been executed and returned in due time, and for sufficient cause shown, postponed by the justice for remedy whereof, *Be it enacted,* etc., that on oath being made by either of the parties, the justice may continue or postpone the trial of the cause, provided such postponement shall not exceed *thirty days.* The Legislature must have meant, as it seems to us, that the continuance of the cause should be confined within the same time that the act of 1794 authorized and directed the justice to (486) cause his warrant to be returned in the first instance, viz., thirty days, *"Sundays excepted."* If the Sundays are taken out in computing the days between the two periods of

time, then the trial day would be within the time limited by the act.

Secondly. If there had been a miscontinuance, the defendants, instead of bringing a writ of false judgment, appeared at the trial and appealed from the judgment to the County Court, and even then no motion was made to quash the proceedings for irregularity, nor was any plea entered. The plaintiff again obtained a judgment in the County Court, and the defendant appealed to the Superior Court, where they entered the plea of *nil debet* in bar of the plaintiff's demand. The judge was of the opinion that if the magistrate had acted illegally in the continuance over that the defendants had waived the objection by pleading in bar of the demand. This Court is by no means prepared to decide that after an *appeal* the defendant could, by any plea, be admitted to deny that there was a judgment from which he did appeal, but if he could, then the Court concurs also with the opinion of the judge on this point, for it is a rule in pleading that good matter must be pleaded in right form, apt time, and in due order. If the defendant pleads in bar to the action he admits the form of the writ and count—he answers to the right in demand, and puts that right in issue, and thereby admits that there is a sufficient *forum* to put it in issue. (5 Bac. Ab., 327, 328.) If there was any error in the proceedings before the justice, the subsequent consent of the defendants to go on with the case, took away the error.

PER CURIAM. Judgment affirmed.

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(487)

Den ex dem. EDMUND S. GODFREY and others v. GIDEON CARTWRIGHT.

On the several demise of one tenant in common, the plaintiff in ejectment may recover his term in the undivided share of that tenant, but the lessors of the plaintiff must, at their peril, take out a writ of possession only for land to which they have title.

EJECTMENT, tried at CAMDEN on the Spring circuit of 1832, before *Swain, J.*

The declaration set forth a demise by the lessors of the plaintiff of the several estate of the wife, and upon the trial it appeared that Isaac Guilford, the father of the *feme* lessor, had died seized of the land in dispute, leaving three children to whom it, together with several other tracts of land, descended. The plaintiff produced copies of two proceedings in partition, by which the land described in the declaration had been as-

signed in severalty to his lessors. Both of them were made upon the *ex parte* petition of William Guilford, a cotenant, and one of them was incomplete, there being no final judgment. All the cotenants were present when the *division* was made under an order in the other, and assented thereto. The defendant showed no title, and contended that the proceedings in partition were inoperative, and that the lessors of the plaintiff could claim no benefit under them.

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

Kinney for the defendant.
Iredell, contra.

DANIEL, J. The counsel for the plaintiff admits that he is not entitled to lands described in the declaration, by virtue of either or both of the attempted partitions of the lands mentioned in the case; they are irregular and illegal. But as Isaac Guilford was entitled to the land in fee simple at the time of his death, the same descended to his three children as heirs at law. That Lydia, one of the lessors of the plaintiff, is one of the heirs of Guilford, and in that character had (488) a right to demise the lands described in the declaration, so as to enable the nominal plaintiff to recover his term in an undivided third of all the lands therein described. On a several demise of the whole tract of land, by one tenant in common, the plaintiff in ejectment may recover his term of such an undivided portion of it as the lessor can prove title to on the trial. The more correct way of proceeding is for the jury to find the defendant guilty of the trespass and ejectment in the undivided portion of the lands described in the declaration, which the lessor of the plaintiff proves title to on the trial, and then the judgment shall be rendered accordingly. (Archb. Forms, 380, 381). In the present case the jury have found a general verdict, and the nominal plaintiff must have judgment that he recover his term. The lessors of the plaintiff, when possession shall be delivered to them under the execution, must at their peril take possession only of such lands as they are entitled to.

PER CURIAM. Judgment affirmed.

Cited: Bronson v. Paynter, 20 N. C., 530; *Holdfast v. Shepherd,* 28 N. C., 364; *Lenoir v. South,* 32 N. C., 242; *Pierce v. Wanett, Ib.,* 452; *Yancey v. Greenlee,* 90 N. C., 319; *Foster v. Hackett,* 112 N. C., 552.

Den ex Dem. CATHARINE DODSON and others v. SIMON W. GREEN.

Where a devisor gave a tract of land to A, excepting two acres which he devised to B, and before a severance of the latter, A purchased them from B and held the whole together during his life as one estate, and by his will devised it as "the land whereon I now live," the whole passes thereby, although further described as of the quantity it would have contained had there been an actual severance.

This was an action of EJECTMENT in which, on the last circuit at WARREN, before *Settle, J.*, a verdict was taken for the plaintiff, subject to the opinion of the court on the following case:

(489) Simon Williams the elder devised the land in dispute to his wife for life, describing it "as the land and plantation whereon I now live, containing six hundred and forty acres." By the two succeeding clauses of his will, he devised as follows: "I give and devise unto my son William Williams the tract of land whereon I now live, containing 640 acres (except the mill and two acres adjoining thereto, the two acres to be laid off in the most suitable manner), to him, his heirs, etc. I give and devise unto my son Simon Williams one-half the mill, and half the two acres of land, after the death of his mother, to him, his heirs, etc. I give and devise to my son Alison Williams one-half of the mill and half of the two acres adjoining thereto after the death of his mother, to him, his heirs, etc." After the death of the testator, Simon, the younger, purchased of William the land devised to him, and also of Alison his undivided moiety of the mill, and the two acres of land directed to be laid off adjoining thereto; and he becoming thus entitled to all the land mentioned in the will, the two acres adjoining the mill never were laid off. Simon the younger lived upon the land devised by his father to his brother William, bought a tract of land adjoining it, repaired the mill, and during his life cultivated land on the mill creek, both above and below the mill—that, and the two acres adjoining it being situated within the body of his cleared land. By his will he devised as follows: "I give my nephew, Simon W. Green (the defendant) negroes Davy, etc., (mentioning a number) and also the land whereon I now live, and my Hargrove tract, all containing seven hundred and eighty-seven and one-half acres; also my household and kitchen furniture, also my wagon, etc., belonging to the plantation whereon I live (one acre of land I except, to be laid off around my father's and mother's graves and others), to him and his heirs forever."

The will contained two other clauses giving specific legacies to two other nephews—and no residuary clause was added.

The land on which the last-mentioned testator lived, and which is described in his will, deducting from it (490) the mill and two acres, contained exactly seven hundred and eighty-seven acres and a half.

The lessors of the plaintiff were the heirs at law of Simon the younger, and contended that the two acres of land adjoining the mill had been severed from the tract of six hundred and forty acres, and did not pass to the defendant, but descended to them.

The defendant insisted that the mill being situated on the tract of six hundred and forty acres, and the two acres never having been actually severed from it, in law passed under the devise to him, and his Honor being of this opinion, judgment of nonsuit was entered, and the plaintiff appealed.

Devereux for the plaintiff.
Badger and W. H. Haywood for the defendant.

RUFFIN, Chief Justice. Upon hearing this case, it seems impossible to doubt either upon the words of the will, or the circumstances stated, that it was the intention of the testator to dispose of the mill, and the two acres of land, with the residue of the tract of which it originally formed a part, to the defendant. It is not like the cases cited, where the devise of land by a particular name, which was known by that name, was confined to the distinct parcel, notwithstanding other more general words. Nor is it like *Helme v. Guy,* 6 N. C., 341, where the words are *"the* tract of land whereon I now live," and the testator owned many tracts adjoining, which were known by different names, that on which he lived, being called the "Radcliffe tract." The several tracts were distinct parcels originally; derived by the testator at different times, and by different titles, were never known by one and the same name, nor, as far as appeared, occupied together. They remained several and the devise could therefore only pass the particular one designated; although thus designated by the terms "the tract of land whereon I live" instead of "the Radcliffe tract." But here the two acres formed a part of testator's paternal estate, and were never actually severed from (491) it, by allotment under the devises in his father's will. The whole, including the mill, was given in one devise to the mother for life, and was occupied by her as one estate. Before severance, the testator, Simon the younger, extinguished all

other titles to the mill, and the other parts of the tract of land, and also occupied the whole as one tenement, when he made his will and died—the mill being at a considerable distance from any of the outer boundaries of the tract, on which he was actually cultivating fields, situate on the stream on which the mill was erected, above and below it. The whole then was in fact one tract and parcel, and was so considered by the testator. It cannot indeed be supposed without express or plain words of exception, that the testator meant to leave out a small parcel of two acres in the heart of a large tract of land and within the portion of it then under cultivation, for the sake of its descending to numerous collateral relations, who were as the case states, his co-heirs. If there was any other devise which could embrace it, or even a residuary clause, the claim of the defendant might be more plausibly resisted. But the words are sufficient to carry the whole to him, and the other circumstances fortify that construction. Especially as the testator has made one exception, namely, of the family graveyard, which he no doubt intended not to appropriate to any particular relative, but to preserve to its former uses, by letting it descend to all his heirs, among whom he might well think, so small a quantity as one acre, dedicated to such a purpose would never be divided. The number of acres specified cannot make a difference. Quantity may be matter of description as in *Proctor v. Pool, ante,* 370, or as distinguishing which of two parcels is meant, when there is no other more certain criterion. But in general it does not import to enter with the description, as identifying the parcel conveyed, more than it amounts to a covenant, that the parcel contains the quantity designated. It is by everybody regarded, if not as surplusage, as too vague to be relied on
(492) as a definite or controlling description. It turns out here, that the quantity mentioned in the will is since found upon admeasurement, to be that contained in both tracts, deducting two acres. But it does not appear that the testator had surveyed the land, or knew that to be the exact quantity, so as to render it not at all probable that he could use those terms for a different purpose, or in a different sense, from that in which they are commonly received.

PER CURIAM. Judgment affirmed.

Cited: Jones v. Robinson, 78 N. C., 401; *Horton v. Lee,* 99 N. C., 232; *Grimes v. Bryan,* 149 N. C., 251.

DAVID BRIGHT v. HORATIO SUGG.

It is not competent for the Supreme Court to revise amendments made in the court below: as when a judgment is entered *nunc pro tunc* it cannot be reversed upon appeal, because it should have been entered at a former term.

This action was originally commenced by a warrant, and came to the County Court of MONTGOMERY on the appeal of the plaintiff. The plaintiff having succeeded in the County Court, the defendant appealed to the Superior Court, when, at the Spring Term, 1833, the judgment was affirmed, and execution issued for the amount of the verdict, and the costs of both Courts.

At MONTMOMERY, on the last Fall circuit, before *Strange*, Judge, the defendant moved to set aside the execution, because it had issued for all the costs, without a judgment therefor having been entered at the trial term. On the other hand, the plaintiff moved to have the judgment entered *nunc pro tunc*, which his Honor directed to be done, and the defendant appealed.

Mendenhall for the defendant.

No counsel appeared for the plaintiff.

DANIEL, J. The question in the case is, whether the defendant can be subject to the cost of the plaintiff, (493) by a judgment entered of record, on motion, at a term different from that at which the verdict was rendered.

The defendant contends that as the plaintiff appealed from the judgment of a Justice of the Peace, the Superior Court had not the power to order the defendant to pay the cost, unless the order was made at the term, the cause was tried in the appellate court. The defendant says that no such judgment was rendered and recorded at the time the cause was tried, which was at Spring Term, 1843, of the Superior Court of Law of Montgomery. At the Fall Term, 1833, a motion was made to enter the judgment *nunc pro tunc*, which was resisted by the defendant, because section 17 of the act of 1794, directing the mode of recovering debts of twenty pounds and under, gives the plaintiff liberty to move the Court that tried the cause for costs, only at the term the trial was had, otherwise he shall pay the costs himself. The Court will in general permit a record to be amended, and a judgment to be entered *nunc pro tunc*, when it is delayed by the act of the Court or the

Clerk. *Bates v. Lockwood,* 1 Term, 637; *Mara v. Quin,* 6 *Ib.,* 1; Archb. P., 228. There is nothing in the case which shows us, that no motion was made, or judgment pronounced for the costs at the trial term, and at the time the verdict was rendered, although not entered of record. When the record was amended by the order of the Court, the judgment stood as of the trial term. The orders or rules for amendments of proceedings made by a Court in the progress of a suit therein depending, do not fall within the description of any part of the record, but such orders are strictly and properly matters of practice in the progress of the cause, regulated by the power of amendment which the courts of law possess. The practice of the courts below is a matter which belongs by law to the exclusive direction of that Court. It is therefore left to their own government alone, without any appeal to or revision by this Court. It is not contempt for a court of error to examine the propriety of an amendment of the record made by the Court below, being a court of record, although the order for the (494) amendment is sent up as a part of the record. The proper object of a writ of error is to remove the *final judgment* of the Court below, for the revision of a Superior Court, in order that the latter Court, from the *premises* contained in the record of the Inferior Court, may either affirm or reverse the judgment, as they draw the same or different conclusions from that which has been pronounced by the Court below. These premises are the pleadings between the parties, the proper continuance of the suit and process, the finding of the jury upon an issue in fact if any has been joined, and lastly the judgment of the Inferior Court. All these premises from which such judgment has been derived, the parties to the suit below have the right, *ex debita justitia,* to have upon the record.

We think, therefore, that it is not competent for this Court to examine into the propriety of the amendment, which is left to the sole direction of the Court by which it has been made. And if this be so, then the circumstance of the order for the amendment being put upon the record in this instance, cannot have the effect of giving competency to this Court to revise the propriety of such amendment. For if the grounds of the amendment are not in themselves removable by a writ of error, and if the parties to a suit have not, *ex debita justitia,* the right to put the rules and orders for the amendment upon the record, then this Court would have or would not have authority to inquire into the propriety of the amendments, according as the inferior court did, or did not return, in each

particular instance, the order by which the amendment was made. *Mellish v. Richardson,* 28 Eng. C. L., 276; 1 Archb. P., 230. It has been here decided that an act done by the Superior Court, in the exercise of its discretion, is not the subject of an appeal to the Supreme Court. *S. v. Lamon,* 10 N. C., 75; *Sneed v. Lee,* 14 N. C., 364; *Ballinger v. Barnes, Ib.,* 460; *Cannon v. Beemer, Ib.,* 363.

PER CURIAM. Judgment affirmed.

Cited: S. v. Reid, 18 N. C., 381; *Galloway v. McKeithen,* 27 N. C., 13; *S. v. Swepson,* 83 N. C., 589; S. c., 84 N. C., 828; *Long v. Long,* 85 N. C., 417; *Henry v. Cannon,* 86 N. C., 25; *Ferrell v. Hales,* 119 N. C., 212.

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(495)

JAMES J. HOYLE and others v. ANDREW LOGAN.

A deed for land which is held adversely to the vendor passes no interest to the vendee, and he cannot maintain a *sci. fa.* to repeal a grant under which the person in possession claims.

This was a PETITION and SCIRE FACIAS to vacate a grant, which was submitted to *Strange,* Judge, at LINCOLN, on the last circuit, upon the following facts: The plaintiffs claimed under a grant to one Cox, dated in November, 1796, for 12,021 acres, and a regular chain of conveyances from the grantee to them, the last of which was dated in March, 1830. The defendant's grant was issued in November, 1815, and ever since its date he had been in the actual possession of the land covered by it, which was within the boundaries of the grant to Cox. At the time of suing out his grant, the defendant had no notice of the existence of Cox's grant.

His Honor being of opinion for the defendant, judgment was entered accordingly, and the plaintiff appealed.

No counsel appeared for either party.

DANIEL, Judge. This was a petition and *scire facias* to vacate a grant. The defendant made two objections wherefore his patent should not be vacated. First, that the plaintiff's grantor had been disseised, and was out of possession, when he made the deed to the plaintiff, so that nothing was purchased but a *chose in action.* Secondly, that the right of entry of

those under whom the plaintiff claimed was taken away by seven years continued adverse possession.

The first objection is good in law. The person who conveyed to the plaintiff had been, and continued disseised in March 1830, the date of the conveyance to the plaintiffs. By the common law a *chose in action* (except in the case of the King) cannot be assigned or granted over (*Lampet's* case 10 Rep. 48 a; 2 Ves. 181) and the reason of the laws not allowing such was, because it tended to champerty and maintenance, and to pass debts, and pretended titles into the hands of more powerful men, who were then able to oppress (496) the inferior orders. (2 Thomas' Coke 113.) It is an established maxim of the common law that no possibility, right, title or any other thing that was not in possession, or vested in right could be granted or assigned to strangers. (*Ib.* 456.) No right of entry or re-entry can be assigned, so that if a person be disseised, and assigns over his right to another before he has entered on the disseisor, such assignment is void. (*Ib.* 566, *note S. Winch v. Keeley,* 1 T. R., 619. *Innes v. Dunlop,* 8 T. R., 595.)

In the second place the plaintiff's grantor being disseised, and his right of entry taken away by the act of 1715 (Rev. ch. 2, sec. 3) he could not, in our opinion have maintained a *scire facias* to vacate the defendant's grant, because he could not be considered such a person *aggrieved,* as comes within the meaning of the tenth section of the act of 1798 (Taylor's Rev. p. 193), establishing a court of patents. Seven years continued adverse possession by the defendant, under his junior grant (which would be color of title) would have taken away the right of entry, and barred the plaintiff in an action of ejectment. The action of ejectment is not mentioned *eo nomine,* in the act of limitation; but that act declares when a right of entry shall be taken away by reason of an adverse possession, accompaniew by efflux of time. The right of entry of the plaintiff, and those under whom he claims, is clearly taken away in this case by virtue of the statute; then what benefit would he derive by vacating the defendant's patent? The Court could not in this species of action, order the possession to be surrendered, the plaintiff would still be driven to his proper action for the land, where he must be defeated by reason of the seven years adverse possession of the defendant under his junior grant. To sustain this proceeding at the instance of the petitioner, it is indispensable that he should be aggrieved by the patent which he prays to be vacated. No person can be thereby aggrieved, but he who has an

interest in the subject matter of it. If it appears that the petitioner never had such interest, or if he once had it, that the same has been utterly extinguished or barred, he is then an officious intermeddler with what concerns him not, has no right to be protected, and no grievance to be (497) redressed.

This decision is not in conflict with *McRee v. Alexander*, 10 N. C., 322, which we understand to rest upon the point that a petition filed at the instance of *several* relators, may be maintained, although *one* of the relators be barred of all right to the land by the act of limitations. We feel ourselves bound by that decision, and shall steadily adhere to it.

PER CURIAM. Judgment affirmed.

Cited: Miller v. Twitty, 20 N. C., 10; *Hoyt v. Rich, Ib.*, 677; *Holland v. Crow*, 34 N. C., 280.

JESSE A. DAWSON v. SAMUEL L. SHEPHERD.

A *fi. fa.* issued upon a dormant judgment is not void, and the sheriff is bound to obey it.

CASE against the defendant, the sheriff of Martin, for a false return to a *fi fa.* issued at the instance of the plaintiff against the goods of one Tunstal, and also for improperly applying the amount raised by a sale of the said goods to another execution, instead of to that of the plaintiff.

PLEA, not guilty.

On the trial at HALIFAX, on the last Fall circuit, a verdict was taken subject to the opinion of the Court upon the following facts. The plaintiff's judgment against Tunstal, was obtained in Nash Superior Court, at the term thereof, beginning on the third Monday of March, 1831. At the following September term an execution issued, directed to the defendant, which was held up by the plaintiff, and never delivered. From March, 1832, an *alias* issued, which came to the defendant, and on this writ the alleged misfeasance took place.

At November term, 1827, of BERTIE County Court, one Thompson obtained a judgment against Tunstal, a *fi. fa.* issued on this judgment returnable to February (498) term following, which was returned *nulla bona.* No other execution issued until February Term, 1832, when an-

other *fi. fa.* came into the hands of the defendant, and was levied upon three slaves. This writ was issued without any *sci. fa.* to revive the judgment, in consequence of Tunstal's waiving such process. Upon the levy returned to this writ, a *venditioni* issued from May, 1832, upon which the negroes were sold, and the proceeds paid to Thompson. The plaintiff contended that he had a preferable right to satisfaction out of those slaves, and this action was brought to recover the sum for which they sold.

His Honor, Judge *Martin,* being of opinion that the plaintiff was entitled to recover, gave judgment accordingly, and the defendant appealed.

Devereux for the defendant.
Badger contra.

GASTON, J. Upon the case stated we are unable to perceive any legal grounds for the judgment rendered against the defendant. Admit that Thompson's execution was irregular because sued out without a *scire facias,* and admit even that this irregularity was not cured by the waiver of Tunstal, the defendant in the execution, upon which points it is unenecessary to express an opinion, yet assuredly it was not therefore void. Now an officer cannot only justify under an irregular or voidable process, but he is bound to execute it. *Weaver v. Cryer,* 12 N. C., 337. Thompson's execution therefore was an obligatory mandate on the sheriff to levy the debt of the goods and chattels of Tunstal. Upon what grounds could the sheriff give the preference claimed for the plaintiff's execution? We can see none unless it be that the latter purports to be an *alias fi. fa.* But it has been settled in *Palmer v. Clarke,* 13 N. C., 354, that an *alias fi. fa.* has no lien, as against another creditor anterior to its teste, when the original *fi. fa.* has not been delivered to the sheriff, but retained by the plaintiff in the execution.

We are of opinion that the judgment of the Superior Court must be reversed, and judgment rendered upon the case agreed, in favor of the defendant.

PER CURIAM. Judgment reversed.

Cited: Smith v. Spencer, 25 N. C., 266; *S. v. Morgan,* 29 N. C., 388; *Brown v. Long,* 36 N. C., 192; *Murphey v. Wood,* 47 N. C., 64; *Boyd v. Murray,* 62 N. C., 241; *Williams v Williams,* 85 N. C., 386; *Ripley v. Arledge,* 94 N. C., 471.

(499)

JESSE POWELL and others v. LEMUEL COOK.

Where one put a female slave in the possession of another, and by his will, subsequently made, bequeathed that slave to the same person for life, and proceeded, "after her death I give the same slave and her increase to," etc.: *Held*, that issue of the slave born between the date of the will and the death of the testator did not pass to the legatee for life.

DETINUE for a male slave, named Willis. The case was submitted to *Martin, J.*, at WAKE, on the last Fall Circuit, on the following facts.

Dempsey Powell, in 1818, put into the possession of Amelia Cook, the wife of the defendant, a negro girl named Ferebe, who continued in the possession of the plaintiff during the life of Powell, the defendants using her and her issue, as their own. Dempsey Powell by his will bequeathed as follows: "I lend unto Amelia Cook (half sister of my wife), during her life time, one negro girl named Ferebe, now in her possession, and after her death, I give the said negro girl, and her increase to Polly Merrit," and thereof he appointed the plaintiffs executors. After the making of the will, and before the death of the testator, Ferebe had issue the slave Willis, claimed in the writ. Amelia Cook was still alive, and if the issue of Ferebe did not pass to her for life, then judgment was to enter for the plaintiffs—otherwise for the defendant.

His Honor being of opinion for the defendant, judgment was entered accordingly, and the plaintiffs appealed.

W. H. Haywood for the plaintiff.
Badger for the defendant.

DANIEL, J. As the will did not begin to operate until the death of the testator, no right to the slave Ferebe was vested in Amelia Cook, until that time. The slave Ferebe only, and not her children born between the date of the will and the death of the testator, passed to Amelia Cook for her life. *Jones v. Jones*, 1 N. C., 482. The subsequent words made use of by the testator in the same clause of the will which gives the slave Ferebe to Amelia Cook for life, which words are as follows: "And after her (Amelia Cook's) death, I give (500) the said negro girl Ferebe, and her increase to Polly Merrit, etc."—do not, by necesary implication or intendment, carry the increase of Ferebe as well as herself to Amelia Cook for life. To say they did, would, in our opinion, be adding

words to the will, rather than construing it, which we have no power to do.

We think that the judgment of the Superior Court must be reversed, and that judgment must be rendered for the plaintiffs.

PER CURIAM. Judgment reversed.

Cited: Covington v. McEntire, 37 N. C., 319.

ELIZABETH OLD v. HECTOR OLD and others.

A witness to a will of land who was, at the time of his attestation, a presumptive heir to the devisor, is not interested in the devise within the meaning of the eleventh section of the act of 1784 (Rev., ch. 204).

This was an issue of DEVISAVIT VEL NON as to a script propounded as the will of Merrit Old, and was tried before *Martin, J.,* at CAMDEN on the last circuit.

The only question was, whether the will was attested in the manner required by section 11, chapter 22, laws of 1784, *(Rev. ch. 204). The supposed will was attested by William Old and Harriet Old; the latter of these was a sister of the supposed testator, and was at the execution of the will, one of his heirs at law; she was also a party defendant to this issue. William Old proved the due execution of the will, and its attestation by himself and the other witnesses. The plaintiff then offered to examine Harriet Old, the other witness, but his Honor refused to permit this, and informed the jury that Harriet Old was interested in the will at the time of its execution, and therefore that it was not well executed to pass land. A verdict was returned in conformity to this instruction, and the plaintiff appealed.

Iredell for the plaintiff.

No counsel appeared for the defendants.

(501) DANIEL, J., after stating the facts as above, proceeded: Two questions arise in the case: First, was Harriet Old, a good witness under the directions of the statute, to attest the will. Secondly: If she was a competent witness to attest the will at its execution, could her attestation be

*24 State Records, 576.

proved by the other witness, as she was at the trial, interested to defeat the will, and a party defendant on the record. It is declared in section 11, Chapter 22, Laws of 1784, that no last will shall be good or sufficient in law or equity, to convey or give any estate in lands, unless it is subscribed in the presence of the testator, by two witnesses at least, no one of whom shall be interested in the *devise* of the said land. In *Allison v. Allison,* 11 N. C., 141, the Court determined that when the witness had an interest in the lands devised at the time of the attestation, no subsequent release could avail to make him a proper witness under the statute. The state of things at the time of the execution of the will, determines the competency of the attesting witnesses under the statute. The witness in this case being only heir presumptive to the testator, had at the time of attestation, no interest in the lands devised. The testator could in his life time, have alienated the lands, or he might have married and had issue, which would have completely destroyed every possibility which the witness had of inheriting the lands. We think the witness had no interest at the time she attested the instrument, and therefore the will was subscribed by two witnesses; no one of whom was interested in the devise of the lands.

If the witness when called by the plaintiff thought proper voluntarily to testify, we cannot see any good objection against it, although she was a party defendant on the record. But if she had refused to testify, because she was a party, then the second question arises, whether her attestation may not be proved by other witnesses. It is a rule of evidence that when a subscribing witness has, since the attestation, become interested, his hand-writing may be proved by other witnesses, as where he has become the administrator of the obligee, even though he disqualified himself voluntarily by taking out administration. *Swire v. Bell,* 5 Term, 371; 1 (502) Starkie, 338. If one of the attesting witnesses to a will is abroad, it seems to be sufficient to give evidence of his hand-writing. If a witness to a will be dead, or has become interested since his attestation, evidence of his hand-writing will be received to support the will. *McKenire v. Fraser,* 9 Ves. 5, 3 Starkie 1693, 1694, and from such evidence, the jury may presume the due execution of the will, although it does not appear from the written form of attestation that the witness subscribed the will in the presence of the testator. *Hands v. James, Com.* 531. *Croft v. Pawlet,* 2 Strange, 1109, 3 Starkie, 1693. *Hampton v. Garland,* 3 N. C., 147; and *Cromwell v. Kirk,* 14 N. C., 355, are in point, to show that when

the attesting witnesses to the will, were competent at the time of execution, and one of them has since become incompetent, the party seeking to establish the will, is not bound to bring forward the incompetent witness. We think the opinion delivered by the Superior Court was erroneous, and therefore there must be a new trial.

PER CURIAM. Judgment reversed.

Cited: Boone v. Lewis, 103. N C., 43.

HORATIO HUBBELL and others v. JOHN D. THURSTON, Admr.

A plea of an outstanding bond, and *no assets ultra*, is no defense to an action of *assumpsit* for rent due upon a parol demise, the latter being of equal dignity with the former.

ASSUMPSIT, upon a parol demise of land, for rent in arrears.

PLEA, that the intestate before his death, had executed a promissory note to one R. C. for $2,125, which was not due, and *no assets ultra.*

DEMURRER AND JOINDER.

On the last circuit, his Honor, Judge *Martin,* at BERTIE thinking that the arrear of rent due upon a parol de-
(503) mise was equal in dignity to a promissory note, gave judgment for the plaintiff, and the defendant appealed.

Badger for the plaintiff.
Iredell contra.

DANIEL, J., after stating the pleadings as above, proceeded: By sec. 2, ch. 4, Laws 1786 *(Rev. ch. 248, sec. 2) promissory notes, and accounts signed by the debtor, are made of equal dignity with bonds and specialties, in a course of administration. In 11 Vin. Ab. 289, pl. 26, the question was whether rent due upon a lease-parol, paid by an executor, should be a good discharge to him, against an obligation of the testators. It was objected that debts by specialty are of a higher nature than debts without specialty, and therefore the executor having paid this rent which was not due by specialty, had paid it in his own wrong, so long as there were debts owing upon specialty. But the whole Court were of

*24 State Records, 792.

opinion, that it was well enough, and that rent, though it be upon a lease-parol, is of as high a nature as an obligation. That an obligation taken for rent, did not extinguish the rent. *Phillips v. Lee,* 1 Freem. 262, pl. 283. In *Godfrey v. Newport,* Comb. 183, 4 Mod. 45, the Court held that the rent being in the realty is of as high a nature as a bond, for no wager of law lieth. Debts due on lease by deed, and debts on bond, are in equal degree, and that lease by deed, and a parol lease are in this case the same. *Gage v. Acton,* Carth. 511, 12 Mad. 291. The contract remains in the realty, notwithstanding the term has expired, and the right of distress gone. *Newport v. Godfrey,* 3 Lev. 267. Rent arrear on a parol lease, and unpaid by the testator, is equal to a debt by specialty, for this savoring of the realty, and maintained from receiving the profits of the land, the executor can no more wage his law against such a debt, than he can against a debt by specialty. *Ergo,* it is more than a mere personalty. 3 Bar. Ab. 82, Wilson's edition.

From these authorities it appears that the question is completely settled at common law, and there is no act of Assembly which alters the common law in this par- (504) ticular.

PER CURIAM. Judgment affirmed.

WYRIOTT ORMOND v. IVEY GIBBS.

Where a testatrix gave specific legacies to her sons W., D. and S., and after directing the residue to be divided between them, proceeded: "But in case either my sons D. or S. die, leaving no lawful issue then living, then my son W. and the surviving one to have his part of all that is willed to him, and in case they should both die, leaving no lawful issue then living, then my son W. to have the whole of what I have willed unto each of them," and S. died leaving issue, and then D. died without: *It was held,* (1) that the specific legacy given him as well as his share of the residue was subject to the limitation over, and (2) that W. alone succeeded, as there was no limitation in favor of the issue of S.

This was an action of DETINUE for several slaves, and the only question being upon the construction of the will of one Mary Jordan—the following case agreed was submitted to *Donnell, J.,* at HYDE, on the Spring Circuit of 1833.

The will was as follows:

"I will unto my son Wyriott Ormond, Willis, Violet and Sam to him and his heirs forever.

"I will unto my son Daniel W. Martin, Reuben, Nell, Vester, Nice, Sylvia and Charity, with all the increase of Nell, two feather beds, and two hundred dollars to him, and his heirs forever.

"I will unto my son Seth B. Jordan, Solomon, Andrew, Edy and Sukey, two feather beds, to him and his heirs forever.

"The remaining part of my estate not willed away, I will unto my three sons Wyriott Ormond, Daniel W. Martin and Seth B. Jordan, but in case either of my sons D. W. Martin or S. B. Jordan die, leaving no lawful issue then living, then my son Wyriott Ormond, and the surviving one to have his part of all that is willed to him, and in case they should (505) both die, leaving no lawful issue then living, then my son Wyriott Ormond to have the whole of what I have willed unto each of them."

Seth B. Jordan died leaving issue, and afterwards Daniel W. Martin without issue. The slaves demanded are those which were given to him by the will of Mary Jordan above set forth.

If under these facts the plaintiff was solely entitled to the slaves, judgment was to be entered for him. If he and the children of Seth B. Jordan were entitled to them jointly, then judgment was to be entered for them, in another action, in which they were joint plaintiffs, but if the slaves vested in the plaintiff, and the personal representatives of Seth B. Jordan, then in both actions judgment of non-suit was to be entered.

His Honor being of opinion that the plaintiff was exclusively entitled, gave judgment accordingly, and the defendant appealed.

No counsel appeared for the defendant.
Devereux for the plaintiff.

RUFFIN, C. J. We approve of the construction put upon this will by the Judge who tried the cause. The expression, "his part," embraces perhaps literally by reason of the words added "of all that is willed to him," the whole property bequeathed to the legatees respectively, in the former part of the will, as well as that given in the residuary clause. But certainly upon a reasonable intendment, all is embraced. There is a limitation over upon certain events. It was much more likely that this was meant of the specific and valuable chattels bequeathed, than of the residue merely, which may have consisted, and probably did, of but few articles, and those of so little value, and so perishable as not to be worth preserving in

the family. The case of *Gibson v. Gale,* 9 Eng. C. L. 218, is not so strong as this, and shows this to be the proper signification.

Upon the other point we do not think that the words are to be considered as creating a condition precedent (506) to be strictly and literally complied with, before the remainder can vest, or rather the second estate arise. The absolute property is given in the first place, and then in certain events limited over, by way of executory disposition, which we must suppose the testatrix intended to take effect, as far as it could, whenever the first estate either in the whole or a part of the property should fail. It is plain this was the actual intention, for the present plaintiff is the favorite throughout. His legacy is absolute, and not to go over to any person in any event, and he is to succeed upon the death of one of his half brothers, without leaving descendants, to his share with the survivor, and upon the death of both under like circumstances, to the whole. It seems clear then that whenever one of them should die, not leaving issue, his share was to survive at all events, and the only question is to whom. The answer is Wyriott, and the other brother, of the latter then "survived," but if he was *not* a survivor, then Wyriott alone. This follows necessarily from these two circumstances; that it was the positive purpose evidently, to limit over the estates of all the sons except Wyriott, upon their respective deaths without issue, though the persons to take in those events depended to a certain extent on a contingency, and the survivorship of Wyriott forms no part of that contingency. His interest is to vest at all events, whether he be dead or alive, when one or both of the brothers die. As to him the only contingency is, that the first taker should be dead not leaving issue; as to each of the others there was a further contingency; that *he* must be living, when the one whose share went over died. The inability of Jordan or Martha to succeed to any part, cannot also exclude Wyriott, because upon the death of both of the others, the whole was to belong to him or to his representatives, and therefore he takes whatever in the event neither of the others could take. The real question is, whether the limitation over is absolute, and upon the single contingency of the first taker leaving no issue at his death, upon which it would seem there cannot be two opinions. That being established, the rest follows of course. There is no dis- (507) position in favor of the issue of one dying before, and therefore they cannot take, nor can his executor, because there never was anything in him to be transmitted to the executor.

The exclusion of Wyriott from any part, is only in favor of the surviving brother, and there being none such, he takes the whole.

PER CURIAM. Judgment affirmed.

MARY MORTON and others v. ISHAM EDWARDS.

Where a testator by one clause of his will gave his daughter two slaves absolutely, and by a subsequent clause gave her another, and proceeded as follows, "which negro, together with those I formerly lent her, at her death to be divided between her children:" *Held*, that parol evidence that the slaves mentioned in the first clause had, before the making of the will, been lent by the testator to his daughter, was admissible, and that fact being established, that the second clause reduced her property in them to an estate for life, without a remainder to her children.

DETINUE for five slaves, tried on the last circuit before *Norwood, J.*, at PERSON.

PLEA, *non detinet*.

The plaintiffs claimed title to the slaves under the will of Wiliam McGehee, their grandfather. By clause 3 of his will, the testator devised as follows: "I give and bequeath unto my daughter Martha Morton two negroes, named little Ben and Amey." By the 13th as follows: "Martha Morton to have a negro of seventy pounds value, which negro, together with those I formerly lent her, at her death to be divided between her children.

Martha Morton died in 1832, leaving the plaintiffs, her children. The slaves demanded in the writ were Amey and her issue. The plaintiffs proved that in the year 1801, the testator lent Amey and little Ben to Martha Morton and her husband. The defendant claimed under a sale made to him in November, 1810, by George Morton, the husband of
(508) Martha, and contended that by the will of the testator, an absolute interest in Amey was given to Martha Morton, who vested in her husband.

His Honor instructed the jury that if they should find that the slaves Amey and little Ben were the same slaves which had been lent by the testator to his daughter before the excution of the will, that by the 13th clause an interest for life only in the slaves, vested in Martha Morton, and an absolute interest in remainder in the plaintiffs, which would enable them to sustain this action.

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

Winston and *Norwood,* for the defendant.
W. A. Graham, for the plaintiffs.

DANIEL, J., after stating the will of the testator, and the facts above set forth, proceeded:

In construing a will the intention of the testator, if consistent with established rules of law must be observed, and no part to which a meaning or operation can be given, shall be rejected.

A will is not to be construed by adverting to a single clause only; every thing bearing on the subject which is to be discovered from the will itself, must be taken together, in order to ascertain the testator's intention. Parol or extrinsic evidence, is admitted, not to control a will, but to show either with reference to what it was made, or to explain a latent ambiguity. *Bengough v. Walker,* 15 Ves. 514. Therefore parol evidence was in this case admissible, to show that the slave Amey was one of those referred to by the testator in the thirteenth section of his will, by the words, "which negro, and *those I formerly lent her,* at her death to be equally divided between her children." The evidence did show that the slave Amey was one of those the testator had lent to his daughter Martha, and therefore fell within the bequest to her children after her death, by the thirteenth section of the will. And the evidence likewise showed that she was the same slave (509) Amey, that was given in the third section of the will to Martha Morton. The question presents itself, whether the testator, having made a general bequest of the slave Amey to his daughter by the third section, could by the subsequent thirteenth section, limit any interest in the said slaves by way of executory devise to her children? If the same slaves had been given absolutely to the children by the latter section of the will, which had been given to the mother by a former section, the mother and children would have been tenants in common according to the decision of this Court in *Field v. Eaton,* 16 N. C., 283. The slaves bequeathed being identically the same in both clauses of the will, and the Court looking through the whole will to find out the meaning and intention of the testator, feels no difficulty in pronouncing that intention to be, that Martha the daughter, should have an estate for life only in the slaves, by virtue of the third section of the will, and that the after limitation by way of executory devise to her

children, in the thirteenth section was good in law. It is a doctrine which hath prevailed at all times as to wills, that where there is a gift of property, and a subsequent limitation inconsistent with the former, as an absolute and complete disposition of the thing, *that* does by necessary implication cut down the former limitation. *Wykham v. Wykham,* 18 Ves. 421, 422. We think the judgment rendered in the Superior Court should be affirmed.

PER CURIAM. Judgment affirmed.

CHARLES S. MOORE v. WILLIAM WATSON.

An account stated in the handwriting of the defendant does not estop him from showing that the settlement only ascertained the items of the account, and left him at liberty to contest the price at which they were charged.

ASSUMPSIT for work and labor done, and materials furnished:

At the trial before *Martin, J.,* at BERTIE, on the last
(510) circuit, on *non assumpsit* pleaded, the plaintiff produced an account containing the items of his demand and their amount, under which was set forth, in the hand writing of the defendant, a credit for a sum of money paid by him, and the balance due the plaintiff, after the deduction of the credit. The defendant then offered to prove that these entries were made by him at the foot of the plaintiff's account, subsequently to the bringing of the action, upon an express agreement between the parties that the work charged therein was admitted to be done, but that the defendant denied the value thereof, and was to be at liberty to contest this value on the trial. This evidence was rejected by the Court, and the plaintiff having obtained a verdict and judgment for the balance so claimed, the defendant appealed to this Court.

No counsel appeared for either party.

GASTON, J., after stating the case as above, proceeded as follows: It is insisted here, on the part of the defendant, that the rejection of this testimony was erroneous. We believe that this exception is well taken. This is not a case where the parties have reduced their contract into writing, and parol evidence is offered to explain, vary or contradict it. The entries or memoranda at the foot of the account, being in the handwriting of the defendant, although made subsequent to the

action, and after the parties were at issue upon the matter in controversy, yet furnish presumptive evidence of his admission of the correctness of the charges therein contained, and is therefore admissible testimony to establish an antecedent contract. But the circumstances accompanying the making of these entries ought to have been received, in order that the force of this presumption might be properly estimated, and correct inferences drawn from it by the jury. The presumption was one of fact, and not of law The instrument had no conclusive force which in law estops a party, and excludes the truth.

PER CURIAM. Judgment reversed.

(511)

JAMES BROGHILL v. WILLIAM WELLBORN.

1. A nonresident creditor cannot, under the act of 1777 (Rev., ch. 115, sec. 27), attach the property of his debtor in this State, when the latter has not absconded, nor removed to avoid the ordinary process.
2. Whether a nonresident creditor can attach the property of an absconding debtor resident in this State. QU.

This was an attachment obtained by the plaintiff against the defendant.

At Wilkes, on the last circuit, the following facts were stated in the shape of a case argued and submitted to *Strange, J.* If upon them, the plaintiff was entitled to proceed, the suit was to progress; if otherwise, then the process was to be dismissed.

Neither of the parties were citizens of this State, and the attachment, upon the oath and application of the plaintiff's agent residing here, was levied on the property of the defendant in this State: it not being pretended, that the defendant had removed out of the State, secretly or fraudulently, or with a design to avoid the ordinary process of law.

His Honor dismissed the attachment, and the plaintiff appealed.

No counsel appeared for either party.

DANIEL, J. According to the case made and agreed to by the parties, we think the opinion pronounced in the Superior Court was correct.

*Section 27, chapter 2, Laws of 1777, 2nd Sess. (*Rev. ch.* 115, s. 27), declares that "when any person who shall be an *inhabi-*

*24 State Records, 55.

tant of any other government, so that he cannot personally be served with process, shall be indebted to any person, *a resident of this State,* and hath any estate within the same, any of the justices may grant an attachment against the estate of such *foreign person, etc.*" The plaintiff is not a resident of this State, and does not come within the purview of this section, and therefore he was not authorized to attach the estate or property that might be found here, which belonged to the defendant who was also an inhabitant of another government.

It is not pretended that the defendant left the State
(512) secretly, fraudulently, or with the design to avoid the ordinary process of the law. Therefore we are not called on to give an opinion whether a non-resident creditor could attach the estate of an absconding *debtor,* by virtue of the twenty-fifth section of the said act. In putting a construction on a section of the attachment act of the State of New York, which section is very similar to the twenty-seventh section of our act, the Court said, "it is very well to give our own citizens a remedy over the property of their absent debtors, but it would be harsh and impolitic to extend this remedy to strangers, who might pursue the property here for the sole purpose of seizing it, and by this means drive its owner to a settlement on very unequal terms, or compel him to litigate in a distant forum, when perhaps both parties, residing near each other, ought to be left to apply to the tribunals of their own country." (In the matter of *Fitzgerald,* 2 Cains, 315.) In this case, now before us, it seems that the plaintiff was not authorized by the act of Assembly, to issue an attachment against the estate of the defendant, and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Price v. Sharp, 24 N. C., 419; *Taylor v. Buchelle,* 27 N. C., 384; *McCready v. Kline,* 28 N. C., 247.

LEMUEL M. PETTIJOHN, Admr., v. ROBERT BEASLEY and others.

Slaves of an infant *feme,* held in common with others, pass to her husband *jure mariti,* although they were hired out by her guardian before the marriage, and the husband died during the term.

This was a PETITION for the division of sundry slaves originally filed in the county court of CHOWAN. The plaintiff

claimed as the administrator with the will annexed of Valentine Beasley, whose title was as follows:

The testator in the year 1833, married Harriet Beasley, who then was, and still continued an infant. At (513) the time of the marriage, the wife was entitled with the other defendants, also infants, to several negroes, who had been hired out by their guardian for that year. The testator died before the expiration of the year, for which the slaves were thus hired, never having had any actual possession of them.

His Honor, Judge *Martin,* upon these facts, at the last term of Chowan Superior Court, directed a division of the slaves to be made according to the prayer of the petition, and the defendants appealed.

No counsel appeared for either party.

DANIEL, J. The point of law raised in this case, has been decided by the Court in favor of the plaintiff in *Whitaker v. Whitaker,* 12 N. C., 310, and *Granbury v. Mhoon, Ib.,* 456. In these cases, the Court said that the possession of the owner of slaves is not disturbed by the hiring; that the occupancy of the hirer is consistent with it, and does not divest it. The hirer is a mere bailee or *locum tenens* for the owner, and only holds the property for her. It is not changed from a *chose* in possession, to a *chose* in action. The owner has such a possession that she may, if of age sufficient, either sell or give the property, and it would pass. The marriage therefore was a complete gift of the individual share of Harriet in the slaves in question to her husband; and that share was vested in possession, as well as in right in him. Harriet and the other defendants being tenants in common of the slaves, did not alter the case, for the possession of one tenant in common of a chattel, is in law, the possession of all the tenants in common.

The opinion of this Court is, that an undivided part of the slaves mentioned, belong to the plaintiff as administrator, and that he has a right to have partition of them in this way, by virtue of a late act of Assembly. We are of opinion that the interlocutory order of the Superior Court was correct, and order it to be so certified to the Superior Court (514) of law of Chowan County, and that Court will proceed in the case to a final judgment.

PER CURIAM. Order affirmed.

Cited: Miller v. Bingham, 36 N. C., 425; *Stephens v. Doak,* 37 N. C., 349; *Caffey v. Kelly,* 45 N. C., 50; *Ferrell v. Thompson,* 107 N. C., 428; *Fowler v. McLaughlin,* 131 N. C., 210.

Den ex dem. MARGARET BARFIELD v. EBENEZER COMBS and others.

1. The deed of a *feme covert* does not bind her when her private examination was taken under a commission by one commissioner only, and when she was neither a resident of another county, aged, nor infirm.
2. The acts of 1715 and 1751 (Rev., chs. 3 and 50) construed by Daniel, J.

EJECTMENT, and at the trial before *Donnell, J.*, at WAYNE, on the last circuit, the only question was, whether the lessor of the plaintiff was estopped by a deed made by her, and her then husband, to the ancestor of the defendants for the land in dispute. This deed was in all respects formal, and the objection was to the mode in which the privy examination was certified. It was dated in April, 1793, and at the ensuing October sessions of the County Court was proved, and the following certificate endorsed upon it: "Then was the within deed of sale from Frederick Barfield and Margaret his wife to etc., proved in open Court by the oath of Ezekiel Slocomb, and ordered to be registered."

In October, 1831, after the commencement of this action Ezekiel Slocomb who was the attesting witness, and also a justice of the peace for the county ow Wayne, certified upon the deed, that "in pursuance of an order of the County Court made at October Term, 1798, authorizing and requiring me to take the private examination of Margaret Barfield a *feme covert,* wife etc., touching the execution of the within deed, etc.: I, the said E. S. being then and there a justice, etc., did proceed to execute the said commission, when etc. (the date of the deed), the said M. B. being privately examined by me, separate and apart from etc., concerning the execution of
(515) the said deed, did acknowledge that she executed the same freely, and voluntarily, and of her own accord, and without the control or compulsion of her said husband."

At the next term of the County Court, this certificate was returned, and an order made reciting the fact that the return of the private examination of the *feme* was omitted to be recorded, and directing it to be recorded *nunc pro tunc.*

His Honor thinking that the deed did not divest the estate of the wife, a verdict was returned for the plaintiff, and the defendant appealed.

Henry and *Mordecai* for the defendant.
J. H. Bryan, contra.

DANIEL, J., after stating the case, proceeded:

In England, the usual, and almost the only safe method whereby a *feme covert* can join in the sale, settlement, or incumbrance of her real estate, is by a fine or common recovery. And a married woman will not be allowed to levy a fine, or suffer a recovery unless jointly with her husband, except under very particular circumstances, as it would be voidable by the husband, or even by herself or her heirs. (2 Bla. Com., 355.) In levying a fine, the husband and wife must make an acknowledgment that the lands in question are the right of the complainant or *cognizee*. This acknowledgment must be made openly in the Court of Common Pleas, where the *præcipe* is actually sued out and returned, or it must be made before a Judge or commissioners authorized to take the acknowledgment out of Court, by virtue of the Statute 18 Ed. I, which Judge or commissioner is bound to examine the *feme covert* privately, whether she does it freely, or by the compulsion of her husband. (2 Bla. Com. 350, 351.) When a fine is levied according to law, it concludes the wife, and bars her of any right she may have in the land, and that because she is privately examined as to her voluntary consent, which removes the general suspicion of compulsion of her husband. (2 Bla. Com. 355.) A judgment in a real action brought against husband and wife, bound the wife when she became discovert and forever, therefore when a feigned action of this de- (516) scription was brought, the judgment in which was to bar the wife forever, the law would not permit that judgment to be rendered, or a record of the *fine* to be made, before the fact was ascertained by a private examination whether the *feme covert* freely consented to the conveyance of her land. (3 Thomas' Coke, 610, 716, note.) After the settlement of the colony of North Carolina, the method of conveying lands by fine and recovery was never used here, as appears by a declaration to that effect, in the preamble of ch. 28, Laws 1715.* (Rev. ch. 3.) The Legislature in establishing a method of conveyance, by which *femes covert* might pass their lands, kept in view the precaution which was used in England, to prevent the wife from being imposed on, and compelled to part from her lands, by the force, fraud, or contrivance of her husband. The act of 1715, therefore enacts, that sales hereafter made by husband and wife, and *acknowledged* before the Chief Justice, or *the Court* of the precinct, where the land lieth, the wife having been first privately examined before the Chief Justice, or one of the Associate Judges, or by some *member appointed*

*23 State Records, 35.

by the Court of the precinct, whether she acknowledgeth the same freely, shall be as good as if done by fine and recovery. This act, not extending to a *feme covert* who resided out of the State, or who was so aged or infirm that she could not travel to court, or to the Judge, and the precinct courts having been changed to county courts, the Legislature passed another act in *1751, ch. 3 (Rev. ch. 50), which enacts that all conveyances in writing and sealed by husband and wife for any lands, and by *them personally acknowledged* before the Chief Justice, or in the Court of the county where the land lieth, the wife being first privately examined before the Chief Justice, or some member of the County Court, appointed by the said Court for that purpose, whether she doth voluntarily assent thereto, and registered, shall be valid, as if done by fine and recovery.

(517) The third section enacts, that when the husband shall acknowledge the execution of the deed, or it is proved by the oath of one or more witnesses before the Chief Justice, or County Court, where the land lieth, and it must be presented that the wife is a resident of any other county, or so aged or infirm, that she cannot travel to the Chief Justice, or County Court to make such acknowledgments as aforesaid, the Judge or County Court may make an order to direct the clerk of the County Court where such land lieth, to issue a commission to two or more commissioners for receiving the acknowledgment of any deed of such *feme covert*. After they have examined her privately and apart from her husband, touching her consent, and certified her consent to the County Court to which the commission is returnable, the deed shall by order of the County Court be registered with the commission and return, and shall be as effectual as if personally acknowledged before the Chief Justice, or the County Court. It is apparent by reading these acts, that the Legislature, in analogy to the law relating to *femes*, meant to restrain the wife from conveying her lands, without the concurrence of her husband, and likewise to restrain the husband from alienating the lands of the wife without her consent freely given. To protect her in her rights the Legislature required that she and her husband should (if within the State, and she could travel), personally acknowledge the execution of the deed before the Judge, or before the County Court, when she was to undergo an examination separate and apart from her husband, touching her full and voluntary consent to such conveyance. This mode of alienation is likewise in analogy to the practice of acknowledging title to the *cognizee* in a *fine*. There the husband and

*23 State Records, 358.

wife were compelled to make a personal acknowledgment, either in Court according to the rules of the common law, or before the Judge or commissioner of *fines* by virtue of the statute. If the acknowledgment made by the wife is in the County Court, the member of the Court appointed for that purpose, takes the *feme covert* aside, separate and apart from her husband, and privately examines her as to her free consent in executing the deed. If she acknowledges that she exe- (518) cuted it of her free will and consent, the examining member of the Court immediately returns, and reports to the Court verbally her examination, whereupon the Court orders the clerk to enter the report of her private examination on the record, and then further orders, that the acknowledgment, the report of the private examination and the deed itself shall be registered, which order is fully entered of record. Mrs. Barfield did not personally acknowledge in open Court the execution of the deed under which the defendant claims the land, either with or without her husband, neither was she privately examined by any member of the Court, in the verge of the Court, as to her free consent to the execution of the said deed. It cannot be pretended that the certificate of Slocomb is of any avail under the third section of the act of 1751, there is no representation that Mrs. B. was a resident of a foreign country, or that she was so aged or infirm that she could not travel to Court to make her personal acknowledgment, nor is there any commission from the Court signed by the clerk, and if there had been both a representation of age or sickness, and a regular commission, it could not have been executed by one commissioner, for the law protects the rights of the wife, by giving her the assistance of at least two commissioners, in those cases which are embraced in the section 3, ch. 3, Laws 1751. The principles of the case before the Court are within the cases of *Burges v. Wilson,* 13 N. C., 306, and *Whitehurst v. Hunter,* 3 N. C., 410. We are of opinion that the judgment of the Superior Court was right, and must be affirmed.

PER CURIAM. Judgment affirmed.

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(519)

THE PRESIDENT AND DIRECTORS OF THE STATE BANK v. F. C. ARMSTRONG, admr. of JOHN ARMSTRONG, and others.

Where a dealer with a bank had a balance to his credit upon a general cash account, and died indebted to it by judgment and upon simple contract, the bank has a right, independent of the statute of set-off, to apply the balance to the latter debt.

This was an action of DEBT upon a judgment obtained by the plaintiffs against the intestate of the defendant Armstrong in his lifetime, and the other defendants, the latter being in fact his sureties. The judgment declared on was $3,046. The only dispute between the parties arose upon the plea of *payment,* and upon a notice of a *set off* for the sum of $930, given at the trial before *Seawell, J.,* at CUMBERLAND on the last circuit.

Sundry payments were admitted by the plaintiffs, and a verdict was taken for $3,136.14, to be reduced to the sum of $1,855.80, if the Court should be of opinion that the defendants were entitled upon the following facts, to have the sum of $930 applied to the judgment declared on, either as a payment or a set off.

John Armstrong was clerk of the County Court of Cumberland, and kept his cash with the plaintiffs, at their office in Fayetteville, and dealt with them as depositors usually do with their bankers. (Some particulars of the mode in which this dealing was conducted is contained in the opinion of the Court, and need not be here stated.) Of the cash thus deposited with the plaintiffs, the sum of $930 never had been paid to Armstrong in his lifetime, neither had he ever made any specific application thereof to this, or to any other debt he owed the plaintiffs. Armstrong died on 20 July, 1827, and his administrator on 19 September following, called at the banking house of the plaintiffs and drew a check for the balance above mentioned, and demanded its payment to him. This was refused by the cashier, who assigned as a reason therefor, that Armstrong owed the plaintiffs a large sum for money paid into his office in his life time, upon executions in their favor, and that he had been directed to retain
(520) the balance at the credit of Armstrong on account of this money. Armstrong did in fact owe the plaintiffs, for money received by him as clerk, the sum of $2,300, and two or three weeks before his death had, upon being called on by the cashier of the plaintiffs for payment, promised to come to the banking house and settle the amount, but had never done so. The administrator never made any other demand for the said sum of $930, neither had he ever given any directions to the plaintiffs as to its application.

On 22 October, 1827, the plaintiffs sued out process upon the official bond of Armstrong assigning as a breach thereof the non-payment by him of the sum of $2,300 above mentioned. On the trial of this action they allowed the defendant credit for the sum of $930, the balance of Armstrong's

cash account, and the sum now in dispute. But his administrator who was the sole defendant, did not consent to this credit, on the contrary he expressly declared his dissent thereto, and notified the attorney of the plaintiffs that he should insist upon applying it as a part satisfaction of the judgment on which this action was brought. This notice was disregarded by the plaintiffs who took judgment only for the balance claimed by them after deducting the said sum of $930.

Directly after the demand made by the administrator for the payment of the said sum of $930, he brought an action of *assumpsit* against the plaintiffs for its recovery, in which he was non-suited at the Fall Term 1829, of Cumberland Superior Court. He immediately brought another action for the same sum, in which he was again non-suited at the Fall Term, 1832, of the same Court; within a year thereafter he sued out a third writ for the same sum, which was returnable to the term of the Court when this suit was tried, and which was, at the trial, in the hands of the sheriff.

His Honor was of opinion, "that it belonged exclusively to the defendant, the administrator of Armstrong, to avail himself of the benefit of the deposit, and that it was not in the power of the plaintiffs, who were to be regarded as debtors to that amount, to say in what manner they (521) were to pay it, except in an action against them to recover it. Here the bank was plaintiff to recover a debt due to it, and it belonged to the defendant to avail himself or not of the deposit, and consequently he might exercise his election as to what cross demand he would apply it. That if he could not apply it as a set-off, the conduct of the bank in refusing payment of it, it being a debt due from it left it in his power, if he thought fit, to treat from that moment, the money paid to the bank on deposit, and thus refused to be repaid, as a payment to whatever demand the bank had against him, and that he had the right to assert it by plea when sued. Therefore the deposit must be allowed either as a set-off or payment."

Judgment being entered accordingly, the plaintiffs appealed.

Henry and *W. H. Haywood* for the plaintiffs.
Badger contra.

GASTON, J. The plaintiff brought an action of debt against the administrators of John Armstrong, Thomas Armstrong, John Hodges, William Hodges, and Robert Campbell, to recover the amount of a dormant judgment which had been

rendered in their behalf against the intestates of these defendants. The matters in controversy were embraced in the issue joined on the pleas of payment and set-off. Upon these issues the jury returned a verdict ascertaining the balance due on the judgment, subject to the opinion of the Court upon a case agreed. This case presented the question whether, upon the facts agreed, the defendants were, or were not entitled to a further credit of the sum of $930, which was claimed by them, but not allowed in the verdict. Upon this question the decision of the Court below was in favor of the defendants, and a judgment having been rendered for the plaintiffs for the residue of the sum mentioned in the verdict after deduction of this credit, they appealed to this Court.

The material facts in relation to the disputed credit are briefly these: The late John Armstrong for many years (522) before his death kept an open account with the plaintiffs as his bankers. He died on 27 July, 1827, and on the face of this account there was then a balance in his favor of the aforesaid sum of $930. About a fortnight before his death, he was called on by the plaintiffs to account with, and pay over to them moneys which the sheriff of the county had paid over to him as Clerk of the County Court, for the plaintiffs. He promised to do so, but died without accounting or making payment. The sum due to the plaintiffs on this account was $2,400. Besides this debt, he also owed jointly with the persons hereinbefore named, the large judgment which is the foundation of this action. Neither of these debts were charged in the running account. On 19 September, 1827, his administrator applied at the bank, presenting a check in favor of himself for the sum of $930, and demanded payment thereof. The officers of the institution refused to pay this check, and claimed the right to apply the balance appearing due to his intestate to the satisfaction *pro tanto* of what his intestate owed, because of the money of the bank received from the sheriff. The administrator immediately thereupon commenced an action of *assumpsit* against the bank, and on the trial thereof was called and non-suited. He renewed the action, and upon the trial was again non-suited. He then issued a third writ which has not yet been executed on the plaintiffs. On 22 October, 1827, the plaintiffs instituted an action on the official bond of Armstrong, which was tried at the same term with this suit, and obtained a judgment for the residue of the money so received by him as Clerk after a deduction of the sum of $930, which they applied in part discharge of that claim. This application of the said sum

was not assented to, but on the trial was protested against by the administrator. On 23 July, 1829, the present suit was brought.

It is clear that the disputed credit cannot be allowed as a set-off, waiving all other objections to it as such, there is a want of that mutuality between the debt demanded, and the debt which the defendants opposed to it, which is indispensable under the statute of set-off. A debt which (523) is due from the plaintiff to one defendant only, cannot be set off to a joint demand against two or more defendants.

It remains to be considered whether upon the facts agreed, the law pronounces that this sum of $930 has been paid in part satisfaction of the judgment which is the foundation of this action. Whatever claim the late John Armstrong had against the plaintiffs, it arose not from *special* but from *general* deposits. He had not placed in the custody of the officers of the bank, money in bags or boxes to be kept distinct from the funds of the bank and to be returned to him in *specie*. Had this been the case the identical money so deposited, would have remained his property in their hands as his bailees. If lost or destroyed without fault of the depository, the loss would be that of the depositor. If not so lost or destroyed, he would have had a remedy against the plaintiffs upon an improper refusal to return it, by detinue or trover, as for an unlawful detention or conversion of his proper goods. The deposits were general.

They consisted (as appears from the account made a part of this case) either of money, or of the notes of the bank, or of notes of other banks, or of the checks of other dealers upon the bank, or of the proceeds of bills or notes discounted for him. They were incorporated into the mass of the funds of the plaintiffs, became their property, and entitled him to a general credit for the amount thereof in account. Upon a settlement, the plaintiffs were bound honestly to account with him for that amount, and faithfully to pay over any balance which on such settlement should be found rightfully due. They were undoubtedly entitled to charge him with whatever sums they had paid to him, or to his checks to others, and with such other disbursements and demands, as by the agreement of the parties, or by the nature of their dealings or by the known usages of the institution, or by the law of the land, were proper debits in such a running account. Had the plaintiffs the right as against Armstrong, upon his refusal to (524) pay over to them monies which he had received to their use, to charge this in the account to the extent of his funds in

bank? There can be no question but if the bank had paid off a note or acceptance of his, payable at the bank, this would have constituted a proper debt in the account. It is not to be doubted also, but that they had a right to apply his funds in their hands to the payment of any note or acceptance of his, held by them. *Rogers v. Ladbroke,* 1 Bingham, 93, 8 E. C. L., 260. Upon the examination of the account referred to, we find that the very first debit is, "3 *June,* 1890, *to note* 108," and that regularly afterwards, so long as he obtained discounts, that is to say, up to 22 April, 1827, his notes are charged off in account, as they become due, or as his means in bank by discounts or otherwise become adequate to meet them. We see also that according to the course of dealing between the parties, he is charged in account with other money demands, as for example, "27 January, 1827; *Brown & Cameron's judgment,* $610.25." From the nature of this account, as an open running account of the cash transactions of the parties, embracing a variety of receipts and payments, debits and credits, from the manner of their dealing with each other, and upon common law principles wholly independent of the statute of set off, we think that either has a right to *retain* for, or to *charge in account* against the other, money received by the latter for the use of the former, so that the balance thus ascertained shall be the *true debt,* and the parties neither driven to cross actions nor obliged to set off, against each other, as for mutual unconnected demands. *Dale v. Sollet,* 4 Bur., 2143; *Green v. Farmer, Ib.,* 2221. But if the decision of the question rested upon this point we should consider it further before we come to a *definitive* determination. We can decide it more satisfactorily to ourselves upon other grounds which I proceed to state.

It is not questioned that if Armstrong had demanded payment from the bank of this apparent balance in his favor, the bank could refuse upon the ground of the set off which they had against him, because of their money received from the sheriff, and had he attempted by action of *assumpsit* to (525) enforce a recovery of this balance, they could have barred the recovery by pleading this set off. As Armstrong's administrator succeeded precisely to the rights of his intestate, whatever was the rule of right as between the plaintiffs and the intestate, became the rule also between the administrator and the plaintiffs. But while this is conceded, it is denied by the defendants that the plaintiffs could apply this balance as a *payment* on account of this particular demand, without the assent of Armstrong or his administrator, because

the two demands were *unconnected,* originating and continuing in distinct transactions, forming opposite debts, recoverable by separate and opposing actions, and not permitted to balance each other, except by a judgment of Court rendered with respect to them when brought forward under the defense of set off. If this be indeed the rule which governs the transaction, and by the force of which the plaintiffs cannot apply the money due to Armstrong's estate, as a payment of the demand they have against it for the money Armstrong held of theirs, we are unable to see how under the same rule these defendants can, without the assent of the plaintiffs, apply the former demand as a payment of *the judgment* upon which they are sued. There is *at least* as little connection between the disputed item and this judgment, as between that item, and the demand against Armstrong for the money paid him. In fact there is much less, because as we have seen, the two last are not even mutual demands, and cannot be opposed to each other upon the plea of set off by the defendants.

The argument by which the defendants endeavor to sustain this their asserted right, is understood to be this: the money standing on the running account to the credit of Armstrong at his death, was the money of his administrator, and he had the right to apply it as he pleased. The refusal of the bank to let him have the control of this money, gave him an election to consider it as cash paid to the bank. There were two demands of the plaintiff's against his intestate, and of course against the administrator as the representative of that intestate. A debtor making a payment, has the right
to apply the sum paid, to either of the demands of the (526)
creditor, and the debtor here, by the plea of payment to this action, has directed the application to this debt. We have felt ourselves bound to consider this argument attentively, not only, because of the respect due to the able counsel who argued it, but because of the still greater respect due to the decision which is supposed to sanction it, and which the appeal brings before us for review. The result of that examination has not been to satisfy us of the correctness of the argument.

However for some purposes the phrase may be allowed, that the balance on the running account in favor of Armstrong at his death, was *the money* of his administrator, we have seen that legally speaking, it was *not his money.* Such balance was evidence that the plaintiffs *owed that amount* to the administrator, and a refusal to pay it upon demand, unless such refusal were made for sufficient reason, rendered the plaintiffs

liable to the administrator, because a breach of the *assumpsit* which the law infers from such indebtedness. If the claim of the plaintiffs against the administrator were so connected with this balance appearing due on open account, that both were items in one continued dealing, then the refusal to pay was rightful, because in truth there was nothing due. If however these mutual claims were unconnected, the plaintiffs had a right to refuse payment, because they had a proper set-off. A debtor who makes an actual payment with his own money has a right to direct its application, because *it is his money,* and he alone has the legal control over it. But a *creditor* has no right to direct his debtor to apply the sum due him to any one of two cross demands which that debtor may have against the creditor. The money in the hands of the debtor is yet *his* money, *he* has the legal control of it—its *specific* application cannot be ordered by the creditor, and the right of opposing a set-off, and if so, of selecting the set-off which he will thus oppose, is the right of the debtor. We do not therefore see that the refusal of the bank to favor
(527) the administrator's check, gave him a right to regard the *sum checked* for, still less the whole apparent balance, as so much money then paid to the bank.

If this view be correct it is unnecessary to pursue the train of reasoning further. A fallacy we think has insinuated itself into it at its commencement, which unavoidably leads to error in the result. But if the administrator could be regarded as having the right to consider the money standing to the credit of his intestate as a *payment* to the bank, and of directing its application—when ought he, and when did he direct the application? The judgment of the Court is, that it was thus applied on 19 September, 1827, because of the refusal of the bank then to pay his check, and of the election declared by him at the time of the plea pleaded. The record shows that the plea of payment was first put in at June Term, 1832. There appears *no plea* referring distinctly to this disputed item until at the term of trial, when the administrator of John Armstrong pleads fully administered, and "gives notice of a set-off for $930." It is perfectly clear, that *in fact* the administrator did not direct the application of this disputed item as a payment on the 19th of September, 1827. He presented a check for $902 payable to *himself.* The bank refused the check, because they claimed the right of retaining for the satisfaction of one of their demands. It was not a controversy for which of the two demands the bank should retain, but whether it might retain for their claim against John Armstrong, or should not retain at all.

The application of this balance to the judgment debt was not urged, nor so far as we see, thought of by either. If the refusal of the bank gave *him* the right to direct the application, he did not then exercise that right. Instead of imputing this amount to either of the demands of the plaintiffs, he required it to be paid over to himself. It is not stated as a fact, nor is there any fact set forth from which it can be inferred, that the administrator treated this as a *payment* by him, or by his intestate, or claimed that it should be so regarded for several years afterwards. He immediately instituted an action to recover this amount as a debt due him from the plaintiffs, and after repeated nonsuits, (528) he to this day, perseveres in claiming it as a debt. If the occurrences at the time the check was refused, either of themselves, or connected with the election at the time when payment was pleaded to this action, can convert the amount withheld by the bank, into a payment, then it must be regulated by the law applicable to such a payment, that is to say, a payment by a debtor to a creditor having two demands, without any direction as to its appropriation. In such case, the rule is settled, that the creditor may then make such appropriation as he pleases. We are saved from the necessity of inquiring how the law would have applied it, in case both the debtor and creditor had at the time declined to make an appropriation (an inquiry which in many cases is not free from perplexity), because the election of the plaintiffs was expressly announced at the moment, and has ever since been invariably adhered to.

I am instructed to declare the judgment of this Court, that the Court below erred, in rendering a judgment in behalf of the plaintiffs for the sum of eighteen hundred and fifty-five dollars and eighty cents; that the said judgment ought to be reversed on account of this error, and that the plaintiffs are entitled to have judgment pursuant to the verdict of the jury, for the sum of three thousand, one hundred and thirty-six dollars and fourteen cents, and their costs in the Court below, with interest on $2,314.50 cents, from the time of the rendition of the judgment in the Superior Court of Cumberland, until paid. The appellants are also entitled to recover their costs in this Court, to be taxed by the Clerk.

PER CURIAM. Judgment accordingly.

Cited: Jones v. Gilreath, 28 N. C., 339; *Hurdle v. Hanner,* 50 N. C., 361; *Walton v. McKesson,* 64 N. C., 154; *Hodgin v. Bank,* 124 N. C., 542; *S. c.* 125 N. C., 508.

(529)

THE PRESIDENT AND DIRECTORS OF THE STATE BANK v. MOSES A. LOCKE and JANE TROTTER.

A condition in the bond of the cashier of a bank "to account for, settle and pay over all moneys, etc.," is tantamount to a condition for "good behavior"; and if it were not, a clause in the charter, prescribing the latter condition, is only enabling, and does not preclude the insertion of the former.

This was an action of DEBT, commenced in November, 1830, upon a bond, made by the defendants in the penalty of $50,000, dated 27 December, 1815, with the following condition: "Whereas, the above bound Moses A. Locke, has been appointed cashier of the Salisbury Branch of the State Bank of North Carolina, now therefore, the condition of this obligation is such, that if the above bound Moses A. Locke, shall and does well, truly, honestly and faithfully, demean and behave himself in the said office and capacity of cashier of the said branch, and shall and does fully, fairly, justly and honestly account for, settle, and pay over all moneys which he ought to account for, settle and pay over, in virtue of his office, as cashier, then, etc."

Three breaches were assigned: 1st. That on 19 April, 1816, the cashier of the Bank of New Bern, paid into the hands of Locke as cashier, in an order, on the State Bank, at Raleigh, the sum of $1,355, with direction to pass it to the credit of the Bank of New Bern, as a deposit, and that Locke did not so enter it, but negligently and unfaithfully omitted to do so, and concealed the fact that the said deposit had been made.

2d. That Locke remained in office until August, 1821, when he resigned, and that he was then bound to settle with, and pay over to the plaintiffs all moneys then in his hands, or which ought to have been in his hands, belonging to them, and was required so to do, but that he failed to pay over or

(530) account for the said sum, and unfaithfully and improperly concealed and withheld the same.

3d. That Locke in 1830, upon being requested to pay to the plaintiffs the said sum of $1,355, refused so to do.

The defendants severally pleaded as follows:

1st. *Non est factum.*

2d. Payment *ad diem, et post diem.*

3d. Performance of the condition, and that Locke had committed no breach of his duty.

4th. *Accord* and *satisfaction.*

The defendant Trotter also pleaded several special pleas in substance as follows: That Locke had, although he received

the sum of money in the pleadings mentioned, often rendered accounts in writing to the plaintiffs of his official transactions, which purported to be true accounts of the sums received by him, and were approved and passed by the plaintiffs, and that on his resignation in 1821, he rendered a final account which was also approved and passed, and that he fully paid the balance that thereupon appeared to be in his hands, and that the plaintiffs without willful default and neglect, might have known, at that time, that the said sum of $1,355 was not included in that account, and had not been paid over; and also, that the said accounts were false and fraudulent; yet the plaintiffs neglected to require further payment or account from the said Locke, for two years after passing the said account, and also neglected to give the defendant any notice of such default in said Locke, for more than ten years as aforesaid. By which *laches,* and by reason of the premises, and because the defendant was altogether ignorant of any default, the said defendant was discharged from all liability on the bond, for the default alleged by the plaintiffs. In other pleas by the same defendant, the same matter was relied on, accompanied with averments that the plaintiffs and their officers had, at the time of passing Locke's accounts, notice that he had received the money mentioned in the declaration, and that it was not included in his accounts, and (531) also knew of other errors and omissions and false entries in them, and yet for a long time, viz.: more than ten years, neglected to give notice thereof, to the said defendant, whereby, and inasmuch as she was ignorant, without her own default, of any default in the said Locke, she became discharged, etc.

On the trial before his Honor *Judge Norwood,* at ROWAN on the last circuit, the plaintiffs proved very clearly the receipt by Locke, of a certificate of deposit in the State Bank at Raleigh, which was, by the cashier of the Bank of New Bern endorsed to him, and directed to be placed to the credit of the Bank of New Bern. This certificate was produced, and was by Locke charged to the mother bank, but no corresponding credit had been given the Bank of New Bern. Locke in the balance sheet made out by him, when he resigned, stated the Bank of New Bern to be debtor to the State Bank at Salisbury, for $1,018, and received credit accordingly; when had the money now in dispute, been passed to its credit the balance sheet, would have exhibited it as creditor to the amount of $317. It was admitted that during the time Locke continued in office, sundry accounts current had been furnished

by him to the plaintiffs, and also to the Bank of New Bern, which had not been objected to. Accounts had also been furnished to the Bank of New Bern, by his successor, up to a recent date. The plaintiffs offered to prove, that in 1830, the Bank of New Bern had claimed and received credit for the omitted sum. This evidence consisted of an account then first rendered by that bank, and of its allowance by the plaintiffs. This testimony was objected to by the defendants, and was rejected by his Honor.

The cashier of the plaintiffs, at the branch bank in Salisbury, proved that soon after he heard of the claim of the Bank of New Bern for an additional credit, he called Mr. Locke's attention to the subject, and asked an explanation, and was informed that unless he, Locke, had paid the amount of the claim into the office of the Bank of New Bern, at Charlotte, he did not know how to account for it.

(532) For the plaintiffs it was insisted, that they had a separate cause of action whenever a breach of the official bond occurred. It was argued for them, that the omission by Locke to enter the proper credit to the Bank of New Bern, in the year 1816, was a breach. That another breach was committed, in Locke's not making a full settlement in 1821, and another, in not paying the sum in dispute in 1830, when his attention was called to the claim of the Bank of New Bern, then made. For the defendants it was contended, that the bond on which the action was brought was void, and if not void altogether, that the second condition for accounting was void. That the cause of action accrued in 1816, and as more than thirteen years had elapsed before the writ was sued out, a presumption of satisfaction arose, which was not rebutted by any testimony which had been offered. And further, as there was no proof that the plaintiffs had paid to the Bank of New Bern, the money demanded in this action, they were not entitled to recover it.

His Honor instructed the jury, that the bond was not void in whole or in part. That the plaintiffs had a good cause of action, whenever a breach of the bond was committed; that three several breaches being alleged, if the plaintiffs failed to establish all of them, they could recover upon such as were supported by proof. That as to the breach assigned, as having occurred in 1816, the law raised a presumption of payment, but that if they were satisfied that the error was not discovered until 1830, this was a circumstance to rebut that presumption. That if the Bank of New Bern retained the accounts current, without objection, a presumption arose that

they were correct; but that this presumption might be repelled.

His Honor also charged the jury, that as to the breach assigned as having taken place in 1821, the presumption of payment did not arise, as the suit was commenced within less than ten years from that time; that as to the breach alleged to have taken place in 1830, the defendants having stipulated by deed, that Locke should account with and pay the plaintiffs their moneys to his hands, no demand for such account and payment was necessary, or if one was necessary, that made in 1821 was sufficient. And finally (533) his Honor, leaving it to the jury to inquire whether the plaintiffs had established any of the breaches assigned, informed them, that if this had been done, they ought to find for the plaintiffs, although there was no proof that the money had been actually paid by them to the Bank of Newbern. The jury returned a verdict for the plaintiffs, in which they found all the issues against the defendants, except those joined on the special pleas of the defendant Trotter; to these they did not respond at all. Judgment being rendered on this verdict, the defendants appeal.

Nash, for the defandants.
Badger, for the plaintiffs.

RUFFIN, C. J., after stating the case as above, proceeded:

Upon the trial, several points were made by the defendants, on which his Honor gave opinions, in which it is insisted there was error, to correct which, is the object of the present appeal.

There is no dispute about the receipt of the money by Locke from Stephens, the cashier of the Bank of New Bern, nor that it was his duty to enter it as a deposit to the credit of Stephens as cashier. But the Court having rejected evidence, offered by the plaintiffs, of the recent payment of the money by the State Bank to the New Bern Bank, it was insisted, that without proof of such payment, the plaintiffs could not recover in this action.

The defendants also prayed the Court to pronounce the bond void, either wholly or in part, as not being authorized by the charter, but contrary thereto. On both points, the decision was against the defendants.

On the first, nothing scarcely need be added to what was observed as to the nature of bank deposits in *Bank v. Armstrong, ante,* 519. The money, when received by the cashier

Locke became incorporated into the mass of property which belonged to the plaintiffs, and which by the plaintiffs was confided to his care. It was not, in his hands, the money (534) of the Bank of New Bern, nor his own; but was the money of the State Bank, for which that institution, and not Locke, was responsible to the depositor. When he left the office, he was bound to leave there all that had been deposited there, to enable his employers to meet the engagements assumed through him. It is therefore immaterial whether the depositor has called, or shall ever call upon the plaintiffs for the money. The right of the plaintiffs depends upon its having been paid into the bank, and upon Locke's having withdrawn it for purposes not those of the bank. The argument cannot be admitted for a moment, that when a cashier withdraws from a bank, he has a right to carry with him all the money in deposit and keep it until the bank shall have satisfied the depositors. With what are their demands to be satisfied, when the cashier has the funds?

The second objection arises under the general issue and is founded on the sixth fundamental article of the ninth section of the bank charter. The words of it are: "Every cashier, before he enters upon the duties of his office, shall be required to give bond with two or more sureties to the satisfaction of the directors, in a sum not less than $10,000, with condition for his good behavior." The terms of the bond on which this suit has been brought have been already mentioned. It is insisted, that a corporation is bound to act in strict conformity to its charter, and that acts and contracts not authorized by it are void, or at all events, those are which do not conform to the charter, in those cases in which the charter does prescribe particularly the form or subject matter of the contract; and that here the second provision for settling and paying over the moneys, is an addition to that mentioned in the charter, and avoids the whole bond, or at least, that the matter added is void.

The objection supposes that the bond taken, varies substantially in the condition from that mentioned in the act, for it is not supposed to be argued that it must be confined to its very words. That would make it altogether inopera- (535) tive, since the act does not say in so many words, in what respects, or as to what duties the cashier shall be of good behavior. The variance is supposed to consist in the difference between "good behavior" and "accounting, settling and paying over all moneys"—the former only referring to integrity, and the latter including capacity, diligence, and abil-

ity to pay. The authority on which this distincton is taken, is *Bank v. Clossey,* 10 John. 271, in which that doctrine is laid down, and it is held, that overpaying a check by mistake was not a breach of a bond "well and truly to perform the duties of the office of teller."

The breach here, is the omission of the plain duty of entering on the books of the bank a credit to a customer's account, by means of which omission, the cashier was enabled to escape being charged, as between himself and the bank, with the sum which ought so to have been credited, and also enabled to retain to his own use, until it was a long time afterwards otherwise discovered. This could not, we think, be good behavior, in any sense of that term. If he was not obliged duly and skillfully to enter the credit according to the approved methods of book-keeping, he was at least obliged, as a man of integrity, to enter it in some way. But to us it seems, that the construction of those words, contended for by the counsel, is not the true one. The object of the Legislature was to have the institution secured in the performance of all the acts which were incumbent on the cashier as duties. The State took a large interest in the bank, and private citizens embarked their money in it, at the invitation and upon the faith of the State. It cannot be supposed that mere honesty of purpose, or rather the absence of dishonest intentions, on the part of the cashier, was all the State meant to require, but further, skill, diligence, punctuality—for these qualities are necessary to the duties on the discharge of which the success, nay the existence of the institution essentially depended. The doctrine of the case from New York cannot prevail over these reasons, if the doctrine were such it is supposed to be. In *Minor v. Bank,* 1 Peters, 46, it was held that the words, "well and truly (536) execute the duties of the office of cashier," includes not only honesty, but skill and diligence. These words are the same as those in the bond sued on in *Bank v. Clossey,* 10 John, 271, which was then cited and relied on. But the doctrine of the case in New York, is not that supposed, as we think. The case before the Court was that of a mistake in the Teller, and found to be really such, in the count of money. It may be true that those words do not form a guaranty against all mistakes, or imply the utmost and perfect, but only reasonable capacity and diligence; and therefore that an act which even a careful and very competent person may commit, would not amount to non-performance. But until the mistake be shown on the part of the defendants, the omission to make any entry whatever, cannot be regarded as good behavior, and the omis-

sion to account for the money in any way cannot but be considered as a culpable omission. So that the breaches here, appeared to be breaches of that part of the condition which does conform to that of the charter; as well as those which are most specific as to the particular duty of payment. Nor do we think these latter words import that the cashier shall pay, at all events, all the money that might come to his hands, so as to insure against accidents, robbery, or the like. If they were not qualified by other words in the bond, they would be subject to a reasonable construction, according to the subject matter, and receive a sense consonant to the previous general provision relative to good behavior, so as to make the obligation to account, an obligation for faithful accounting. But they are expressly qualified. The cashier is to account for, settle and pay all moneys, "which *he ought* to account for, settle and pay over *in virtue of his office.*" This is not adding a duty beyond good behavior, but only the expression of one of the particulars, which constitute that general duty, and (537) which cannot vitiate the obligation, in respect of the previous words.

If, however, the provision had been a new and substantive one, out of both the words and sense of the charter, we should still think it binding. It is true that a corporation is the mere creature of the law, having no natural existence, and therefore no original power to contract. That power is necessarily derived from the charter. But it does not follow, that the charter must specify every contract that may be made by the corporation, or the mode and form in which it shall be made. As a matter of necessity, its capacity to contract is only said to arise out of the charter, because the origin and existence of the corporation—the ideal being which contracts —are derived from, and depend on the charter. But when once called into existence by law, its power to contract generally, or only to make particular contracts for specified purposes and in specified forms, will depend upon the purposes of the incorporation, and the enabling and restraining clauses in the charter. When the charter is by statute, as here expressly creating certain persons, when associated, a body politic in law and in fact, able and capable in law to purchase and possess estates, real and personal, to a certain amount, and "generally, to do and execute all acts, matters and things, which a body politic in law may, or lawfully can"—there is given to this impersonal being the general faculty of contracting, which persons by law have, though the mode of contracting may be different. To these words however, are added, "subject to the

rules, regulations, restrictions and provisions hereafter prescribed and declared," and in the ninth section it is subjoined that the following rules, restrictions, limitations and provisions, shall form the fundamental articles of the constitution of said corporation, among which is the provision, before quoted, for taking cashier's bonds.

To show that within the intention of the Legislature, the capacity of the corporation to make each particular species of contract, does not require an express grant, it is only necessary to advert to the phraseology of this article. It requires the cashier to give bond in not less than $10,000; yet it does not profess to confer on the corporation the power to take it payable to itself, nor to take one in a greater pen- (538) alty, though it is apparent that the sum mentioned is not adequate security in a bank with so large a stock, and that the Legislature expected that a larger would, and ought to be required.

But the argument is, that the words are restrictive, and that a contract not conforming to it, is void. The effect of this argument, if sound, would be serious. The appointment of the cashier would itself be avoided, and as the bank can only deal and be dealt with through agents, and he being illegally inducted, is not the agent, and all contracts through him would be null. This consequence would go far to prove the reasoning fallacious. We deem the construction contended for not to be the true one. The clause seems to us not more restrictive on the corporation than it is enabling. The object was not to impart the faculty of making a contract with the cashier and two sureties for him, for his faithfulness in office, and to make the appointment of one without bond void; nor was it to restrain the general faculty before imparted, to that of taking security in a particular sum or form. Another purpose was in view. The act incorporates all the subscribers to the bank, including the State, as the largest stockholder. It then vests in the president and directors, as a select body of the corporators, powers which make that board, as it were, the acting corporation for the ordinary purposes, and general management of the corporate affairs. The intention was to guard the mass of the stockholders from the assumptions, negligence or mistakes of that select body, as well as the malpractices of the agents by them appointed, as far as was practicable. The same protection was requisite for the State and each member of the community, as being concerned in the credit and soundness of the institution. Hence, by the eighth section of the charter, it is enacted that the directors of the

principal bank shall have power to appoint directors for the branches, and such officers under themselves, as well as the branches, as shall be necessary for the business, and shall be capable of exercising such other powers and authorities (539) for the well-governing and ordering the affairs of the corporation, as shall be fixed and determined by the laws and ordinances of the same; which by-laws are not to be contrary to law, and subject to the restrictions of the charter. Then follow a number of provisions in the next section, which are called fundamental articles of the constitution of the corporation. They are obviously of different natures. Some of them prescribe the mode of action, and limits to the powers of the whole body of stockholders, such as the times of general meeting, the mode of voting, and the scale of votes, and the number of directors to be chosen for the principal bank. Others relate to things which neither the whole body can authorize, nor the select body do, with or without such authority; and others obviously impose duties on the board of directors, as practically conducting the business, or declare limitations on that body in the exercise of those functions. Thus in the course of their trading, they are forbidden to hold real estate, except under certain circumstances; to contract debts beyond a fixed sum; from dealing except in specified articles; from committing usury; from making loans to the United States or a State; from withdrawing the capital from the branches. They are required to make dividends, to submit a state of the bank to the stockholders in general meeting, to appoint directors and officers of the branches, and to cause discounts to be made, and deposits to be received there, upon the same terms as at the principal bank, to cause the cashiers to make weekly statements to the board of the condition of the bank, and to furnish the treasurer with a similar statement, when required, not exceeding one in three months.

These are obviously functions of the Board of Directors, and therefore the mandates concerning them are to be considered as spoken to that Board. So of the duty of taking bond from the Cashier. The Directors appoint that officer by the express provision of the charter. They therefore are to take the security, which he is required to give. If the Board fail to take any security, or such as is prescribed, it is crimi- (540) nal in the persons composing that body, and they would be amenable, probably, to the State and to the whole corporation. It may be, too, that at the election of the State, upon a judicial proceeding, the charter might be adjudged forfeited for such disobedience to the law in even this small por-

tion of the corporation, as the board is in possession of the funds of the whole corporators, and exercises *de facto,* according to its chartered organization, the most important of its franchises. These questions, however, are not at all involved in this cause, and even the hypothetical solution of them, either in the affirmative or negative, must not be considered as intimations of an opinion upon them. But admitting that the board ought to take the security, and that the members of it are responsible for not doing so, and taking it for granted that the sovereign might hold all the stockholders to be involved in the default of those, to whom the sovereign requires them to commit their affairs; yet the inquiry recurs, whether an officer thus appointed by the Board of Directors, would not be liable to the action of the whole corporation for any wrongs committed by him, or upon any contract entered into by him with the whole corporation. If his appointment be illegal and void, it is nevertheless incredible, that he may under color of it, get the funds and effects into his hands, and defy the world. The corporation is not *de facto,* upon such a breach of duty by the directors, dissolved; and until dissolved, may prosecute all who do it wrong, and enforce all contracts entered into with the corporation itself. If for instance, deeds for lands, contrary to the statute, were taken, they would be valid as against the vendor. If not, the charter is an absurdity; for if void, the charter could not be violated in that respect, since the bank could never acquire the estate, the acquisition of which constitutes the offence. A cashier, like another wrong doer, would be liable in trover, for the effects in his hands, if they could be identified. If they consisted of monies not identified, there is as little doubt that he would be liable in assumpsit, for money had and received, as other persons are, who get money of another (541) without consideration. In thousands of instances, corporations have had judgments on counts for money had and received. If a bank send money by an individual to another bank, and he convert it, or one steal it, surely it is impossible that there is no remedy for such a wrong. If the party be liable for money had and received, it is a case of implied contract. The law supposes every contract it implies, to have been in fact made; it infers that the promise was made, because it ought to have been. But it never thus inferred, if in law it could not be made between the parties. If these positions be true, and a corporation can, as it has often done, maintain assumpsit for money had and received to its use, then although the board of directors may have violated a duty incumbent on that body, by not taking a proper bond, the whole corporation

may yet have redress upon any other contract, proved or presumed, by which the cashier has become bound to the whole corporation for his transactions, particular or general. A liability on a promise to pay a particular sum does not stand on a different footing from one on a covenant and bond to cover all sums, which he has received, or may receive. There is an ability in the whole corporation to make a contract of either kind, and the liability depends on the terms of each contract. Here the cashier has been admitted into office, and has possessed himself of the assets of the corporation, and has given a bond, which, in its terms, covers the demand; and he is therefore bound by it. The true purpose of the fundamental article was to require the cashier to give a bond, and to require the board of directors as a body, distinct from the mass of the stockholders, and from necessity, entrusted with their interests, to take a bond payable to the whole corporation. This requisition is addressed peculiarly to the board, for the protection of the other corporators, including the State. It is mandatory to that body, but a compliance by that body is not a condition of which the performance must be shown, to give the corporation itself an action upon a contract with it. The clause is not an enabling one to the whole corporation to make the
(542) contract described in it, nor is it restrictive of the general faculty of the whole corporation; chartered for the purposes of banking, and as an instrument of commerce, and providing a circulating medium, which will avoid a contract with it in another form. It is therefore the opinion of the Court that the jury was properly instructed upon this point.

The next error alleged relates to the case made under the pleas of payment. The money was received in 1816, and was never entered in account. While Mr. Locke remained in office, the books and papers of the bank were open to the directors, and he rendered to the board weekly statements; and upon his resignation in 1821, a particular account was made up, from which his successor settled with him, when he fell in arrears, a considerable sum, which has since been discharged. This sum of $1,355, not appearing on the books was not brought into that settlement; and was not discovered until 1830, when Mr. Locke was asked for an explanation, and said he could make none, unless he paid it to the New Bern Bank at Charlotte.

His Honor charged the jury, that a presumption of payment arose from the lapse of time, between 1816 and 1830, but that it was repelled, if the error had not been discovered before 1830; that each of the breaches assigned in the declaration were distinct causes of action, and if the plaintiff failed on

that of 1816, there might yet be a verdict on that of 1821, for not paying over the money; and that as to this last, the time being less than the ten years before this suit, there was no presumption of payment.

The Court has been somewhat embarrassed by the manner in which these propositions were stated in the Superior Court. We do not agree in the opinion, if, as it seems, it was meant to lay down, that one, having a distinct and complete cause of action touching an entire sum, ascertained at a particular day, and being barred of that action by the presumption of payment, from efflux of time since that day, can, because the liability arises on a covenant or bond, with a condition to account, by a subsequent demand, create a new breach (543) and a new cause of action, and thereby avoid the effect of the time, and former presumption altogether. Upon the proof, the demand upon each breach, is substantially for the same sum of money. Although the plaintiff may fail on one, and recover on the other, and to that extent they are distinct; yet upon the evidence, the whole sum only can be recovered on all or either. The same debt therefore is demanded in each. Now the presumption we are speaking of, is that of *payment.* If the money is *once paid,* there is nothing more to demand, and so there cannot be a second breach committed by the non-payment on the second demand. This presumption of payment supposes it was made at the beginning of the time, for it is the lapse since, that puts the proof of the debtor's power, or raises the inference against the creditors, that he would not have waited so long, if he had not received satisfaction. We should therefore have held it erroneous to say, that as to the non-payment in 1821, which is one of the breaches, there was no presumption in favor of the defendants, if it were *true,* that such presumption ran as to the breach of 1816. It is indeed correct to say, that the time does not raise the presumption, that the money was paid in 1821, because it is less than ten years. But there would be a presumption that it was paid before, namely in 1816, when the first breach in relation to this same sum is alleged. We concur indeed with his Honor, that the whole presumption is rebutted by the ignorance of the error, and therefore if the case were before us, on a motion for a new trial, because the verdict was unjust, or against evidence, we should refuse it. But it is reviewed here for error in law, and we are unable to see whether the jury found the verdict upon the breach in 1816, because the presumption was rebutted, or upon that laid in 1821, because against that there was no presumption. We are, however, led upon reflection to conclude

that the first error in the Superior Court, consists in supposing, that there was in either case the presumption contended (544) for; and that the jury ought to have been told that there was nothing to raise it.

The fact pleaded, is payment or satisfaction. It is said that it is established by the lapse of time. That rule is familiar in its application to bonds, merely for the payment of money, or doing particular acts on a day or days certain, or even on demand. Then each party knows his rights and obligations, and they are distinctly unconnected and in opposition as debtor and creditor. But when one is bailiff or receiver of the other, there is during the continuance of that relation, and until an accounting between them as to their transactions up to the period embraced in the account, no legal presumption, as an arbitrary and settled rule of law, that the receiver has paid to the principal all the monies or any particular sum before received for him. Why? Because the duty of the receiver is, in that case, not merely to pay to the other the money as a debt which he owes him; but it is also, until demanded, to keep it for him as his money. Until an accounting and some payment thereon, the presumption is that the cashier of the bank did *not* pay the money to the stockholders or for the use of the corporation, as between them. There was no person to receive it but himself, and therefore it remained in his hands. That presumption becomes a certainty, if his own accounts, which he was bound to keep truly, contained no entry of such payment during his agency, nor even an acknowledgment by him that he has received the money, which he now contends must be deemed, upon mere presumption, to have been paid by him, while thus in office. It is manifest, we think, that there is nothing for such a presumption to rest on. The only possible reliance the defendants could have on time, was the presumption, not of satisfaction, but that the demand itself never existed, that the money was never received. That would have been a legitimate argument, though it would probably have availed but little against the direct written evidence under his own hand. That, however, would be altogether a presumption of fact, with (545) the decision of which, by the jury, this Court could not interfere. No question was made on it at the trial, or alluded to by the Judge. Upon the question made, it is thought clear by this Court, that until the defendant Locke ceased to be cashier, there was no presumption that he paid to the plaintiff any monies of which entries do not appear on the books kept by him; but on the contrary, that, as it was his duty to keep those monies, the presumption is, as against himself, that

he did keep them and has used them. When he gave up his office and came to a settlement with his successor, that settlement raised a presumption that all demands were then included, or had before been settled, until the contrary appears. And as to the presumption from time, on which alone the question was raised in this case, it did not begin before the settlement. But the day of the settlement is in our opinion a *punctum temporis*, at which the parties hold the relation of debtor and creditor, and that only; and from which alone any presumption of satisfaction could now run, and from which it did arise and would protect the defendants, if the time had been long enough and there had been nothing to repel it. But being less than ten years, it was in itself insufficient. We speak of that settlement as the first accounting, because there is no evidence of any other. It was urged in argument indeed, that there was a weekly accounting. But that is surely a misapprehension: at least we cannot understand the case in that way. The "weekly statements," spoken of by the witnesses, must be those statements mentioned in the fourteenth fundamental article in the charter. They are "*statements* of the amount of stock of the particular office and of the debts due the same, of the monies deposited therein, of the notes in circulation, and of the cash in hand." This does not mean a detailed account of all the items composing those general accounts, such as a list of the debtors and depositors and a description of the money, upon which the board is to settle with the cashier. But only a balance sheet, or what is familiarly called in banks or among merchants, *a state of the bank* or of the house, (546) by which the aggregate amount of its assets and engagements may be seen, and its present cash means appear. The use of it is simply to enable the persons engaged in the management of the bank to regulate the discounts for the day and order its general dealings for the ensuing week. It purports to show what the condition of the institution is, according to the books, and what it ought to be, upon the supposition that all its debtors are good and its officers faithful. But it supposes nothing as to these facts, nor does it purport to be an account between the bank and the cashier, nor to prove that the money that, according to it, ought to be in the bank, is there. It is not an account *to* or *with* the bank; but is a compendious account *of* the bank, as the cashier says it is, precisely of the same character with that required by the same article, in the same words, to be rendered by the officers to the treasurer for the information of that officer and the Legislature, upon which no particulars appear or are expected to appear.

There was certainly no necessity for a further demand; as that implied by accounting, in 1821, was for everything.

The remaining question is on the defect of the verdict in not responding to the special pleas. If those issues be material, the verdict is imperfect and there must be a *venire de novo;* but if immaterial, the jury would have found for the defendants on them unnecessarily, and the plaintiffs would still have been entitled to judgment *non obstante veredicto.*

Upon the defence constituted by the facts as pleaded or as proved, in another Court, we do not propose to make a suggestion. But upon its sufficiency at law, we have not the least doubt or hesitation. The pleas are substantially taken from those in *Navigation Company v. Harley* (10 East. 34). The case is an authority directly against them. Lord *Ellenborough* unfortunately dropped the observation, that "none of the pleas appear to have been proved in fact," which it is feared has led to some mischief. But if they had been proved in fact (547) they would have been unavailing. Baron *Wood,* on the trial, ruled that the case made in the plea was no defence at law, and it came on in the King's Bench on a rule for a new trial for that error. The counsel for the plaintiff were stopped; and the Court held clearly, that no *laches* of the obligees, in not examining the accounts or not calling on the principal, was an estoppel to proceeding at law against the sureties. No such estoppel was known of. This is precise authority upon the point, that one who is surety by obligation, though his character appear in the instrument, cannot avail himself of *laches* by the creditor, at law at least, if he can in equity, for *laches* is neither performance nor a release, and all the obligors are bound alike. In *Bultrel v. Jarrold,* (8 Price, 467), an action of debt was brought in the Court of Exchequer on a recognizance of bail entered into by Bultrel as bail of Rowe, and the defendant pleaded that the plaintiff without his privity, came to an agreement with Rowe, whereby he gave him time and was to receive payment in goods, which were consigned to him accordingly. It was held bad on demurrer, because such a parol agreement with the principal could not discharge the obligation arising on matter of record. Upon this judgment error was brought in the Exchequer Chamber, where it was affirmed. Error was again brought in the House of Lords, where it was again affirmed in 1820, without a dissent on the part of any Judge; and Lord *Eldon* remarking that the plaintiff in error, must seek his remedy in equity. The Court can enquire into the solvency or insolvency of the principal, when it took place, whether the surety has an indemnity or has been

injured by either laches, or the insolvency, or only by his own negligence. In 1821, the case of *Davy v. Pendergrass* (5 Barn and Alder, 187), was decided in the King's Bench, accordingly. It was debt on bond, excuted by S. & J. P. and the defendant as surety, with condition to pay within one month after demand of such balance, not exceeding £500, as upon settlement between the plaintiff and principals, S. and J. P. should appear to be due the plaintiff for coals to be delivered (548) to S. & J. P. The breach was the non-payment of a sum thus demanded. Over and plea, that the plaintiffs had by parol agreement, without the privity of the surety, given time to the principals to pay by installments, and taken a warrant of attorney to take judgment, and issue execution for the whole upon default of payment of any installment. On demurrer, there was judgment for the plaintiff. The whole Court went on the ground, that that debt arose by deed in which the principal and sureties bound themselves for the same act and nothing would discharge it as to one which would not as to the other. It was distinguished from mercantile or parol contracts, as guaranties, bills of exchange, and the jurisdiction of bail bonds, under the statute. It was not performance, for then the principal himself might plead it; nor a release being *in pais*. Nothing *in pais* can discharge an obligation but performance or satisfaction. The remedy upon all such agreements is in equity, as it is in the case of laches. These authorities fully support the opinion we entertain, and on which the Court founded the judgment in *Binford v. Alston, ante* 351. *The People v. Janson,* 7 John, 332, is a respectable authority to the contrary; but it is not sufficient to change the common law. It has not met with the decided approbation of the profession in New York, and is shaken by the subsequent case of *The People v. Berner,* 13 John., 383, in the same State; and the Supreme Court of the United States denied its correctness, and refused to follow it in *United States v. Kirkpatrick,* 9 Wheat., 737. The courts in this State have never yielded to the innovation, but have steadily held to the settled rule of the common law.

PER CURIAM. Judgment affirmed.

Cited: Shaw v. McFarland, 23 N. C., 218; *Spruill v. Davenport,* 27 N. C., 666; *Banking Co. v. Tate,* 22 N. C., 316.

(549)

Den ex dem. ISAAC T. AVERY v. NATHAN ROSE.

The requisition of the act of 1798 (Rev., ch. 492) amending the revenue laws, as respects the land tax, must be strictly complied with by the sheriff, or the estate of the owner is not divested, and where land was, under the fourth section of the act, stricken off to the Governor, and the sheriff, instead of executing his deed at the County Court succeeding the sale, as the act requires, did it at a subsequent term, the deed is inoperative.

EJECTMENT, which was submitted to *Seawell, J.*, at BURKE, on the Spring circuit of 1833, upon the following case agreed:

The land described in the declaration was granted in the year 1796 to one William Cathcart. On 19 November, 1814, the taxes being unpaid, it was sold by the sheriff, and was struck off to the Governor, no person offering to pay the taxes for less than all the land covered by the grant. The sheriff by deed, dated 27 July, conveyed the land to the Governor. This deed was, at July Term, 1815, of Burke County Court, in the words of an endorsement on it, "duly acknowledged in open court by A. A. McDowell, late sheriff, and recorded at full length, on the records of this office," and was deposited and recorded in the office of the Secretary of State, on 30 November following. On 16 November, 1819, a grant for the same land issued to the lessor of the plaintiff. If the sale and deed of the sheriff divested the title of Cathcart, then judgment was to be entered for the plaintiff; but if the title of Cathcart was still subsisting, then judgment was to be entered for the defendant.

His Honor, in giving judgment, after stating the facts above mentioned, proceeded as follows: "The act regulating these sales passed in 1798 (Rev., ch. 492), and directs the sheriff making such sales, to perfect the deed, by signing, acknowledging and delivering the same, in the presence of the next ensuing County Court, and the clerk is required to register the same in a book kept for that purpose, and to re-deliver
(550) it to the sheriff, who is required before he settles his account with the comptroller, to deposit the deed with the Secretary of State, who is required to record the same, and keep it for the benefit of the State. The lands thus conveyed are declared to be vacant, and subject to entry.

"The argument insisted on is, that the deed is invalid, because the manual operation of signing, sealing and delivering it did not take place in the presence of the County Court; and moreover, because the acknowledgment of the deed was not at the succeeding court, after the sale by the sheriff. It seems to

me that the fair construction of the act is that it was intended to enforce the payment of the taxes, and to provide a mode in which a record should be made of the default of the owner, upon which the land should be subject to re-entry, and that the time within which the deed was to be executed, and the manner of executing it, as provided by the act, are altogether directory to the sheriff, and that the land became subject to entry, and to be granted again, or that the forfeiture to the State became perfect, as soon as the sheriff had sold them, made a deed to the Governor, and that deed had been recorded in the Secretary's office. Unless this construction be adopted, the sale must be void, unless it shall appear that every particular act required of the sheriff and clerk, shall have been done in the prescribed mode.

"One requisition is, that before the sheriff settles his account with the comptroller, the deed to the Governor shall be deposited in the Secretary's office. Another is, that the clerk shall record it in a *book kept for that purpose.* Another, that the sheriff shall call on the clerk for the deed. Another that the clerk shall deliver it to the sheriff within twenty days after the term of the Court. All which requisitions appear to me to be only directory to the sheriff, and in no respect to constitute any part of the title."

Judgment was accordingly entered for the plaintiff, and the defendant appealed.

The case was argued at a former term by *Nash* for (551) the defendant, and by *Badger* for the plaintiff, and held under advisement until the present term.

RUFFIN, C. J. This case arises under Laws 1798, c. 492, and depends upon its sound construction. It recites that the mode of selling lands for taxes as then established by law was insufficient to secure the collection of the revenue; and then provides amongst other things, that, when no person will pay the taxes for a less quantity than the whole tract, it shall be deemed a purchase of the whole by the Governor, and the sheriff shall execute a conveyance to him, and his successors, for the use of the State; that it shall be the duty of the sheriff to perfect the deed, by signing it, acknowledging and delivery theref in the presence of the next County Court; that the clerk shall register it in a book, to be kept for that purpose, and after doing so shall certify the same, and deliver it to the sheriff (who shall call on him for the same), within twenty days after the Court; that the sheriff shall, before he settles his account with the comptroller, deposit the deed with the

Secretary of State, who shall record and keep it for the benefit of the State, and that the lands so conveyed shall be deemed vacant and subject again to entry. It then further provides that the Secretary of State shall give to the sheriff a certificate setting forth the quantity of land thus conveyed (the tax being then *ad numerum* not *ad valorem*), and that upon the deposit thereof with the comptroller, and the oath of the sheriff that he had conveyed in conformity to the requisitions of the act, all the lands by him sold for taxes, and thus purchased for the use of the State, the comptroller (the requisites of the act being complied with), shall allow the sheriff in his settlement, a credit for the tax on those lands and all charges on the sale, and his commissions thereon, as if the sum had been collected in money; and lastly that the sheriff shall be credited in like manner in his settlement at home, for the county and poor taxes.

Such are the enactments of the statute. On the part
(552) of the appellant, it is contended that the sheriff's authority to sell the lands for taxes is a naked authority, and that the validity of all acts done by him, and of the title derived under him, depends upon the strict and literal observance of all the provisions of this and other laws prescribing his duties, either as preparatory to a sale, or in completion of it by a conveyance; and particularly, that since this statute defines the time and mode of conveyance, one made in a different manner, and at a different time, is void. On the other hand, the counsel for the plaintiff insists that these provisions are merely directory to the officers, and although each officer may be liable for the omission of his own duty, at the suit of the party grieved, to the extent of the damage sustained, yet that the validity of the acts of one officer cannot be impeached upon the default of another, nor the default of all affect the title of the land, whether purchased by the State or an individual. Of this latter opinion, was his Honor, upon the trial, in reference to most of the provisions of the act, and particularly in reference to those which relate to the defects alleged to exist in the deed made by the sheriff in this case. They are two: The one, that the deed was not signed, acknowledged and delivered in open Court, but only acknowledged there. The other that such acknowledgment was not at the next Court after the sale.

We have considered the act attentively in its details, and in connection with the other statutes upon the same subject. We have also weighed the principles upon which the construction of this and similar statutes insisted on by each side, are founded. In our opinion, each principle is correct to a certain extent, but in their application, neither is true, as an universal proposition.

It is true, that the sheriff has but a power, and no estate, in the land, it is also generally true, that he who has only such a power, and must conform in its execution to the terms prescribed. The grant of the power was at the will of the grantor; and the formalities with which its faithful execution are to be guarded, are equally arbitrary. They must therefore be strictly observed. There is as little doubt that the will (553) of the Legislature touching the mode of the performance of official duties or of the transfer of estates, is equally obligatory. But there may be and is a difference in the means of ascertaining that will. While exact conformity is required to the provisions of instruments conferring a power between individuals, because the Court can see no ground out of it, for any latitude of discretion, and because the instrument itself could be, and was necessarily looked to by one dealing for the estate, and a departure from its injunctions readily perceived; there are yet many instances in which forms and ceremonies, prescribed by the Legislature, are judicially regarded merely as forms and ceremonies, the omission of which shall not prejudice except in those cases which fall within the reason for prescribing them. An example is found in the law, requiring all bills of sales for slaves to be registered; yet, they are good between the parties without it, and are void only as to creditors and purchasers, for whose benefit the enactment was made. Nor has the omission of them been allowed to operate, when for the sake of executing a secondary intention of the Legislature as to the manner of performing an act within their primary intention, the principal act would be defeated. As in sales under execution without due advertisement, when the object is the satisfaction of the creditor with as little loss to the debtor as possible; which can only be attained by sustaining an honest purchase, at even an irregular sale. Hence such sales have been supported; and also those of land, where there were goods, although the statute only authorizes the sale of land for the want of goods. It cannot be said that is the consequence of the form of the writ, and that to it only need the purchaser look. For although the *fieri facias* is as at common law, except that it runs on its face, against lands and tenements, as well as goods and chattels, yet the provisions of the statutes control its operation in particular cass to some and in others to all purposes, as if they were incorporated into the writ. Thus the writ does not specify the advertisement order, place or mode of sale; yet the sheriff is certainly liable to the (554) action of the party for misfeasance or non-feasance in each particular. So, while the purchaser gets a good title,

when the default of the sheriff consists in violating some of the directions, he will gain nothing, if it consists in the violation of others. As if he buy from the sheriff at private sale, which he could make at common law, but cannot, under our present law. *Ormond v. Faircloth,* 1 N. C., 636, 5 N. C., 36. Also, if the sheriff sell land or slaves at another place than the courthouse or after the last day of the week, on which by law, he ought to sell, a purchase is void. *Mordecai v. Speight,* 14 N. C., 428. Or, if the purchaser by active means procure the sheriff to sell without advertisement, or to sell lands when there are chattels, he takes nothing. *Jones v. Fulgham,* 6 N. C., 364; *Lanier v. Stone,* 8 N. C., 329. In these cases, the authority of the writ is not deduced from, or confined to, its terms, but to those terms as controlled by the general regulations of the law. These regulations all are alike bound to take notice of. The sheriff himself, when called on in any way, must be able to show his compliance with them. Third persons need not show affirmatively the observance on the part of the sheriff, of all legal pre-requisites to the sale, nor are they charged to take notice of all irregularities when shown on the opposite side, as in the advertisement, or adjournment of the sale. or that there were chattels which the sheriff might have seized instead of the land. But where the violation of law is known to the purchaser, and he has procured it or could not but know of it, as in the case of a private sale, he is no more protected in his purchase, than the sheriff is in the sale. In these instances the purchaser breaks the law himself, or abets its breach by the officer, to the apparent prejudice of the parties to the execution or to the danger of their interests, and ought not to be upheld by the law.

The first inference from the foregoing cases and reasoning is, that the provisions of the statute, which direct the performance of certain duties under certain circumstances, are (555) to be taken as merely directory, in favor of those who cannot generally know, whether the required circumstances exist or not, and have a right to expect that the officer of the law has in all things observed the law, and that he is sufficiently responsible for the consequence of his breach of duty. The next is, that as to the officer himself, and as to all those who procure the infraction of the law by him, or abet such infraction, when they must know it to be such, and so know because the contrary cannot be, those directory provisions are strict laws and admit of no modification or departure. All such regulations are intended to protect the weak and distressed, and are guards against those in whose power they are,

and cannot be dispensed with, except to avoid a greater mischief to the person whose protection is their object. But this can never apply in favor of those persons who are themselves the violators of the law, and yet seek to take benefit by the very act which is contrary to the law.

The application of these rules are familiar to sales by execution. It has been insisted by the counsel for the appellant, that they must be confined to them, and cannot be extended to sales for taxes. Cases from the Courts of the United States and some of the sister States were cited, which seemed rather to sustain the position. Doubtless that conclusion may properly follow from the framing of the particular statutes. The law may be so drawn up as to show an intention in the Legislature, that each matter prescribed shall, under all circumstances, and as to all persons, be of the essence of the sale, which is to be the final result of all those proceedings. But in this State such sales have not been regarded in the light of *ex parte* proceedings, inflicting a forfeiture, or to produce one consequentially of the nature of inquest of office or outlawry, nor even as a naked private power, but as a method of raising, by a species of process, money due to the sovereign; and therefore, upon the same footing, as far as the like regulations were applicable, with the methods of levying debts at the suit of private persons. Thus in *Martin v. Lacy,* 5 N. C., 311, it was held, that the purchaser had a good title under a sale (556) for taxes, although the sheriff had not advertised the time, or in the Gazettes prescribed. It may be mentioned here that besides the general reasoning which induced the Court to adopt that opinion, it finds some sanction in the phraseology of the act of 1792, which directs that lands sold for taxes should be advertised "as is required in cases of sale by execution," as to which the law was settled, that the purchaser was not bound to prove due advertisement. The point was again made in this Court, in *Stanly v. Smith,* 4 N. C., 124, and ruled as before.

But on the other hand, when the sheriff had no authority, or the purchaser's title deed shows that he has transcended his authority, and that therefore, it must have been known to the purchaser, the doctrine is settled that no title passes. Thus in the same case of *Martin v. Lacy, supra,* it was admitted that if no tax was due, or if it had been paid, the sale would be void. In *Jones v. Gibson,* 4 N. C., 48, a tract of land was sold for the taxes alleged to be due on the whole for three years, when the tax on an undivided third part had been paid. It was held for that reason that the sale was void, and also because the sheriff cannot sell for a tax longer due than two years. In

Douglass v. Short, 14 N. C., 432, it was again decided that a sale for the tax of two years, when only one was due, was ineffectual; because the whole thing is not sold, entitling the former owner to the surplus of the proceeds, as on a *fi. fa.* but only the least part for which any person will pay the tax due. It is impossible to say for what quantity half the sum of money would have been given, as only one person might have had the whole sum demanded, while many could have raised that due. The owner, if the sale stood, would certainly be deprived unjustly of a part of his land, and as the Court could not say how much nor which part the abuse of authority took from him, it was necessarily held void for the whole.

Applying the principles of these decisions to the provisions of the revenue laws generally, and to that under consid-
(557) eration, in particular, we think the present question may be decided on grounds entirely satisfactory.

Chapter 1, Laws 1784 *(Ch. 1, Iredell Rev., 475), for ascertaining what property shall be deemed taxable, the method of assessing it and collecting the taxes, provides (s. 14) that if any owner of land shall be unwilling to pay the taxes, he may surrender the land to the State, and that it may then be taken up by others. In 1793 (new Rev., c. 394), a method is pointed out for those who had attempted to make a surrender, to do it effectually; and as to all future cases, the act of '84 is repealed. By Laws 1787 (c. 269) and of 1801 (c. 3 Martin's Rev. 170) the justices, taking the list of taxables, are required to return their lists to the County Courts immediately following the taking of them, and the clerks to transmit copies to the comptroller on or before the 1st of December following, and also the name of the sheriff and his sureties; on which the comptroller is to charge the sheriff with each tax on his books and certify it to the treasurer. The clerk is also to furnish the sheriff with certified copies of the tax lists, on which, after the first day of the succeeding month (now April) he is to proceed to collect, and is to account for and pay into the treasury the whole amount of each species of tax on or before 1 October ensuing; in default of which, the sheriff shall forfeit his commissions, and the treasury shall immediately take judgment against him for the sum reported by the comptroller, and also, by other acts, for certain penalties. Upon a settlement, if made, the sheriff shall be allowed certain commissions, and by other acts, his charges, and for insolvents under particular regulations. By Laws 1792 (c. 376) and 1800 (c. 547) the sheriff has the further time of one year, from the day prescribed by law

*24 State Records, 543.

for settling his public accounts, to finish the collection of taxes, and may do so by distress; but it is expressly provided that this privilege shall in no respect alter or interfere with the law, directing the time and manner of his accounting with and paying the comptroller and treasurer. These acts fix (558) the time at which the sheriff is chargeable, the sums to be debited to him, and the evidence on which the charge is made. By them he is bound to pay the gross revenue of his county on the first day of October, unless he discharges himself in some of the methods prescribed by law.

One of those methods is that now under consideration. It is unjust that the sheriff should pay the tax (then on land, according to quantity) if he had attempted to sell, but could not sell the subject taxed for the sum assessed on it. Previous acts had authorized him to distrain and sell lands for the taxes. That of 1792 makes land liable for all the taxes of the owner, and for want of personal property, directs a sale out and out, and the surplus money to be paid to the owner. That of 1794 provides that so much of the land shall be sold as shall be necessary to pay the taxes and contingent charges; but it does not say when or how that part shall be laid off, identified or conveyed. The act of 1796 directs advertisement in certain Gazettes and that the land shall be offered in tenth parts, until the sum be raised. This act was still defective in not specifying the time and method of severance and of conveyance; and also in the important particular of not providing for the case, in which a sale could not be made for want of bidders. Then comes the act of 1798, which contains the enactments before quoted, and besides them, these others. That the sheriff should set up the whole tract of land, liable for taxes, by way of Dutch auction, and strike off so much to the person who offered to take the smallest number of acres for the sum to be raised. That the purchaser may choose his quantity out of any part of the land, to be laid out in one compact body, as nearly square as may be, and adjoining some of the outer lines of the tract; and that he should within ninety days deliver to the sheriff a plat made by the county surveyor from actual survey, with the courses and distances mentioned thereon; and the sheriff is thereupon required to make him a deed.

The cases embraced in the act are therefore two: a purchase by a private person; and one by the State, or by the sheriff, for the State. The inquiry is, whether the times (559) at which the sales are to be completed by conveyances, according to the letter of the act, are, in respect of the titles derived under such sales and conveyances, mere formal col-

lateral incidents not material to the titles themselves, or are substantive component parts of the conveyances, and essential to their validity. We take it for granted that the act of sale is not supposed by any body to vest the title till a conveyance.

With regard to a sale to an individual, we think it quite clear, upon principle and authority, that the time is material. The purchaser is to procure the survey and plat and bring it to the sheriff. These acts are his own, or he undertakes to have them performed. He must lose by his own negligence, and cannot say that a thing which the Legislature requires him to do, is unimportant in itself, and that it may be done at any period, as well as that which is prescribed. It will hardly be stated after the cases of *Stanly v. Smith,* 4 N. C., 124, and *Douglas v. Short,* 14 N. C., 432, that if the sheriff were to convey the whole tract to a purchaser, as having been bid off by him, that the deed would be good for any part, or if he were to convey an undivided share, without any survey, or a parcel polygonal in form and not contiguous to any of the outer boundaries. Why would the deed be had?—because there is an excess of power beyond that delegated, and this cannot but be known at the time to the person claiming benefit by the act. So with respect to the time of the survey; the same party is laid under that restriction, and he must observe and submit to it. There is no instance in which the law allows a person who is to do a thing, or to do it at a particular time, to have himself the benefit of it, when omitted, as if it were done, or done in due time. But certainly not in a case where the delay is a prejudice to another, and the effect of the act, when completed, is to defeat a former estate. If the purchaser be not held down to the time, he will have an indefinite period. In the meanwhile, the former owner cannot know which part is his, for no election is given to him, in default of the (560) purchaser's election. The object of the act was to have as little sold as possible, and therefore it gives the selection of the quantity bought to the purchaser, and it was also an object to afford the former owner an early opportunity to know his own, and therefore the purchaser's selection must be at a short day. Upon this act in itself, therefore, the materiality of the time is apparent, in respect of a private purchase. But if there could be a doubt on it, it is entirely removed by Laws 1809 (Rev. c. 760), which is in amendment of the former. It recites, that by the act of 1798, purchasers are required, within ninety days (which is enlarged by subsequent acts), to present to the sheriff a plat made by the county surveyor or his deputy, from actual survey, and that the surveyor

is not obliged by law to make the survey within the time, *by whose neglect or refusal the honest purchaser may lose his land,* although he has fairly paid the State for the same; and enacts that the surveyor shall survey upon request, under a penalty, and upon his refusal, gives the purchaser a further time of six months to procure a survey by any other person, on which the sheriff shall convey. Under this act of 1808, it could not be denied that if the purchaser did not, within the enlarged time, complete his title, it would be gone entirely. The act recites upon its face that the time is essential, and that the purchase may be lost by the fault of the surveyor, and not that of the party alone, and if it were open before the judicial construction to the contrary, it is not now, after this legislative interpretation. Indeed, the very enlargement of the time is conclusive upon the necessity of observing strictly that before prescribed, for why do it by statute, if it were allowable by the courts? It cannot be said that the object was to make the restriction complete to the longer period allowed, for the act ties it down to that period, no more than the former act to the lesser term, except in the inference to be deduced from the declaratory provision, that under the former act, no title passed unless upon a survey within ninety days. After the act of 1808, this sense put by the Legislature on the law of 1798 must be received by a court. We deem it clear therefore, (561) that the purchaser must observe the time, as much as the former owner must, in his application for redemption.

The same train of reasoning leads to the conclusion that it is equally essential to the title of the State. The prescription of certain periods in the same statute, within which those things are to be done which divests an estate, the things themselves being of the same nature would seem to render it certain, that if a fixed day be material in the one case, it is in the other.

But it is said, there is a difference, as the State is in no default. All the acts are to be performed by officers, whose omissions, therefore, ought not to prejudice the State. That as a purchaser, her title ought to be supported, and unless it be, that the revenue due to her, as sovereign, will be lost upon a construction of the very act, which declares its object to be, to secure its collection, for which end the previous laws were insufficient.

If the State could be regarded as a purchaser, the Court could not sustain the purchase, if by the structure of her own laws she had made its validity to depend upon an act which has not been performed. That may well be, notwithstanding she is herself the purchaser. It is not to be presumed that she intends injustice to her citizens, and she may rather relinquish

the present tax, than exact future taxes on the same land, from the owner, and then defeat his title by taking a deed under a former sale. For the owner is liable in his personal estate and other lands, for the taxes on each tract, by other statutes, and until a conveyance, the title of the land sold remains in him, and he may be assessed for it. In the case of a sale to an individual, he is made liable, it is true, to the accruing taxes, but this must mean after he has completed his title, because the provision for redemption is, that the former owner shall repay the sum paid on the purchase, with twenty-five per cent thereon, without including intermediate taxes. But the act is silent about accruing taxes when the State buys, and so it must have been intended, because one tax is always assessed on land
(562) before it can be actually sold for the preceding assessment, and the public is under no obligation to give up either.

But to us, it seems that the State cannot be deemed a purchaser, whose title is to be protected, notwithstanding irregularities, within any of the principles on which they are disregarded in sales on executions. The scope of the act is not to enable the State to reacquire her territory from her own citizens. She does not wish it. As soon as she gets it under this act, it is by the same act offered for private appropriation again, upon the same terms on which it was before granted. The policy of the State, in this statute and throughout our legislation, is to part on the most favorable terms with all her public domain, with a few exceptions, and not to become again the proprietor of any that has been granted, unless in a case of necessity. This is clear from the act of 1793, which forbids the surrender of land to avoid the taxes. It is apparent on the act of 1798 itself, for she does not purchase, as a chapman does, for the least price, but only takes the land instead of the tax, when the tax can be got in no other way, and if she does not take the title, the sheriff is responsible for that tax, and the owner for the accruing ones. The great object of this provision, therefore, is not to acquire the land for the State, but to *secure* the *collection* of the taxes, to raise revenue, and have it duly accounted for and paid by the proper officers, and in justice to those officers, to make them account for, and pay only such portions as they have collected, or might have collected.

As has been already mentioned, the sheriff is charged with all the taxes upon the clerk's return, and they are to be paid by him, whether collected or not, on the first of October in each year. If they have been received either from the person assessed, or by the sale of his property, the sheriff accounts only

for what has come to his hands. Before the act of 1798, there was no provision to meet the case, where no sale could be made, nor for the case of a sale at a less price than the whole tax. These omissions exposed the Treasury to the dan- (563) ger of deficiency, and also of fraud. The sheriff might make sales for a small part of the tax, or he might really be unable to collect it by a sale. In the latter case he ought to be excused from paying. No act of the assembly is found which authorized any relief to him, at the public offices upon his return of that fact, or otherwise. But if he did not get it then, the Legislature itself would certainly extend it by a special act, for which, probably, there were many applications. To avoid these inconveniences to the public, and especially to give a certain and adequate relief to the sheriffs upon an uniform rule, which would protect them from exactions at the Treasury for monies, which they had not, and could not receive, and at the same time enforce them both to diligence in collecting, and punctuality in paying the revenue, were the causes of the act of 1798. The case within the purview of the act, is a sale and conveyance completed before the tax for which the sale is made is due, and paid at the Treasury. The office of sheriff is annual, and his accounts and settlements for each year, distinct and independent. Hence the settlement in which he is to have credit for the land sold, is that which includes that very tax. The act assures to him such credit, upon certain conditions which it puts in his power to perform, and the performance of which it requires to be established by certain evidence. The case then is not one in which the interest of the creditor, or the debtor requires the law to be indulgent in overlooking omissions in the mode of proceeding. It is one in which the creditor is secure at all events, because she can look to the sheriff and his sureties for the tax, but in which she will not, provided he makes it appear in the manner prescribed, which is plain and easily attainable that she ought not. This part of the act is therefore substantially and really for the benefit of the sheriff himself, the person charged with the duty of selling, and with the performance of all the subsequent measures of importance required for its completion. Upon established principles he ought to be held to strict performance. He is so held in this statute. It requires him to produce and file the deed in the office of the Secretary of State before he settles for the taxes, and to make oath (564) that he *has conveyed* all the lands struck off to the State, *in conformity to the requisitions of the act.* The deed must therefore have been made, recorded and filed, before the first

day of October of the year in which the tax is payable. This would of itself be fatal to the plaintiff's title, since the sale was for the tax of 1813, due 1 October, 1814, and was not made till 19 November following. But it is not adduced now with a view to that position, but to those on which the decision was made in the Superior Court. If the sale must be before the day of payment, and one afterwards is void, it necessarily follows that every other act, essential to the use of the sale and deed upon that day of payment, must also precede it. That such subsequent sale is void, is deduced from these premises. The act no where engages the State to refund the taxes already paid into the Treasury, if at a subsequent day, the land cannot be sold to a private person, nor does it authorize the Treasurer or Comptroller to allow a credit, except in the settlement for the tax when due. After receiving the tax from the sheriff, it cannot be supposed that the State would keep it, and also take the land. She does not agree to purchase but for a tax due her at the sale. For the benefit of the sheriff she does that, but the act holds out no idea to him, that after he has accounted with her, he may yet impose the land on her, and reclaim the money. There is no power in the officers of State to allow such a credit, or to make the land a part of the public domain, but in one event, which has not occurred here. It must be taken here that the State has received the tax, and therefore ought not to take the land. At the Treasury the sheriff could not be reimbursed, unless by a special act, the validity of which arises not from the previous legal provision and obligations on the State, but upon the will of the Legislature, who can dispose of the revenue at pleasure. Nor is it to be supposed that such a case would meet with Legislative
(565) favor, because it would encourage negligence and delays in collecting the taxes. But if it would, it has not been expressed in any public law.

The question has thus far been considered in reference to the words of this part of the Statute, and to the circumstance that the interest of the sheriff himself, was principally concerned, and therefore that he should act in due time. Whatever interest the State has, demands likewise his diligence throughout. It is important to her to know her actual net revenue, and what prior claims there are against her at the time it is paid in. She wishes to re-sell the land, that she has reluctantly taken back, and with as little delay as possible. An early and public notice of it in the county where it is situated, is therefore deemed important. She wishes to avoid and detect frauds attempted on her, and therefore while

the whole matter is of recent occurrence, she requires that a sale made, shall be acknowledged of record and in open court of that county, that no pretended sale may at a distant day be imposed on her, and she brought in conflict with one of her own citizens. Every act of omission which tends to defeat these views, is inconsistent with the real intention of the Legislature, and cannot be tolerated. The State does not take the land but as a credit to the sheriff for the tax, and no conveyance to the State is to be taken as valid within the Statute, but such an one, on the production of which, the sheriff would be entitled to credit for the tax. From this it would result, that the sheriff must procure the other officers to do their duty, because otherwise the State is not bound to accept the deed, and the title does not vest in her, under this law, in any other case. The injury to the sheriff is not one which defeats an estate, but is merely pecuniary, for which his redress would be plain against the officer. But it is not necessary to decide on the effect of the omissions of others. The case is not brought to that, but arises on the omission of the sheriff himself, of an act exclusively in his own power, which the law makes essential to his own discharge, without which discharge, the State neither wishes, nor will take the land.

It may be said that the State has accepted this deed by her officers, and by other officers, has re-granted (566) the land, amongst others, to the lessor of the plaintiff, which shows that she claims the benefit as a purchaser. It is notorious that grants are always issued upon the suggestion of the grantee, that the land is vacant. The State does not warrant that, nor is it a fraud in her to grant land already appropriated. On the contrary, it is declared to be a fraud in her to obtain a grant for such land; for which the entry laws declare the grant void, and for which it may be revoked and cancelled, upon *scire facias,* at her suit. Besides this, the sovereign is never estopped, because she must necessarily act through agents with instructions and authority prescribed by law, and therefore may always show the truth.

To this conclusion we have formed, no objection occurs to us as plausible, unless it be, that under the statutes mentioned, the sheriff has an additional year to make collections, and may do so by distress. The answer is, that the two statutes are to be construed together, and so as to make them consistent with each other if they can be. If consistent, one does not repeal the other. They appear to us to stand together, each in full force. The sheriff may sell to reimburse himself, during the next year. But the State does not consent that he may use the

name of the Governor as a bidder upon that occasion. If he delays to sell until he pays the taxes, he must find bidders. His delay is at that risk. The sale is then made for his benefit exclusively, both in form and fact, and not for that of the State; and therefore she will have nothing to do with it.

The authority to make the State a bidder is a special one, and for the sheriff's benefit, to bid for her only where there is no other bidder, for a tax due to her, and to make a deed within a certain time, upon which the sheriff shall have credit. It must therefore be strictly construed with respect to those acts, and the periods prescribed. The sheriff, for instance, could not stake off less than the whole to the State; if he did, it would be void, being beyond his restricted (567) power. There is the same limitation on his power to vest the title in the State after the period for making the deed has elapsed. Upon these grounds, it is the opinion of the Court, that the deed to the Governor is void, because it was not made or acknowledged at the Court next succeeding the sale. The duty of making it was the sheriff's; the exoneration and advantage to be derived from it, in the contemplation of the law, was his, and the consequence of the neglect must fall, and has fallen on him.

We should very reluctantly hold, that "a due acknowledgment in open Court," was not a signing, acknowledgment and delivery in Court of a deed dated at that time, unattested, and not requiring any other attestation but the certificate of the Clerk to those facts. The recognition of the signature then, would seem to be a signing then. But the Court has not examined this point very much, and therefore does not positively decide it; deeming it safest, however, in all such cases, that ministerial officers should comply with the law to the letter, especially where they are themselves to take benefit by their own acts.

The judgment of the Superior Court is reversed, and judgment upon the case agreed rendered in this Court for the appellant, the original defendant.

PER CURIAM. Judgment reversed.

Cited: Saunders v. McLin, 23 N. C., 576; *S. v. Rives,* 27 N. C., 314; *Love v. Wilbourn, Ib.,* 347; *Garrett v. White,* 38 N. C., 134; *Jordan v. Rouse,* 46 N. C., 122; *Woodley v. Gilliam,* 67 N. C., 239; *Taylor v. Allen, Ib.,* 350, 1, 2; *Hays v. Hunt,* 85 N. C., 308; *Mayers v. Carter,* 87 N. C., 147; *Morrison v. McLaughlin,* 88 N. C., 253; *Fox v. Stafford,* 90 N. C., 298; *Stanley v. Baird,* 118 N. C., 83; *Worth v. Simmons,* 121 N. C., 361; *Stewart v. Pergusson,* 133 N. C., 281.

THOMAS J. ARMSTRONG, Chairman, etc., v. DANIEL DALTON, Exr. of ISAAC DALTON.

Although no *laches* are imputed in the State, and as to it the rule is *nullum tempus occurrit*, etc., yet this is not the case as to those bodies to whom the execution of public trusts is confided. And where the County Court brought an action of *assumpsit* against a treasurer of public buildings, *it was held* that the act of limitations was a bar.

This was an action of ASSUMPSIT, commenced 2 April, 1833, by the plaintiff, as chairman of Stokes County Court, (he being enabled to bring it by a private act of the Assembly passed in 1825), against the defendant, the executor of David Dalton, for money paid to the testator, as Treasurer of Public Buildings, and not accounted for.

PLEAS—1. *Non Assumpsit.* 2. Statute of Limitations.

On the trial on the last circuit, the plaintiff offered the deposition of one Archibald Campbell, taken under a commission signed by the clerk of the Superior Court of Stokes, under the seal of that Court, but which recited that the Court in which the action was pending, was "the Superior Court of Law and Equity for the County of Stokes." The defendant objected to the deposition, and assigned as a reason why it should be excluded, that the action was pending in the Superior Court of Law for the County of Stokes; there being in fact, no such Court as that described in the commission. But his Honor *Judge Norwood* overruled the objection, and the deposition was read. The defendant offered evidence which tended to prove that more than three years had elapsed since his tstator made a payment on account of the fund in his hands, and he relied upon the Statute of Limitations.

His Honor charged the jury that the Statute of Limitations did not bar the State, and inasmuch as the Legislature had delegated to the County Courts for the more convenient administration of justice, a portion of the sovereign (569) power, it did not bar their action, the money claimed being the property of the public.

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

W. A. Graham, for the defendant.
Nash, contra.

DANIEL, J., after stating the case proceeded: In England, a general rule has been laid down, as established, that when an

act of Parliament is made for the public good, the advancement of justice, and to prevent injury and wrong, the King shall be bound by such act, though not particularly named therein. But where a statute is general, and thereby any prerogative, right, title, or interest, is divested or taken from the King, in such case the King shall not be bound unless the statute is made by express words to extend to him. Bac. Ab. (Prerogative, E 5, page 559). From the presumption that the King is daily employed in the weighty and public affairs of government, it has been an established rule of common law, that no *laches* shall be imputed to him, nor is he in any way to suffer in his interests, which are certain and permanent. *"Vigilantibus sed non dormientibus jura subveniunt"* is a rule for the subject, but *nullum tempus occurrit regi,* is the King's plea. For there is no reason that he should suffer by the negligence of his officers, or by their contracts or combinations with the adverse party. (5 Bac. Ab., 562, Hob. 347.) Therefore the King is not bound by any statute of Limitations, unless it is made by express words to extend to him. (5 Bac. Ab. 461, Plo. 244.) But the rule of *nullum tempus occurrit regi,* is subject to various exceptions, both at common law and by statute, which may be seen in Mr. Hargrave's note, to 1 Thomas' Coke Lit. 74 (n. 16). It seems that the rule *nullum tempus,* etc., is applicable to the States where not restrained by some constitutional provision, legislative enactment, or principle of the common law. (*Kemp v. The Commonwealth,* 1 H. & M., 85.) It is said by the Supreme Court of the United States, that it is a well settled principle, that the Stat-
(570) ute of Limitations does not run against a State. *Lindsey v. Miller,* 6 Peter., 666. But does not the rule extend to actions brought by a county, or in the name of any officer or person for the benefit of a county? A county is *quasi* a corporation. It has certain rights and privileges, and can by its agents and officers execute certain given power. Judge *Kent,* Com. 121, 122, says, besides the proper aggregate corporations, the inhabitants of any district, as counties, or towns, incorporated by statute with particular powers, are sometimes *quasi* corporations. Public corporations as distinguished from private corporations are such as exist for public political purposes only, such as counties, cities, towns, and villages. They are founded by the government for public purposes, and the whole interest in them, belongs to the public, viz.: to the county, towns, etc. But the reason which upholds the rule of *nullum tempus, etc.,* when applied to the sovereign, does not, in our opinion, excuse the *laches* of the officers of these

small communities. The plea of *nullum tempus, etc.,* is, as before mentioned, one that peculiarly belongs to the sovereign, or to the Commonwealth to be exercised for the public good. The system of accountability and discharge as between the sovereign and his subjects, or between the State and its citizens, is regulated by peculiar provisions, and guarded by numerous checks, under the direction of great public officers, so as to render it easy to ascertain even at remote periods of time, the rights as well as the obligations of those against whom claims are preferred. But the contracts between these small communities, and individual citizens are liable to all the uncertainties with respect both to charge and discharge, and to all the defects of proof, concerning them, which time ordinarily produces in the investigation of human transactions. The King or the State cannot be presumed to mean wrong, or to have an interest inconsistent with justice.

But these communities, like the individuals who compose them, have no such legal presumption in their favor. No authority is shown to support the position that they (571) are not like other corporations or private persons subject to the operation of the Statutes of Limitations, nor can we see any reason which can bring them within the exception which is admitted to apply to the sovereign and the State. Sec. 5, ch. 27, Laws 1715*, Rev. c. 2, sec. 5, declares that *all actions* therein enumerated shall be commenced or brought within the time and limitation in the act expressed, and not after. The rights delegated to the counties by the State, do not in our opinion exempt the remedies by action of the counties, from the operation of the act of limitations. We mean remedies for rights or things, which rights or things have been claimed or held adverse to the county.

As to the exception taken to the reading of the deposition of Campbell, we think the commission sufficient to authorize the taking of the deposition. In the sentence, "Superior Court of Law and Equity," the word *"Equity"* is considered as surplusage. The commission is signed by Thomas S. Armstrong, the Clerk of the Superior Court of Law for Stokes County. The commission is likewise under the seal of the Superior Court of Law; it is sufficiently certain, and properly authenticated. We are of opinion, that a new trial must be granted, because of a misdirection on the plea of the Statute of Limitations.

PER CURIAM. Judgment reversed.

*23 State Records, 33.

572)

EDMUND and MARTHA DUNSTON v. BENJAMIN HARDY.

A person, not the guardian of infants, who takes upon himself to hire out their slaves, making the bonds payable to himself, is a *wrong-doer*, and may be rendered liable for a conversion. And the proper measure of damages is the amount of the hiring, with interest from the expiration of the credit.

The doctrine of conversion stated by RUFFIN, J.

This was an action of TROVER, for the conversion of slaves, tried before his Honor, *Judge Mangum*, at BERTIE on the Spring Circuit of 1830, when the following facts were in proof.

In 1818, one Edward Fleetwood, was the guardian of the plaintiffs and in their right had possession of the slaves in question. He died in December, 1818, having duly appointed Benjamin Hardy, his executor. On 1 January, 1819, the plaintiffs having no guardian, Benjamin Hardy, as the executor of the former guardian, and with the full knowledge that the slaves belonged to the plaintiffs, hired them out for one year, and took the notes for the hires, payable to himself. The obligors in the notes, and their sureties were deemed good at the time of the hiring, but before the expiration of the credit (twelve months) the obligors and sureties failed, and Hardy did not collect the hire. The slaves were not demanded of Hardy, during 1819, and after the hiring had expired, to-wit, 1 January, 1820, they came to the possession of the present guardian.

The plaintiffs, by their guardian, brought this suit some time in 1824, and alleged the act of hiring for one year to be a conversion, and claimed damages for the value of the hire for one year, and interest to the day of the rendition of the judgment. The jury under the instructions of his Honor, rendered a verdict for the plaintiffs, for the actual amount of the hires, bargained for by Hardy, and interest on that amount, from 1 January, 1820, the day, on which it fell due, to the
(573) time of the trial. A new trial was moved for on account of misdirection, and refused, and a judgment entered upon the verdict; from which the defendant appealed.

Gaston for the defendant.
Hogg for the plaintiff.

RUFFIN, J. I think this action is maintainable, and that the Court below did right throughout. It may be a hard action; but the question is, can the plaintiffs bring it? I think

they can; for here is an actual conversion. The defendant took the plaintiffs' property, knowing whose it was, and disposed of it for value for one year. It is no answer that this was intended for the owners' benefit. The finder of a chattel, the property of one unknown, may justify taking it, and reasonably using it. For until the owner appear, it belongs to the finder. But if the latter consume it, or sell it, he must pay the owner; for that is an actual conversion, and the intent makes no difference. So when one sees another's property in jeopardy, he may take it into his care, and preserve it; but he cannot make a disposition of it, but at the risk of the owner's action. So, if one design a benefit to the owner, and the property happens, by accident, to be destroyed in the very act of using it to promote that benefit, to the owner, the party is excused. The case of the boat, put at the bar, *Drake v. Shorter,* 4 Esp., 166, is an instance of this sort. Another might be, where one took the horse of another to ride for a physician for the owner, and he was injured without negligence. Many others could be put. But they are altogether different from the exercise of that dominion, which implies a right to sell or dispose of the property. Although the taking be not wrongful, the use, in that way is. It is an actual conversion. No person can assume an agency of that sort for another, and especially for infants. He who intermeddles with their property, must make sure of his authority. The utmost dealing with infants' property
that can be countenanced, is to hold it for preservation (574)
until the next Court at which a guardian could be appointed. It is said, the defendant did not choose to be guardian; but that he voluntarily did the appropriate acts of one, for the benefit of the infants; and therefore ought not to be charged. But the intent cannot alter the fact. Here, I repeat, is an actual conversion. All beyond preservation is a tortious charity. But if it were put upon the question of intent, the case is equally conclusive against the defendant; for he took the bonds payable to himself, so as to make himself, and not the hirers, debtor to the infants. There are, however, many instances, in which the law will not tolerate acts of officiousness, flowing from the most benevolent motives. Suppose the infants here, had died, instead of their guardian. There can be no doubt, that one may safely, and often ought, to collect the effects of a deceased person, for safe keeping. The law supports such an act. But he must not keep them too long; nor must he, in any event, sell them, however perishable they may be, and though the sale be absolutely necessary to prevent their destruction or waste. If he does, he becomes a

wrongful executor. Why? Because it is too dangerous to let men, upon any pretense, intermeddle with other people's property, in a way looking like ownership in themselves. And in such case, it is clear, that a subsequent administrator might bring trover, either against the seller or the buyer. Such a transaction is indeed capable of confirmation. But here the plaintiffs were infants and could not assent, and their guardian refused the bonds. They have elected to consider the defendant, not constructively their agent, but according to his apparent and direct character, a wrongdoer. I see nothing to prevent them. As to the damages and interest, they were properly left to the jury, with directions to make the value of the property, the measure. Trover is not a vindictive action in which the character of the party, or the feelings of the (575) jury, constitute the standard of damages. It is to recover for an injury to property; and the question is not the gain of the defendant, but the loss of the plaintiff.

PER CURIAM. *Judgment affirmed.

Den ex. dem. CHARLES H. BALLARD v. TULLY CARR.

Where a cause was removed, and the record certified on the removal was erroneously copied, upon advantage being taken of that error in the Supreme Court, the remedy is to move to stay proceedings until the record of the court where the trial was had is corrected, and then to bring up that record by *certiorari*.

Iredell, for the defendant upon an affidavit setting forth that this cause had been removed from GATES to HERTFORD by an order which was entered on the record of the cause, while pending in that Court, but which had not been transcribed into the copy certified to HERTFORD; and that the plaintiff, who was the appellant, had assigned that omission as error, moved for a *certiorari* to GATES, in order to found a motion for an amendment in this Court, upon the transcript returned to that writ.

No counsel appeared for the plaintiff.

RUFFIN, C. J. This cause was tried in Hertford, to which it had been removed from Gates, and has now come into this Court by appeal.

*This case was decided several terms ago, but the papers having been misplaced in the confusion occasioned by the fire, which consumed the Capitol in 1831, it could not be reported sooner.

There is a defect in the transcript sent here, in not setting out an order, made in the cause, while it was in Gates Court, which may be to the prejudice of the appellee, and it is admitted that the same defect exists in the transcript filed in Hertford, from which that in this Court has been (576) correctly made. The appellee now moves on affidavit, for a *certiorari* to the Clerk of Gates Superior Court, to obtain a true transcript from that Court, setting out the omitted order, so that the record here may be amended by it.

Not doubting that this Court has the power of making the amendments here and ought to do it from the record in Gates, rather than there should be a failure of justice, yet it might be a question, whether it should be by *certiorari* to that Court for a copy to amend by, and ought not to be from the original, which would be troublesome and expensive to the parties. The amendment may be more conveniently made in the transcript in Hertford, from the originals carried into that Court by the Clerk of Gates, and as the judgment we are here reviewing is that of the Court of Hertford, there is a manifest propriety, that the records in that Court and in this, should be consistent. As the more convenient practice therefore, the Court adopts it as a rule, to stay proceeding upon the appeal here, until the party can have the amendment made in Hertford, and bring up a new transcript from that Court upon *certiorari*, rather than pursue the course requested by the appellee. The motion for the *certiorari*, at present, is therefore refused; but the Court will not give judgment in the appeal at this term, but will give the appellee an opportunity of bringing in a transcript of the record as amended. Besides the greater convenience of this course, as it appears to us, it is sanctioned by the course in England, upon writs of error brought in the Exchequer Chamber, which proceeds upon a transcript only from the King's Bench, in which the original record remains, and in that respect, differs from the case of a writ of error from the King's Bench, to the Common pleas. (Tidd's Practice, 771.)

Cited: S. v. Reid, 18 N. C., 381; *S. v. Craton,* 28 N. C., 166; *S. v. Barfield,* 30 N. C., 353.

(577)

JOHN LEIGH v. HEZEKIAH LOCKWOOD, Admr.

Upon *plene administravit*, the defendant is allowed the costs of an action brought against him in his own right for a conversion of chattels, which he *bona fide* thought were of the assets of the decedent.

This was an action of DEBT, brought against the defendant as the administrator of one Wilburn. The only question arose upon the plea of *plene administravit.*

On the trial before *Martin, J.*, at PASQUOTANK, on the last circuit, the defendant offered to prove in support of his plea, the costs incurred in defending an action of trover, brought against him for a quantity of corn, in which a verdict had passed against him. That this was in the possession of his intestate at his death, was by him, the defendant, under the advice of counsel, sold as a part of the assets; and that the action was defended *bona fide.* But the suit being against the defendant in his own right, his Honor rejected the evidence, and a verdict being returned for the plaintiff, the defendant appealed.

Kinney, for the defendant.
Iredell, contra.

RUFFIN, C. J. It is somewhat surprising, that the researches of the bar and of the Court, have been ineffectual for a case in point, upon the question in this cause. It may perhaps be accounted for from the circumstance, that in England almost all administrations are settled either in the spiritual courts, or upon a creditor's bill in chancery. If the creditor uses such accounts at law upon an issue on *plene administravit,* he must take them as they are, and cannot charge the executor thereby, without also discharging him. In those courts the executor is regarded as a trustee, and if he conducts himself fairly, is entitled to his costs in the suits there, and also all those incurred *bona fide* in other courts, in the course of administration, as just allowances to him in the execution of the trust, by which as he cannot be gainer, he shall not be made loser. This is the general doctrine. *Williams' Exr's.* 1252-3.

It is clear that all such charges, properly incurred, are
(578) good against the estate, as against the legatees and next of kin, who are more strictly *cestuis que trust,* than creditors of the executor. But if the costs have been unneces-

sarily incurred, as if the executor suffer himself to be sued for a debt, when he has assets to pay it, or sue for a demand which he knows, or had the means of knowing, never existed, or had been satisfied, he is not only bound, where the law subjects him to the costs, to pay them as between himself and the party to the suit in which they arose, but must pay them out of his own pocket, as against the estate. In general the common law does not give costs against an executor, but upon the idea that he is personally in default, and ought to pay them at all events *de bonis propriis,* if he has not assets under his own control with which to defray them. If he has assets he is considered, in respect to them, the debtor. Yet that is not the principle which governs the settlement between him and those to whom he is accountable in equity. There the estate is considered, in the first instance, the debtor, and the executor only when he acts wrongfully. Hence although at law, costs are not given to a defendant in a suit in which an executor is plaintiff, and the cause of action arose in the testator's time, although the plaintiff fail, yet the executor is entitled to charge his own costs against the estate, as against the legatee, and for that reason the latter is not a competent witness for the executor, by releasing his interest in that debt, without releasing his interest in the whole *residuum. Baker v. Tyrwhitt,* 4 Camp. 27.

The idea on which his Honor went, and which has weighed much with this Court, is that the suit in which the costs were incurred, was for a trover of the defendant's own, and that it was a personal wrong, in which the intestate's estate was not concerned. It is in strictness so at law, and conclusively so as between the parties in that action. It is presumptively so in every other court, and as between all parties, until the executor makes it appear that his defense was upon his right in his representative capacity, for the benefit of the estate, and upon a fair case. The question is, whether those facts (579) can be acted on at law, upon the plea of *plene administravit,* to the suit of a creditor. We see an inconvenience in it, as for the want of a competent Ordinary to adjust the charges, the trials before a jury may be much perplexed by such questions, and our statutes only give authority to the County Courts to fix the commissions and not settle the account so as to show the balance. But we see a greater inconvenience; positive injustice to the executor, in rejecting them altogether. We assume here that the defendant could have proved what he offered to prove, that the corn was in possession of the intestate at his death; that he supposed he owned it, and that he sold and delivered it as administrator; that he had good reason for

his belief, and proceeded under advice of counsel. This is a case of perfect *bona fides,* which Lord *Ellenborough* said, in *Baker v. Tyrwhitt,* was the ground of the liability of the residuary legatee to the executor, when plaintiff for his own costs. We think this defendant would have a right to charge his costs in that action to the estate as against the legatees. Why should he not against a creditor? In our law, an executor as well as administrator, is a representative in trust, and not for his own benefit. Although at law he is not regarded so in every case, yet he is in respect of the administration of the assets. The acts of 1789 and 1799 authorize all necessary charges and disbursements, and provide that they, and the commissions allowed shall be deemed proper charges against the assets, and may be retained as well against any creditor of the deceaed, as against a person claiming as legatee, or as being entitled to a distributive share. To us it seems that whatever claims the executor has against the estate, he may, by these statutes, assert as against any person who is prosecuting him for a demand on, or for the estate, and in the court in which he is thus prosecuted. His right, as in other cases, will depend upon the disbursements being necessary and proper. We know that executors are constantly allowed upon a question of fully administered their own costs in actions brought by them as executors, and in which they failed. The failure establishes that (580) the demand was no part of the testator's estate, and therefore that the executor went beyond his duty in suing for it. In England certainly, he can claim such costs from the legatees. In our law he always claims and retains them as against creditors. The cases seem to us analogous, and indeed to be the same in principle; which is that the executor acted honestly on the occasion, and upon his trust. The only difference is, that if the testator left evidence of a debt, it raises a presumption that the executor believed the debt due, and that it was a part of the estate, and the form of the action shows that he acted only for the benefit of the estate. That presumption the legatees may repel. In the present case the record raises a contrary presumption, that the wrong was the defendant's own, and upon his own title, or claim of title. We think he may repel that presumption, especially as it has been held that the plaintiff in the former action might have declared against him in his representative capacity. *Mobley v. Runnels,* 14 N C., 303. His right to reimburse himself the costs, cannot depend on the caprice of the plaintiff in that action as to its form. Upon the whole, it is the opinion of the Court that the evidence ought to have been received, and that the judgment

might be reversed, and the cause remanded for a *venire de novo*.

PER CURIAM. Judgment reversed.

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

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(581)

SAMUEL KING, Chairman, etc., v. BENJAMIN HOWARD.

Executors, when they are defendants, have generally no privilege as to costs, and are subjected to them, unless some plea to the whole action be found in their favor. And where upon *plene administravit* the defendant was fixed with assets, as to part of the plaintiff's demand, the latter recovers his costs.

This was a *scire facias* against the defendant to have execution *de bonis propriis,* for the costs of a former action of debt brought against the defendant as the executor of John Howard.

The *sci. fa.* set out an absolute judgment in favor of the plaintiff for $47.07½, the amount of assets in the hands of the defendant, and also for 49.55 the plaintiff's costs, and judgment *quando* for a large sum. An execution *de bonis testatoris* was recited with a return of satisfaction, of the assets found to be in the hands of the defendant, and *nulla bona* as to the costs. No *devastavit* was suggested in the *sci. fa.*

PLEA—*Nut tiel record.*

From a copy of the record of the former suit, which was filed with the transcript, it appeared that the action was debt on a bond with a condition. The pleas were Performance—*Plene administravit*—Former judgments and no assets *ultra.* On these pleas a verdict was returned for the plaintiff, and on that of *plene administravit,* the finding was, "that the defendant hath not fully administered, and hath assets in his hands to the amount of $47.07½." Whereupon judgment was rendered as recited in the *sci. fa.*

His Honor *Judge Norwood,* at LINCOLN on the last Fall Circuit, dismissed the *sci fa.* and the plaintiff appealed.

Pearson, for the plaintiff.

No counsel appeared for the defendant.

RUFFIN, C. J., after stating the case as above, proceeded: The proceedings throughout have been irregularly conducted,

and the entries inaccurate, and the case is brought here in a form which is far from presenting the points distinctly. (582) No case is stated in the record, on which the opinion of the Court was given. But to the transcript of the present suit is annexed a transcript of the former one, which we cannot suppose was meant to enable this Court to pass on the issue on *nul tiel record,* but was intended to form the case on which the point actually decided, arises. That point as we understand it, is whether in the former suit the plaintiff was entitled to judgment for costs, *de bonis propriis* of the executor. With reference to that we have looked into the record, and we are of opinion that he was.

To that action the pleas were, conditions performed, fully administered, former judgments, and no assets *ultra.* No particular sum is mentioned in the last plea, as confessed in this action. The assets admitted must consequently be understood to be such only as were charged with the judgments previously rendered, and mentioned in the plea. If the plea had specified the sum, and the plaintiff had taken issue on it, that the defendant had assets to a larger amount, and that had been found for the defendant, he would have been entitled to judgment for costs against the plaintiff; for at common law, there could not have been a judgment *quando* for the residue of the debt, since the plea went to bar the action for the whole residue, and had been found for the defendant. *Hogg v. Graham,* 4 Taunt, 135; *Marshall v. Wilders,* 17 Eng. C. L., 467. This has been adopted as the rule here, it being held that the right to costs is not altered by our practice, introduced under statutes, of rendering judgments *quando,* where the issue upon a general or special *plene administravit* is found for the defendant. *Battle v. Rorke,* 12 N. C., 228. In the case before us, however, all the issues were found for the plaintiff, and upon both the general and special *plene administravit* the verdict is, that the defendant had assets to the value of $47.07\frac{1}{2}$ over and above the judgments with which he would have satisfied so much of the plaintiff's demand. The question is, whether in such a case the executor is liable for the costs at all events.

This has been so often decided, that it can hardly be (583) called a question at this day. Executors, when defendants have generally no privilege as to costs, but may make themselves liable to them, even when there are no assets, and when the plea was not untrue to their own knowledge unless some one of the pleas which goes to the whole cause of action, be found in their favor. If he plead *plene administravit,* in whatever form pleaded, and it be found in any part false, or

if it be, as pleaded, confessed by the plaintiff, and issue be joined on any other plea or pleas, on which the verdict is generally against the defendant, the judgment is in *presenti* or *quando*, as the case may be, for the debt to be levied *de bonis testatoris*, and for the costs, presently to be levied *de bonis testoris et si non, de bonis propriis*. So it is laid down, I Saund. 336, note 10, by Sergeant *Williams*, whose writings have, after a scrutiny of many years, been found so accurate as to be now deemed of the text of the common law, especially upon the heads of pleadings and entries. The adjudications in our own courts have been repeatedly accordant. *Parker v. Stephens*, 2 N. C., 218. *Hogg v. White, Ib.*, 298. *Teasdale v. Branton*, 3 N. C., 377. It is only when the executor succeeds on an issue on some one plea which goes to the whole cause of action, that he is entitled, to costs, and in such case he is entitled, although he may have failed upon other pleas put in by him. *Cockson v. Drinkwater*, Dougl. 239. *Hindsley v. Russell*, 12 East. 232. *Hogg v. Graham*, 4 Taunt. 135. And as to the verdict on an issue on the particular plea of *plene administravit*, either generally or *preterit* is, upon the same principle, only when found altogether for the defendant (that is, either that he has no assets or none beyond the sum confessed, so that the judgment would be in England, that he go without day, and here, *quando* for the whole sum in dispute in the issue), that the defendant is entitled to costs. *Wellborn v. Gordon*, 5 N. C., 502. *Battle v. Rorke*, 12 N. C., 228. For every judgment on a verdict on issues, must be for costs against one of the parties, and it is clear that the executor cannot recover his costs where neither of his pleas proves a bar to the plaintiff. Consequently he must pay them. It is just that he should, if he has any (584) assets and did not confess them truly, for if he had, the plaintiff might have accepted them and taken judgment immediately *quando*, for the residue of the debt. The pleading of the executor compels the plaintiff to incur the expense of a trial, and these expenses must be paid by him through whose fault they accrued.

The judgment does not seem to have been entered at length, but if it had been, and expressly *de bonis testatoris* only, or *de bonis propriis*, it is according to Sergeant *Williams'* note amendable, even after error brought. We think it ought to be made conformable to the rights of the parties, and also that judgment may be rendered on this *sci. fa.* for costs without a suggestion in it of a *devastavit*, as is laid down in *Teasdale v. Branton*, 3 N. C., 377, which has since been followed.

It is not competent for this Court to pass in the first in-

stance, on the issue joined on *nul tiel record,* but the cause must be remanded to the Superior Court for that purpose.

The judgment must therefore be reversed, and a *procedendo* awarded.

PER CURIAM. Judgment reversed.

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

JONAS RICKS v. GEORGE HAYWORTH.

A bond given by one who applies to be made defendant in an ejectment, with a condition to be void if he shall pay all costs which may be adjudged against him, does not comply with the requisitions of the act of 1804 (Rev., ch. 658), and a *sci. fa.* cannot be brought on it as a bail bond. But it is valid as a bond at common law, and will sustain an action of debt.

This was an action of DEBT upon a bond of £100 executed by one William Riley and the defendant, to the plaintiff, with the following condition:

"The condition of the above obligation is such, that (585) whereas Doe on the *demise* of Jonas Ricks hath instituted an action of ejectment against Richard Roe and the above bounden William Riley, and on motion the said W. R. hath been admitted to become a defendant of record in said suit: Now if the said W. R. shall defend the above suit with effect, or if a recovery shall be had against him, he shall fully pay and discharge all such lawful costs as may be awarded against him by the Court, then the above obligation to be void."

The declaration averred that Riley had been cast in the ejectment, and that costs to the amount of 103 dolls. had been taxed to the plaintiff, and assigned the non-payment of those costs as a breach of the obligation.

The defendant, after *oyer,* pleaded 1st. *Non est factum.* 2d. That the bond was given under the second section of the act of 1804 (Rev. ch. 658), directing bail to be given in actions of ejectment, and therefore, that the only remedy upon it was by writ of *scire facias.*

Upon the first plea, the attesting witness, who was the attorney for Riley in the ejectment, proved that the bond was signed and sealed in his presence; that he had no particular recollection of the delivery of it; but that from his usual course, he presumed that after the bond was executed, he took it and

carried it to the Clerk's office, and filed it among the papers in the cause, as a necessary preliminary for the rule for making Riley a defendant; and in support of this, the plaintiff proved that it had been so filed and was there found after the determination of that suit.

For the plaintiff it was contended, that if the bond did not conform to the requisitions of the act of 1804, yet that being a voluntary bond, it was valid at common law and would sustain this action.

His Honor *Judge Norwood* instructed the jury that, from the evidence of the attesting witness, and from the fact of the bond having been filed in the Clerk's office, they had a right to presume its delivery. His Honor also held that the bond did not conform to the act of 1804, but was valid at common law.

A verdict was returned for the plaintiff, and the defendant appealed. (586)

Mendenhall, for the defendant.
W. A. Graham, for the plaintiff.

GASTON, J., after stating the facts as above proceeded: The counsel for the appellant has mainly rested his case here upon the supposed error in this adjudication.

This is the first occasion on which this Court has been called upon to expound the act of 1804, and the untechnical language in which many of its provisions are expressed, has caused some embarrassment in ascertaining the precise meaning of the Legislature. The first section requires that, upon the return of any writ of ejectment (meaning return of service of the copy of the declaration of ejectment), the real plaintiff, by which is to be understood the lessor of the plaintiff, his agent or attorney, shall enter into bond "with the clerk of the court," to prosecute the same with effect, or to pay such costs and damages as shall be awarded against him. The second section then enacts, that the persons who shall make themselves defendants in ejectment, "shall on doing the same, either by themselves, their agent or attorney, enter into bond with good and sufficient security, to answer such writ or writs of ejectment in the Court to which they may be made returnable; and abide by the determination of the same; which defendant or defendants shall under the same rules and regulations, and liable to the same judicial proceedings, as to all costs and damages that may be awarded against him or them as principal and bail are subjected to in other civil actions of law in said courts." The plaintiff insists that the first section expressly requires that the bond therein

directed, shall be made payable to the Clerk of the Court; that the second having directed a bond to be given, and not declared to whom it shall be payable, necessarily implies that it shall be made in the same form with that prescribed in
(587) the previous section, and that the instrument in this case, being payable to the lessor of the plaintiff, departs in that respect, essentially, from the bail bond required by the second. We do not adopt this construction.

Whenever a bond is directed to be taken, and no special direction given with respect to its form, it must be understood as a bond, to be made payable to him whose rights it is intended to secure, and for whose benefit it is required. Laws 1787, c. 276, made it a duty of every Clerk of a Court of Record in this State, before issuing a writ or other leading process against a defendant, to take sufficient security of the person applying for such writ conditioned to prosecute the suit with effect, or in case of failure, to pay the defendant all such costs as should be awarded against the plaintiff. It has been the uniform and universal usage under this act, to make this prosecution bond as it has been termed, payable directly to the defendant in the action. The clerk is to be regarded as the legal agent for the defendant, empowered and commanded to receive the security in the name and on the behalf of the defendant; and not only have innumerable suits been prosecuted effectually upon bonds thus taken, payable to defendants, but since the act of 1831 has raised prosecution bonds to the dignity of the records, judgments on bonds in this form are every day rendered in our courts. The act of 1787 made provision for those cases only, in which the suit was commenced by a writ or other leading process issued from the clerk's office. There was no legal provision for a prosecution bond, in an action of ejectment. The first section of the act of 1804 supplied this omission, and required upon an action thus instituted, the same security from the lessor of the plaintiff for the defendant's costs, as had been demanded from the plaintiff, upon the institution of other suits by the act of 1787, and directed the bond, "to be entered into with the clerk"—that is to say, to be taken by the clerk as the appropriate legal agent of the defendant, as in all other cases.

As the requisition of the first section of the act of
(588) 1804 is analagous to that of 1787, in regard to the prosecution bonds, so the provisions of the second section are intended to conform *generally* to the requirement of bail from defendants by Laws 1777, c. 115, s. 16, 17. That act makes it the duty of the sheriff on serving a writ of *capias ad respondendum*, to take bond with two sufficient sureties payable to him-

self, and to assign over that bond to the plaintiff in the suit, and declares that all bail so taken shall be held and deemed to be special bail, and as such, liable to the recovery of the plaintiff. The old form of the condition of these bail bonds, approved by this Court in the case of *Rhodes v. Vaughan,* 3 N. C., 167, is, to make his personal appearance before the Court and then and there to answer to the plaintiff in the action, and to stand to and abide by the judgment of the Court. The first part of the condition of the bail bond under the act of 1777 is omitted in that required by the act of 1804, because in the latter no process has been served, the tenant in possession has only been invited to make himself defendant, is under no obligation to appear, and is to give the bond after he shall have appeared and prayed to be admitted a party defendant. Under the act of 1777, the bond is to be taken to the sheriff and afterwards assigned to the plaintiff, because it is designed to secure the double purpose of bail for appearance and bail to the action. In the latter, it should be given directly to the plaintiff, because it is to effectuate but the one purpose of securing bail to the action. With the exception of that part of the bail bond which stipulates for the appearance of the defendant, the conditions of both bonds are identical. We have not been without difficulty upon the question, whether the obligation did not vary from that prescribed in the act of 1804, in being made payable to the lessor of the plaintiff, instead of the nominal plaintiff. We are satisfied that it would be more consistent with the regularity of judicial proceedings, that the bond which, by the act, is substantially made part of the record in the action of ejectment, and on which judicial writs may issue to enforce the recovery of the plaintiff in that action, should be made to *him* whom the record recognizes as *the plain-* (589) *tiff,* and this is the form which we would advise to be pursued. Indeed, we can perceive great perplexities and embarrassments which may follow from any other course, where there are several counts on the demises of different lessors, and there is a recovery on some and not all of these counts. But as in this act the Legislature speaks of the lessor of the plaintiff as the real plaintiff, and as for many purposes he is considered in law the plaintiff (*Aslin v. Parkin,* 2 Bur. 665), and as in the present case no inconvenience could result from a bail bond being made to the lessor of the plaintiff, instead of the plaintiff on record, we should hold this to be a bond conforming to the provisions of the act of 1804, and fit to be proceeded on, as such, by the peculiar remedies prescribed in cases of bail, were it not for other objections to it, which we proceed to consider.

The condition in this bond omits the material stipulations which the act of 1804 distinctly requires to be inserted in the condition of the bonds under that statute; and substitutes for them other stipulations, perfectly intelligible, and not of equivalent import. The condition of the bond prescribed by the statute is, "to answer to the writ *i. e.* the action, of ejectment in the Court to which it may be made returnable and abide by the determination of the same." The *legal* meaning of these terms and the nature and extent of the duty secured by them are clearly defined. They constitute an undertaking, that if the defendant be condemned in the action, he shall pay the costs and condemnation or render himself up a prisoner, or that the bail will pay the costs and condemnation for him. The condition in this bond allows the penalty to be saved only in one of two modes. Either the defendant must defeat the action of the plaintiff, or make *full* payment of all costs that may be adjudged against him. Under the bond, as prescribed by the statute, the bail can always discharge themselves from liability by a surrender of the principal; are discharged by his death at any time before they are fixed with the debt; and cannot be subjected to the plaintiff's demand until after an inef-
(590) fectual attempt by a *capias ad satisfaciendum* to seize the defendant's body. It is perfectly clear that a surrender of the body of Riley would not be a *performance* of the condition of *this* instrument. It is equally clear, that if Riley should die after a recovery against him for the costs of the ejectment, *his* death would not be a payment of those costs within the words of this condition, and if we regard the plain meaning of terms, the condition would be broken when once Riley should refuse to make payment of the costs recovered, whether a *ca. sa.* or any other execution had been sued out against him or not. We cannot therefore regard an obligation which contains stipulations plainly variant, both from the ordinary terms, and the legal import of those required by statute to be inserted, in an instrument, to which instrument it gives a peculiar dignity, and on which it prescribes an extraordinary remedy, to be and to constitute that very instrument, without altering the contracts of parties, and interfering with the law which they had a right to prescribe, and which they have prescribed for themselves, on the subject matter of such contracts. Where the law has not defined the meaning and prescribed the effects of terms, those used in the contract must be understood as meaning what they obviously import, and producing such results as the intent thereby declared ought to operate.

We are thus conducted to the conclusion, that the obliga-

tion on which the plaintiff declared, was not a bail bond made in conformity to the requisitions of the act of 1804, and therefore could not have been proceeded upon as such by *scire facias*. It is however an obligation in due form between parties able to contract, containing no stipulations contrary to morals, to policy, or to positive statute; and if validly executed, is fit to be enforced by the ordinary remedies which the law gives when such obligations are broken. The only objection to the execution of the instrument is to be found in the exception to the charge of the Judge, with respect to its *delivery*. The attesting witness, who was the attorney of Riley, in the action of ejectment, stated he had caused the bond to be exe- (591) cuted, and that from his ordinary practice in such cases, he believed he had filed it away among the papers of the suit, for the purpose of enabling Riley to become a defendant. And it appeared from the records that the bond was so filed when Riley became defendant. The Judge instructed the jury that from this evidence they might presume a delivery. We are satisfied with the correctness of this instruction. An instrument under seal is made payable to the plaintiff, it is deposited in a place of safe keeping accessible to him, and for the purpose of securing to him the benefit which that instrument confers, he has accepted it, claims the instrument as his, takes it as his, sues upon and produces it as his. It is not only evidence from which a jury might infer delivery, but from which, if believed, they could not rationally decline to infer it.

It is the opinion of this Court, that there is no error in the judgment which has been rendered against the defendant below, and that it must be affirmed with costs.

PER CURIAM. Judgment affirmed.

THE COMMISSIONERS OF PLYMOUTH v. JOHN C. PETTIJOHN.

An ordinance of the commissioners of a town directing, under a penalty, cattle to be penned at night, applies only to residents of the town; not to those living beyond the corporation limits, although their cattle may stray into the town.

This was a WARRANT brought by the plaintiff for a breach of an ordinance of the town of Plymouth, in the following words:

"Whereas the Commissioners of the town of Plymouth view the practice of suffering cattle to lie in the streets thereof

after night, not only as a common nuisance, but as highly dangerous to persons coming into town after night. (592) Resolved, therefore, that the owner of such cattle shall cause them to be penned during every night, by or before dark, under the penalty of fifty cents for each omission, and for each and every cattle beast not so penned. And all cattle found in said streets between dark and daybreak shall be taken up and penned by the town constable, or other person appointed by three or more of the commissioners, for the time being, and turned out every morning."

Upon the trial before his Honor, Judge *Daniel,* at WASHINGTON, on the Fall Circuit of 1829, the plaintiff having made out a *prima facie* case, the defendant proved that he lived out of the limits of the town. His Honor thinking this fact to be a complete defence, the jury found for the defendant, and the plaintiffs appealed.

No counsel appeared for either party.

RUFFIN, C. J. This is a warrant for a penalty for not penning a cow in the night time, contrary to an ordinance of the commissioners which is set out at large in the case.

The act of incorporation enables the commissioners to make all such ordinances, rules and regulations for the good government of the town, not inconsistent with the laws of the State, as to them shall seem fit; and to enforce the observance of them by penalties not exceeding ten dollars; and also in particular to prevent and remove nuisances. The by-laws require the owners of cattle to pen them every night, and for each omission, gives a penalty for the use of the town, of fifty cents.

The defendant is not an inhabitant of the town, nor member of the corporation; but his cow was found lying in the streets, once after night; for which this penalty is claimed. In the Superior Court, it was held, first, that the defendant was not within the meaning of the ordinance; and secondly, that if he was, the commissioners had not the power to make a by-law binding on him.

If the opinion on either point be correct, there is no cause of action, and the judgment must be affirmed.

The latter is the more general question, and is inter- (593) esting from its bearing upon the regulations of a wholesome police in towns and villages, and upon the powers of their corporate authorities over the citizen and his property. It is probable that such ordinances are not uncommon;

and therefore it is to be regretted that the question of their validity, or the extent of their validity should not have been discussed upon this occasion, that the Court might have been called on or felt authorized to decide and settle it. The case has stood over for several terms for that purpose, as there was no appearance on either side, and we supposed that to be the point of most concern to both parties. It has at last, however, been submitted without argument, which upon a principle prescribed to all judges by a proper self-respect and a due regard to the saving of the rights of third persons, induces us to confine our opinion as being definitive, to such points as are absolutely necessary to the adjudication in this particular suit.

The practice forbidden in the ordinance is of public inconvenience, and the suppression of it a fit and proper subject of town regulation. The penalty is within the sum limited in the charter; and for that reason, must probably be admitted by the Court to be reasonable. If it were competent for us to hold otherwise, we should deem this, which inflicts a penalty of only fifty cents, to be, as respects this point, valid. Nor do we doubt that all the corporators are bound by the ordinance as operating either upon the thing creating the nuisance or inconvenience, or upon them personally; because it concerns the interest of their whole community and also derives an obligation from the consent, expressed or implied, of every member.

There seems as little reason to question, that one not a corporator, but who comes within the limits of a town, and there violates a police regulation sanctioned by a penalty, becomes as liable to pay it, as if he were a member. For a local jurisdiction is vested in the corporate authorities, which embraces all persons and things within its local bounds; and he who comes within the limits is no longer a stranger, but, for the time being, is subject to the jurisdiction as an (594) inhabitant. So, too, it may be yielded of things, as well as persons. The cattle of a stranger straying into the town and there becoming nuisances or found damage feasant, may be removed, by way of abating the nuisance; and probably, may be distrained and impounded until the owner shall pay the expenses and such pecuniary mulct as may have been before imposed.

But the question in this case is, whether there is a power, under the laws, in the commissioners, not only to deal with the beasts in the manner supposed, but, in the first instance, to impose a penalty upon the owner for the use of the town,

to be answered by him in his person or other property, he being a stranger, and having done no act within the limits of the town. Upon it the Court gives no opinion; though we do not wish to conceal that we refrain the rather, as the case stands before us, from a sense of the impropriety of expressing conclusively, than from the difficulty of making up one. The point is, however, thus distinctly stated and left undetermined, in order that, upon its arising in future, it may, as one involving the supposed and practised powers of local corporations and the rights of the citizen, be fully considered and discussed.

Admitting the power to ordain such penalties in general, it is sufficient for the defendant in the case before us, if the ordinance itself does not extend to him. Such, we think, is its true construction. If an act of the corporation can bind persons beyond its limits for acts or omissions within them, yet, as those limits are the bounds of the jurisdiction, ordinances in general terms, are to be regarded as naturally referring to persons and things which are both within the place, and to those only. When an offence is made to consist of the omission to do an act in the town, he only is within the purview of the law, upon whom, by that or some other law, the act is imposed as a duty to be performed within the town. General terms used in reference to such a duty and penalty are restrained by the subject matter, and cannot be extended
(595) to persons, who have no rights to be exercised and no duties to be performed within the place, since that would be to render them liable, not for the omission within the town (which is the specific offence), but for the consequential evil resulting from the omission of a similar act at another place, at which it was not a duty. There ought to be express or plain words to include such persons, which are not found here.

The ordinance recites that the practice of letting cattle lie in the streets after night had become a dangerous nuisance; and then provides, first, that the owner of cattle shall pen them every night, by or before dark, under the penalty of fifty cents for each omission; and secondly, that "all cattle found in the streets between dark and daybreak, shall be taken up and penned by the town constable, and turned out the next morning."

There are two objects in the ordinance, which are altogether distinct. The one is, to abate the alleged nuisance; which is to be effected by taking any cattle found there, out of the street, and confining them for the night. This operates

upon the thing then within the town, and is expressly extended to all cattle there being, no matter to whom, or where belonging. The other is to prevent the danger of future nuisances, and avoid the trouble and necessity of abating them, by giving penalties for those acts deemed most likely to produce them, whether they should in fact produce them or not. The penalty is against the owner of a beast for not penning it. The question is what owner is meant? Clearly, an inhabitant, owning cattle. The penalty is not given for any cattle found in the streets, but for any not penned. It is not given for the nuisance, but for an act tending to produce it, and is a reasonable precaution against an inconvenience incident to beasts owned in the town. Such an owner incurs it although his unpenned cattle may not stay in the streets, but stray into the country or upon the lots of other persons. They probably will lie in the streets, and may properly be required to be confined by the owner as a matter of police. But strangers are, by the general law, under no obligation but to avoid the making a nuisance or doing an injury, and then only (596) to answer for the actual damage. The town has no interest that a person, not within it, should pen his cattle, nor power to compel him. All that can be required of him is to keep them out of town. That is fully provided for in the by-laws, in a different manner, namely, by impounding. Whether a penalty could be given in such case for the cattle coming into town, is the general question left undecided. But here it is confined by the words of the ordinance to the omission by the owner to pen his cattle; which shows that the person meant is such owner, being an inhabitant of the town or within its jurisdiction.

PER CURIAM. Judgment affirmed.

Cited: Whitfield v. Longest, 28 N. C., 272; *Wilmington v. Roby,* 30 N. C., 254; *Comrs. v. Capehart,* 71 N. C., 160.

MERRIMAN FEATHERSTON v. WILLIAM MILLS.

The act of 1798 (Taylor's Rev., Appendix) establishing a court of patents does not enable the patentee in a junior patent to repeal an elder one, although his entry was prior to that of the patentee in the latter.

This was a PETITION *and* SCIRE FACIAS to repeal a grant. On the Fall Circuit of 1832, at BUNCOMBE, before *Swain, J.*, the facts were that the plaintiff had made his entry on 18 April, 1801, and obtained his grant on 12 December, 1812. The defendant made an entry which included a small part of the land covered by the grant to the plaintiff, on 22 January, 1807, and obtained a grant on 27 January following.

The presiding Judge, upon grounds wholly distinct from that taken in this Court, vacated the grant to the defendant, and he appealed.

No counsel appeared for either party.

RUFFIN, C. J. The great importance of the questions arising under the act of 1798, in their bearing on individual rights and the public repose, and the doubts which seem (597) to be entertained upon them in the profession, has called for the most deiberate consideration of them, on the part of the Court. It is gratifying to us that numerous cases have been brought up, in which respectively those questions are presented in almost every varied form of which they are susceptible, and that some of them have been argued, at the bar, with an ability which has greatly aided the Court in arriving at conclusions satisfactory to themselves, and founded, as we think, on clear principles and authorities. In *Crow v. Holland, ante,* 417, we have held that a private person is not entitled to use the name of the State and her remedy, as sovereign, to repeal a grant, which did not aggrieve him at and by its emanation; in other words, that only an elder patentee, or he who had prior right, can sue a *scire facias.* In *Hoyle v. Logan, ante,* 495, we have further held that the privilege thus belonging to the elder title ceases with the right to which it is an incident; and therefore, that the party must continue to be entitled at the time of resorting to this remedy. Hence a bar to his right of entry, such as the statute of limitations or a conveyance from himself, is also a bar to the *scire facias.* For he is then no longer a person grieved, but an officious intermeddler.

The present is a mixed case. The relator's patent is junior to that of the defendant, but his entry is prior; and the question is whether that is, within the act of 1798. We think very clearly that it is not. We see no reason to doubt as between the State and the defendant, the land, when once entered, is no longer the subpect of re-entry and of grant, if the first entry remains in force, and is finally perfected, more than

it would be if the first enterer had also obtained the first grant. The second entry is void by the words and in the sense of the act of 1777, as well when there is a prior entry, then valid and on which the party, entitled by it, proceeds to complete an apparent title, as when such completion has taken place before the second entry or the grant founded on it. But the enquiry is against whom and in what sense is it void, and how is advantage to be taken of it? It is void against the State, being founded on the false suggestion, that the land (598) had not before been either granted or entered. Is it so as against the first enterer himself? The question implies in its terms, that the party's title consists of his entry alone; and the decisions already made show in that alone it must consist, for as a junior patentee he has no remedy under the act of 1798. The entry has never been considered as a legal title, or as at all constituting a part of the title at law.

It is not given in evidence in ejectment to support the grant by showing an authority in the officers of State to issue it. Perhaps this would at once be a conclusive answer to the petitioner, since this proceeding by *scire facias* is strictly at common law, and within the jurisdiction of the chancellor derived from that source. (4 *Inst.* 88). But there is a better reason, founded in the nature of the right by entry, and the defences against it. It is an equity, which upon the payment of the purchase money, entitles the enterer to a grant, if applied for in due season; and also entitles him to call for a conveyance from one who has already obtained a grant for the same land, with notice of the previous entry. That such is the idea of the right by entry is clear from the many circumstances. Entries are not made the subjects of legal jurisdictions in any but the excepted case of a *caveat,* as provided in the act of 1779, which arose upon the discontinuance of the land offices. Decrees have been frequently made in equity for the first enterer against the first patentee. They repel the position that the grant as between those parties is void. They are founded in the very contrary position that they are not void, but that the grantee is a trustee for the claimant under the prior entry. The decree proceeds precisely on the same ground with one against a person, who, having notice of an unregistered deed, takes a conveyance to himself, and registers it first. The first deed is not made valid at law by the notice, nor the latter invalid, but the last purchaser is held to have taken his legal title by reason of the fraud, in trust for the pur- (599) chaser. For that reason the first enterer has relief in equity. It is founded on the proper ground, namely the fraud

on himself. When he seeks relief on the different ground, that is to say, a fraud on the State, he must show himself to be the person to whom the law has delegated that privilege. By the act of 1798, it is to be exercised in a court of law; and it follows to our apprehension that he only can be said to have it, who can show a title which that Court can recognize, investigate and adjudge, and against which a mere equity on the other side would be no answer. We think the statute did not intend to enlarge the jurisdiction of the common law courts, so as to embrace some of the nicest equities, and involve them in the issues to be submitted to the jury. But what confirms us entirely in this opinion is that there is no necessity for such a jurisdiction, and therefore, it is not to be presumed that it was intended to be created by the general words, "persons aggrieved." The purpose was to give a remedy to those who had none before. The first enterer had at that time an adequate and complete one in equity. Two were not necessary; and either it must be supposed that two are given in the same case, or that a less perfect claim under the entry will be sustained at law than would authorize relief in equity; and neither supposition is admissible. There is also this farther reason: a court of equity measures its relief according to the rights of the parties and holds the defendant a trustee for the various persons entitled to the extent of their rights respectively. If the first entry be for a part only of the land granted, so far only is the title of the grantee defective and a trust declared. This is manifestly the justice of the case. But under the statute, the grant is void for the whole, if it be so as to any part, and the judgment is that it and the enrollment be revoked, annulled, cancelled and vacated. The case before the Court is an example of this kind. The grant to the defendant covers but a small part of the plaintiff's entry, and includes other lands not entered by him. A judgment against the defendant would avoid his grant *in toto,* while the
(600) plaintiff has an equitable interest in only a portion of the land. To this the defendant must submit, in a case where the plaintiff has no other remedy but the one which cancels the grant; because his right must yield to the superior rights of the opposite party. But in putting a construction on the statute, as to the persons to whom this remedy is given, this is a sufficient reason for confining it to those who are without any, but under the statute.

The Court will not be understood as expressing an opinion, that the mere circumstance that the lands included in an elder patent or entry are converted in whole or in part by a younger

one, does not render the latter void within the statute: For it is our purpose to avoid any determination beforehand upon the cases which the act embraces, or may be supposed to embrace.

We all think that for these reasons, the judgment of the Superior Court must be reversed, and judgment be rendered for the defendant, notwithstanding the verdict.

PER CURIAM. Judgment reversed.

Cited: O'Kelly v. Clayton, 19 N. C., 247; *Miller v. Twitty,* 20 N. C., 10; *Hoyt v. Rich, Ib.,* 677; *Plemmons v. Fore,* 37 N. C., 314; *Gilchrist v. Middleton,* 107 N. C., 678; *McNamee v. Alexander,* 109 N. C., 245; *Kimsey v. Munday,* 112 N. C., 832; *Janney v. Blackwell,* 138 N. C., 439.

JOSEPH SOUTER v. DAVID DAVENPORT.

A variance between the bond declared on and that produced in evidence can only be taken advantage of upon the trial; it forms no ground for arresting the judgment.

This action was originally commenced by a warrant in which the defendant was to answer the plaintiff "in a plea of debt, the sum of one hundred dollars with interest."

The plaintiff was nonsuited before the magistrate and appealed to the County Court of BUNCOMBE, where he obtained judgment for $97.84, principal and $6.03, interest. From this judgment, the defendant appealed to the Superior Court, where the case was tried at the special term held in July last by his Honor Judge *Martin.* The plaintiff produced a bond of the defendant's for $350, upon which several payments were endorsed, and obtained a verdict for the balance due, (601) viz: $96.48. The defendant then moved in arrest of judgment, upon the ground of a variance between the warrant and the bond, which motion being overruled and judgment rendered upon the verdict, he appealed.

No counsel appeared for either party.

GASTON, J., after stating the facts as above, proceeded: The cause has been here submitted without argument, and the only error assigned by the appellant is clearly not sustainable.

After verdict, it appears that defendant's counsel moved in arrest of judgment upon the ground that the warrant which was the plaintiff's declaration, and the bond offered in evidence, did not correspond; which motion was overruled by the Court. Had there been a variance, which we by no means admit, the objection should have been taken on the trial. A motion in arrest can only be found on some *intrinsic* cause appearing upon the face of the record.

Judgment is to be affirmed, with costs.

PER CURIAM. Judgment affirmed.

ASHLEY SWAIM v. THOMAS FENTRESS.

The writ of *certiorari* is used in this State as a writ of false judgment and as a substitute for an appeal. It never has been allowed in lieu of a writ of error. The latter writ being entirely efficacious for five years, there is no need for the former during that period, and after its expiration, the *certiorari* being discretionary, should not be granted, as thereby the limitation to writs of error would be avoided.

The facts of this case, as collected from the record, are these: Fentress, on 24 November, 1818, sued out an original attachment against one Williams, returnable to the County Court of Randolph; in which Swaim appeared upon the first notice served upon him as garnishee, and made his (602) garnishment on 6 February, 1821, at which term there was a conditional judgment of condemnation of the sum in his hands sufficient to pay the recovery the plaintiff might make. At November, 1821, a judgment by default was entered against the defendant Williams, and at February following, the writ of enquiry was executed and final judgment entered against Williams for the sum assessed and costs, and also of absolute condemnation of so much in the hands of the garnishee as was sufficient to satisfy the same. On 28 January, 1829, Swaim applied for a *certiorari* and *supersedeas* upon his affidavit, stating that when he had made his garnishment, counsel had advised him that an attachment would not lie against Williams upon that cause of action and that he then believed the suit was ended; but that about two years afterwards an execution issued against him on the judgment, when he again applied to other counsel to have it set aside for irregularity, and was informed that it had been done; since which time he had not heard anything of the case, until, just

before this application, he discovered that process had been kept up against him, and that execution was then out.

On this affidavit a *certiorari* was granted by *Martin, J.,* and on the return of it with the record, various counter affidavits were filed upon the merits. But it was insisted on behalf of the plaintiff in the *certiorari,* that it was immaterial how the merits were; for that the judgment against him, as garnishee, was void, because the attachment was not at first served on him, but on another person, who disclosed that he, Swaim, was Williams' debtor, and he was then summoned and made his garnishment; whereas an alias attachment should have been levied in his hands; and also for that, the judgment against the principal defendant, Williams, was void, because an attachment would not lie for the demand therein sued on, and because there was no sufficient affidavit of the demand, and because the attachment was not under the seal of the justices of the peace. For these reasons his Honor, *Judge Norwood,* at RANDOLPH, on the last circuit sustained the writ, and made the *supersedeas* absolute; and the defendant in the (603) *certiorari appealed* to this Court.

Mendenhall, for the defendant.
No counsel appeared for the applicant.

RUFFIN, C. J., after stating the record of attachment against Williams, and the facts as above mentioned, proceeded as follows: Deeming this, for the present, an appropriate remedy, for the applicant, we are far from thinking he has entitled himself to it. It is intended to supply the place of an appeal, of which the party has been deprived, or which he has lost by accident; and it is an extraordinary remedy, accessible only to one who has been injuriously denied the ordinary one of appeal, or who has merits, and has been diligent, as far as he could be, in applying for this. The case upon the merits is abandoned from necessity; for upon looking into the garnishment, it is clear the party owed the debt condemned in his hands, and that it was the subject of condemnation. But if it were otherwise, no sufficient reason is given for not praying an appeal, nor excuse for delay in making this application. The suggestions of counsel as to the future disposition of the case were altogether inadequate to authorize the total inattention to its progress. We should think therefore upon these grounds, that the *certiorari* ought to be dismissed. But as the decision was not made upon them, it is proper the Court should further consider the other points.

We understand his Honor to annul and reverse the judgment of the County Court, as erroneous, or to declare it null and void in itself. We are not aware of any power in one Court to supersede the judgment of another by direct order, as being merely void. The Court itself, whose judgment it is, may expunge it, or when acted on, another court may pronounce it inefficacious to authorize the act professed to be done under it. The proceedings of inferior magistrates, not according to the course of the common law, may be reviewed and quashed by a court of general superintending jurisdiction.

But not so of those of a court of record, proceeding (604) according to the common law and having jurisdiction. They may be reviewed and reversed, but not quashed or directly superseded as nullities upon having the record brought up. *Whitley v. Black,* 9 N. C., 179. Regarding this writ, however, as bringing up the record and judgment to be reviewed in the matter of law, it is our opinion that it cannot be sustained. It might be questioned whether any or all of the alleged defects would entitle the plaintiff to reverse the judgment. That which he relies on, as being the specific error in the judgment against himself, we think is not an error. The statute authorizes and directs the garnishee to be summoned twice before a judgment shall be entered against him, for want of appearance; but if he appear and answer upon the first subpœna, the second is unnecessary and not required. Whether the garnishee can allege errors in the process or judgment against the defendant in attachment, or whether these are such as he can assign; or whether they be errors for which the judgment should be reversed on a writ of error, might all admit of debate. But the Court does not deem it necessary to express an opinion on them; because admitting the affirmative throughout, it seems clear to us, that a *certiorari* is not the proper mode of taking advantage of them, but only a writ of error; which it has been held, lies for a garnishee. *Haughton v. Allen,* 1 N. C., 364.

The writ of *certiorari* has been used here as a writ of false judgment, or in aid of that writ. It has also been used as a substitute for appeals allowed by our law for a second trial of facts. Its most frequent and important application in this State has its foundation in the right of appeal for that purpose. But it never has been allowed as a substitute for a writ of error, and where one would lie, to bring under review mere matter of law apparent on the record of the County Court. It never can be allowed for that purpose; because there is no necessity for it, since a writ of error operates, under our stat-

ute, after security is given, as a *supersedeas,* and relieves the plaintiff in error, until a judgment of affirmance. That writ can be sued at the parties' pleasure, until the expira- (605) tion of the period by which it is limited, and when the law does not suffer errors to be regarded, even if they exist. During that period, the party must be confined to the remedy by writ of error, because it is complete, and could not be more so upon *certiorari.* After that time has elapsed, certainly the writ of *certiorari,* which is extraordinary and merely discretionary, cannot be granted; for that would be an evasion of the law limiting writs of error and giving a substitute for a remedy which is itself barred. Upon each principle, the judgment must be reversed and this writ dismissed. Here no issue of fact was joined between the plaintiff and the garnishee; but the judgment was on the confessions in the garnishment itself. If erroneous, the garnishee might have appealed at the time or sued his writ of error within five years, as his next best and common remedy. That being adequate, a *certiorari* could not be useful or granted to him. It was not a fit case for that writ; but if it were, he could not have it after five years, by which all errors are cured and the judgment irreversible in any way. Here, there were eight years from the judgment against the garnishee, and about seven from the final one against him and the defendant, before this writ was sued out.

The judgment of the Superior Court must therefore be reversed, and the *certiorari* dismissed, and judgment rendered under the statute against the plaintiff in the *certiorari* and his sureties, for the amount of the recovery in the County Court, and the costs there, and also, for the costs in the Superior Court and in this Court.

PER CURIAM. Judgment reversed.

(606)

STATE v. NORMAN GILLIS.

When, upon the trial of an indictment for arson, the evidence was that the prisoner had in his possession bank notes similar to some stolen from the house when the arson was committed, and that he gave contradictory accounts of the mode in which he obtained them, an instruction to the jury that these contradictions were evidence to prove that he did not come honestly by them, is not erroneous. And these declarations lead to prove the guilt of the prisoner.

This was an indictment for ARSON in burning the dwelling house of one McKendre, in MOORE. The evidence was entirely

circumstantial. It was proved that the last time McKendre left his house, just before it was burned, there was in it a chest which, among other things, contained two bills of a hundred dollars each, one of fifty and one of ten dollars—all issued by the Bank of the United States; that directly after the arson, this chest was found in the woods near the house, broken open and rifled of its contents. That the prisoner was entirely destitue of personal property. That he pretended to go to the south for the purpose of obtaining money for a horse, which he alleged he had sold upon a credit. That two days after the arson, he was sixteen miles below Fayetteville, and was then in possession of notes similar, in their amount and number, to those taken from the chest, and stated that he had received them for the sale of his crop of cotton—that on another occasion, he said he had obtained them by building a house in the State of Tennessee—that a few days afterwards he was in Wilmington when he bought a coat and paid for it in a note of the Bank of the United States for fifty dollars—that from Wilmington he went to Fort Johnston, on his way to Charleston, and while going down the river was seen in possession of two bills of the Bank of the United States for one hundred dollars each—that at Fort Johnston, he professed to be desirous of going to Charleston to collect money due him for the sale of a horse—that he then stated that he had raised the money in his possession by the sale of a
(607) negro, before he left home—that although there were two modes of conveyance from Fort Johnston to Charleston, he embraced neither, but returned to Wilmington, where he exchanged two United States Bank bills of one hundred dollars each for others, giving a premium of two and a half per cent—that soon after this, he was seen in Bladen County, when he said he had been to Charleston, and was on his way home to pay off an execution which had been levied on his land; and that there he expressed a wish to exchange two hundred dollars for South Carolina Bank notes, saying that directly after his return he should travel, and that money of the latter description would suit him best.

His Honor, *Seawell, J.*, in his charge to the jury, explained to them the purpose, for which the various circumstances above mentioned, had been offered in evidence, and left it to them to say, whether those circumstances satisfied their minds of the guilt of the prisoner beyond a rational doubt. If they did, that it was their duty to convict him. His Honor also instructed the jury that the giving inconsistent and contradictory accounts in relation to the manner in which the prisoner

said he obtained the bills, was evidence to prove that he did not come honestly by them. The prisoner was convicted and judgment of death being pronounced, he appealed.

Badger, for the prisoner.
The *Attorney General,* for the State.

GASTON, J. To assist juries in complicated cases to arrive at a correct conclusion upon disputed facts by advising them as to the nature, bearing and tendency of the proofs, but at the same time to withhold any intimation of an opinion as to the weight of the whole or any part of the testimony, is one of the arduous duties which the law enjoins upon Judges who preside at the trial of issues. This duty is the more important and the more difficult, where the evidence is entirely circumstantial, where the quality of each circumstance is to be precisely ascertained, and the effect of them combined, accurately determined by the triers. And it swells into one of awful magnitude, when the issues of life and (608) death depend upon its faithful, correct, and judicious performance. The exception made in this case imposes upon us the responsibility of examining whether the prisoner has well founded cause of complaint of the manner in which this duty was discharged by the Judge below.

The exception is directed solely to that part of the charge, in which his Honor instructs the jury that inconsistent and false declarations of the prisoner, in relation to the manner in which he obtained the bank bills in his possession, were "evidence to prove that he did not come honestly by them." It is insisted that this instruction was erroneous, for that in the first place such inconsistent and contradictory declarations do not in law prove more than that *some* of them are false; and secondly, that if they amount to proof of a dishonest acquisition, they do not, as the Judge intimates, furnish evidence that the prisoner stole the bills which the prosecutor lost, or committed the arson of which he was accused. To form a correct judgment of the validity of the objections, it is indispensable that we should first ascertain the meaning of the instruction to which they apply. Are we to understand the Judge as having declared that the contradictory statements did prove a dishonest acquisition; or only, that they were evidence having a tendency to prove it, relevant to that purpose, and fit to be weighed by the triers, with a view to the determination of that fact? We cannot doubt but that the former *is not,* and that the latter *is* the sense of the instruction which

he intended to give, and which the jury understood his words to convey. The difference between proof of allegation, and evidence to prove an allegation, is so obvious that we cannot permit ourselves to believe that it was overlooked by the Judge, or confounded by the jury. It is pointed out in the beginning of "the statement" which forms a part of the transcript. "*The evidence* was entirely circumstantial, and *consisted of the testimony* of witnesses *to prove, etc., etc.*" The statement pretends not to affirm that any facts were *proved,* but set
(609) forth the evidence offered *to prove* them, in order that the bearing of the instructions upon testimony might be seen and determined. It was the duty of the Judge to show the jury the application of the evidence to the material facts in controversy; and it was also his duty to refrain from the expression of an opinion whether it did or did not prove such facts. His language is appropriate to the former purpose, and is within the sphere of his legitimate province; and we cannot from a weak and overstrained humanity, or in a spirit of perverse criticism, conjecture, that it may have been designed to effect, or without intention may have effected, the latter purpose, and thus invaded the province of the jury.

Satisfied that this was the instruction given, we proceed in the exercise of our defined and limited jurisdiction, to enquire whether in this instructon there be legal error. And upon an anxious and deliberate consideration of all that has been urged in argument, and of all which our own reflections can suggest, we are bound to declare that we see no error. Contradictory declarations with respect to a fact, do not indeed, absolutely and directly, prove more than that all of them cannot consist with the fact. *All may, some* of them *must* be untrue. If made by an individual in regard to a matter of which he has positive knowledge, he is guilty of falsehood. But the fact of falsehood once established, it becomes, in many cases, an important piece of evidence to ascertain other facts—the causes which induced, and the ends to be promoted by a resort to falsehood. There is direct testimony of an arson, committed under circumstances, clearly indicating that a robbery was at that same time perpetrated by the incendiary. An individual, who before the commission of these crimes was destitute of money, and property, immediately after quits the neighborhood, travels to a considerable distance to and fro without assignable motive, is in the possession of four bank bills, constituting a large sum of money, corresponding in amount, and in the character and the respective denominations of the bills, with those stolen from the prosecutor, and busies

himself in converting these into bills of another kind, and of less value, for which he gives a premium. No mind capable of drawing a conclusion from connected facts, (610) can hesitate to acknowledge that such testimony strongly attaches to this individual, the charge of the theft and the arson. But in addition to these facts, there is another circumstance. In the course of his wanderings, he gives many relations to different persons at different places, with respect to the manner in which this money, so strangely in his possession and so strangely used, has been acquired by him; and these relations are wholly inconsistent with each other. The connection between such conduct and the motives for it, the consciousness which it indicates, and the interests which are intended to be served by it, are unquestionably matters well meriting the consideration of those, whose grave duty it is, by all the means in their power, to ascertain the truth of the imputed charge. Falsehood, diversified in its forms, but always repeated on this point, clearly *tends* to show a consciousness of dishonest acquisition, and a solicitude to embarrass inquiry and to prevent detection. That it *proves* dishonest acquisition is not an inference of law, nor was it the instruction of the Judge; but that it is relevant to *that fact,* and is evidence for that purpose, fit to be considered and weighed by the jury, seems well warranted by reason, observation and experience. Whether by itself or in connection with the other matters testified, it produces a conviction so settled and undoubting as to induce the jury to infer that fact, as one proved to exist, must be left, as it has been left, to their integrity, their intelligence and their acquaintance with the ordinary concerns of human life. We see no intimation of opinion from the Judge that a dishonest acquisition of the money, in the prisoner's possession, was evidence that he stole the money lost by the prosecutor, and committed the arson charged in the indictment. But it does appear to us, that the fact of such dishonest acquisition, supposing it established, is a circumstance which much strengthens the other evidence as to the identity of the bills taken from the prosecutor, with those disposed of by the prisoner. Both sets had been shown to be for the same amount; to consist of bills of the (611) same bank, and each bill of each set to be of the same denomination. The prisoner acquired what he disposed of, at the time when the prosecutor lost his. These were strong coincidences. Add to them that the prosecutor had his taken away *dishonestly,* and the prisoner acquired his *dishonestly.* and who does not feel its force? When the better evidence

cannot be had, circumstantial proof is as admissible to identity of things or of persons, as to any other matter. No objection was taken to the admission of any part of the evidence offered to establish this identity, and unless it be in law inadmissible for this purpose, we are bound to consider it of a proper character, and fit therefore to be heard and considered. The *sufficiency* of the evidence either to identify the property stolen, or to establish that the thief was also the house-burner, or to show that the prisoner was both, are enquiries into which we cannot enter. These were proper enquiries, *first* for the exclusive and unbiaised decision of the jury—and *afterwards* of the Judge who presided at the trial. The case shows that both have made these enquiries, each in the order prescribed by the law, and both of them, no doubt, in the conscientious discharge of duty. After explanation of the purposes for which all the various circumstances had been given in evidence, the jury were instructed that "if these circumstances satisfied their minds, beyond a rational doubt, of the guilt of the prisoner, it was their duty to convict him; but unless they produced this full satisfaction, it was their duty to acquit him." Thus instructed, they have on their oaths pronounced him guilty. The Judge from whom a new trial was asked, upon his oath "to do equal justice to the public and to individuals," refused to set aside the verdict. The judgment of the law necessarily follows, unless an error be shown in the proceedings. None such is seen by us, and we must therefore direct the Court below to pronounce sentence of death against the prisoner.

PER CURIAM. Judgment affirmed.

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(612)

STATE v. BENJAMIN DAVIS.

It is not forbidden by the act of 1796 (Rev., ch. 452) for a judge to tell the jury that a witness "had given a fair and candid statement, and appeared to be a creditable man"; the statement being admitted to be correct.

The defendant was indicted for receiving stolen goods, knowing them to be stolen.

On the trial before *Martin, J.*, at PASQUOTANK, on the last circuit, the case stated that "the prosecutor and owner, who was a respectable citizen, gave a clear and apparently unimpassioned relation of the circumstances affecting the case"—

stating in substance that he had lost his property in March before the trial—that he applied to the defendant for information respecting it, who denied that he had any knowledge of it—that in two or three days thereafter, he found a part of it in the possession of the defendant; and that afterwards, he found the rest of it in the possession of a neighbor of the defendant. This neighbor was examined, and proved, that four or five weeks before the prosecutor claimed the property found in his possession, he had bought it of the defendant.

For the defendant, it was contended that the evidence proved that the defendant stole the property, and not that he received it, knowing it to be stolen—that his being found in possession of it raised a presumption that he was the thief, and that there was no evidence of a theft having been committed by anybody else.

In summing up, his Honor stated, "that the prosecutor appeared to have given a very fair and candid statement—that he seemed to be a creditable man—but, he added, perhaps I am going too far in speaking thus of the prosecutor and his testimony; you, gentlemen, are the exclusive judges of such matters. I have no right to express an opinion upon the facts of the case, and therefore you will decide entirely for yourselves, what degree of credit you will give the prosecutor, without being at all influenced by any inadver- (613) tent remarks of mine."

His honor left it with the jury to find whether the defendant actually stole the goods, or received them knowing them to be stolen, informing them if they should find that he was the thief, they ought to acquit him.

The defendant was convicted and appealed.

Kinney, for the defendant.
The Attorney General, for the State.

GASTON, J., after stating the charge as above, proceeded: The counsel for the appellant insists that the remarks characterized by the Judge as inadvertent, and which the counsel very candidly admits to have been such, transgressed the grounds imposed on Judges by the act of 1796, entitled, "An act to secure the impartiality of trial by jury, and to direct the conduct of Judges in charge to the petit jury"—that whatever effect the immediate connection of this mistake may have produced on the minds of the jury, it was physically impossible to obliterate from their recollection what was the Judge's opinion of this testimony—that this opinion was forbidden by

the law to be made known to them—that the trial, because of this prohibited communication, was illegal; and that the defendant has therefore a right to require that the verdict, consequent upon such illegal trial, should be set aside.

The act of 1796 enacts "that it shall not be lawful for a Judge, in delivering a charge to the Petit Jury, to give an opinion whether a fact has been fully or sufficiently proved, such matters being the true office and province of a jury; but it is hereby declared to be the duty of the judge in such cases, to state in a full and correct manner the facts given in evidence, and explain the law arising therefrom." It is obvious that if we confine ourselves to the *words* of this statute, there is no ground for the complaint which we are now considering. But it has been long since settled, that the literal, is not the true interpretation of the act. Solicitous to discover and faithfully to carry into execution the legislative will, this Court
(614) has fixed its attention upon the purposes declared in the act, and has given to it such a construction as it believed, would most effectually accomplish these purposes. On the one hand, it has been seen, that the Legislature designed to preserve the purity and independence of the trial by jury, by securing to every man, the right to have a decision upon the controverted facts of his case, which shall be the result of the jury's investigation of the evidence, uninfluenced and unbiased by the opinion of the Judge. On the other hand, it has as clearly seen the desire of the Legislature, that every aid and facility should be given to the jury, by a fair, full and impartial statement of the evidence, and by an explanation of the principles of law therewith connected, to make such investigation correctly, in order to arrive at the true result. It has therefore held, not only that the law may be violated by informing the jury that a fact is, or is not, *fully* proved, but by giving them to understand on what side the judge believes the weight of evidence to be. But it has also held, that the evidence, of which, the jury is to have a full statement comprehends not only the words testified, but the circumstances under which they are testified, and that it is within the province, nay, part of the duty of the judge, to present these circumstances to their notice, and fairly to comment upon them as part of "the facts in evidence." *Reel v. Reel,* 9 N. C., 85. *S. v. Moses,* 13 N. C., 259. It has held that the judge has no right to advise the jury upon the weight of the evidence, but that he may point out, and that he ought to point out, the rules of law which may be useful in ascertaining this weight. If he should err in stating these rules, the party grieved has the legal right to except to the error. If

there be any departure, in this statement, from fairness and impartiality, it may be a manifestation of opinion upon the controverted facts, as distinctly as though he had expressed such an opinion.

But, if he bring to the notice of the jury what really is evidence proper for their consideration, if he state the rules of law correctly in relation to this evidence; and if in the recapitulation of the facts, there is no departure from (615) fairness and impartiality; it would be absurd for the party to complain of the judge because of the conclusion, which a fair statement of the evidence and the law plainly indicates or may probably induce. The law desires that the truth should be ascertained. It regards the jury, who are the appropriate triers of facts, as having sufficient capacity and integrity to arrive at a correct result upon the disputed facts, without the aid of an opinion from the Court, as to that result. But it knows that these triers may be aided, and it wills that they should be aided, by the Court summing up for their consideration, the testimony in relation to these facts; including in this summary, the circumstances connected with the testimony; and the rules of law calculated to show their relevancy and application. The task thus allotted to the presiding judge, is confessedly one of great difficulty and delicacy. He is to rescue the case from misrepresentation and misconception of the evidence, and from the false glosses put upon it by ardent and ingenious advocates; he is to present a fair, full and impartial statement of the evidence as applicable to the matter in controversy; he is to collate the testimony of concurring and conflicting witnesses; and indicate these presumptions or legal inferences previously formed on such occasions, and generally found to be accordant with truth; and the more perspicuously and lucidly he discharges these functions, the more faithfully he has performed his duty. But if in doing all this, he intimates his individual opinion, as to the existence, or non-existence of a controverted fact; on which side of the controversy he believes the truth to be; or which of the witnesses he regards as having the higher claims to respect for his accuracy and probity, he then overleaps the boundary of duty, and invades the peculiar and exclusive province of the jury. It is not strange, therefore, that conscientious minds should, in this situation, be perplexed with unfounded scruples. Such do we consider the scruples, which the learned Judge entertained on this occasion; and as he did entertain them, it is (616) impossible not to respect the promptitude and decision, with which he hastened to correct, what he feared, *might* be

an error. But this Court doth not hold it to be an error. The case stated, which is a part of the record, which we are bound to consider as unquestionably true, and which indeed has been unequivocally admitted to be so, declares that the prosecutor and principal witness was a respectable man. This therefore was a fact in evidence, either expressly proved, or (what is more probable) acknowledged on both sides. He also gave a clear and apparently unimpassioned relation of the circumstances of the case. This was another fact creditable to his candor, his accuracy, and his impartiality. As facts they were proper to be stated to the jury, and ought to have on their minds the influence to which the jury believed them entitled. The judge therefore did not err, but was strictly within the pale of duty in thus bringing them before the consideration of the jury.

It is not necessary, but we consider it not inappropriate, to declare the opinion we have formed on the question, whether the Judge's correction of the mistake, in case it had been a mistake, removed the defendant's legal right of exception. We are of opinion that there is a precise analogy between the case, in which improper evidence has been incautiously received, or an intimation of opinion, upon a question of fact, inadvertently given by the Court. So soon as the mistake is discovered, the Judge should specially instruct the jury, wholly to disregard what they ought not to have heard. In either case, if there be reason to believe, that the opinion inadvertently given, or the testimony improperly admitted, has biased the minds and perverted the judgment of the triers, a sufficient cause is furnished, addressed to the *discretion* of the Judge, for setting aside the verdict. But without some such reason, the presumption of law is that what the Court has withdrawn from the jury, as unworthy of credit, and wholly improper for consideration, has in truth been utterly disregarded. Any other presumption cannot be warranted, without disrespect to a tribunal, which the nature of our institutions proclaims, as having the
(617) capacity and probity to decide rightly, where the materials for a correct decision are fairly laid before them. If therefore the Judge had inadvertently expressed an opinion which ought to have been withheld, the complete removal of the opinion, removed also the ground of *legal* exception to the trial.

The appellant, by his counsel here, objects to the charge delivered by the Judge. He left it to the jury to say, upon the whole testimony, whether they believed the prisoner had committed an actual theft, upon which belief they were instructed not to convict him; or believed that he had received the goods

after they were stolen and with a knowledge of the theft. While the counsel admits the charge to be unexceptionable for what it contains, he insists that it was the duty of the Judge to have gone further, and to have instructed the jury, that the evidence tended to prove the prisoner guilty of actual theft, but not of the receiving of goods stolen by some other person. There are many reasons which forbid our listening to this objection.

In the first place, it ought to appear either that such an instruction was specially prayed for and refused, or at all events, that the case was one, in which there was *no* testimony tending to fix upon the accused the crime charged. The case indeed shows, that the prisoner's counsel argued in his defense to the jury, that if guilty of any offense it was the offense of stealing, and not of that stated in the indictment, but it does not show, that an instruction from the Court was prayed for, as to any legal presumption arising on the evidence. In the next place, upon the application for a new trial, no exception to the want of specific instruction is alleged. We cannot intend therefore that it had been asked and refused. Nor are we at liberty to pronounce, whether the testimony would have warranted such special instruction, because, according to the law of this Court, no more of the testimony is to be found on the case stated, than is necessary to present the points distinctively raised upon the record. Circumstances, in themselves and separately not of much weight, might and ought to have great influence in determining, whether the prisoner was (618) guilty of stealing or receiving stolen goods, very proper to be laid before, and to be considered by those who were to try the facts, but not proper to be inserted, and perhaps wholly overlooked, in a statement intended to present legal errors for the decision of a tribunal, which has no authority to examine into facts.

We are of opinion, that the errors assigned and the objections taken, to the judgment in the Superior Court, are not sustained, and that a certificate to that effect should go to that Court accordingly.

PER CURIAM. Judgment affirmed.

Cited: S. v. Harris, 46 N. C., 196; *S. v. Laxton,* 78 N. C., 569; *S. v. McNair,* 93 N. C., 631, 2; *S. v. Collins, Ib.,* 567; *S. v. Crane,* 110 N. C., 535; *Wilson v. Mfg. Co.,* 120 N. C., 95.

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ACCOUNT.

An account stated in the handwriting of the defendant does not estop him from showing that the settlement only ascertained the items of the account, and left him at liberty to contest the price at which they were charged. *Moore v. Watson*, 509.

ADMINISTRATORS.

Vide Executors and Administrators.

ADVERTISEMENT.

Vide Executors and Administrators, 6.

AGENT.

Vide Assumpsit.

AGREEMENT OF PARTIES TO A SUIT.

Vide Jurisdiction.

ALIEN.

1. An alien cannot take by descent, curtesy, dower or other title derived merely from the law. *Paul v. Ward*, 247.
2. An assignment of dower to an alien, whether voluntarily by the heir, or by the law itself, is null, and will not entitle her to recover in ejectment. *Ib.*, 247.

AMENDMENT AND JEOFAIL.

1. The statute (5 Geo. I., ch. 13) for the amendment of writs of error, and for preventing the arresting or reversing of judgments after verdict, is in force in this State. Therefore when the writ was to answer the plaintiff of plea of debt, for $213.32, and the declaration was in debt *qui tam* for $160: *It was held* that the variance was cured by a verdict for the plaintiff. *West v. Ratledge*, 31.
2. The act of 1777 (Rev., ch. 115, sec. 35) incorporates all the statutes of jeofail and amendment, including that of 5 Geo. I., into the legislation of this State as fully as if they had been re-enacted. *Ib.*, 38.
3. The omission of the Christian name of a defendant in a warrant is a fatal defect, and such an one as this Court has no power to supply by amendment. *Johnston v. McGinn*, 279.
4. A mistake of the clerk in transcribing a word may be amended in this Court by comparing the transcript with the original. *Semble* per DANIEL, J. *S. v. Seaborn*, 319.
5. It is not competent for the Supreme Court to revise amendments made in the court below; as when a judgment is entered *nunc pro tunc*, it cannot be reversed upon appeal, because it should have been entered at a former term. *Bright v. Sugg*, 492.

Vide Errors and Defects Cured.

APPEALS.

1. The Supreme Court is required to inspect the whole record of a case brought up by appeal, and must notice substantial defects in the memorandum of pleadings used in our courts; in these

APPEALS—Continued.

so much must appear as to show with certainty on what point the issue was joined and the verdict given. *Finley v. Smith*, 97.

2. The act of 1777 (Rev., ch. 115, sec. 58), authorizing appeals in questions concerning grants of administration, applies only when by the act of 1715 (Rev., ch. 10) the applicant has a vested right to the administration. When the County Court has a discretion in making the grant, as in administrations *pendente lite*, its judgments are necessarily final, and cannot be reviewed on appeal. *Pratt v. Kitterell*, 168.

3. In an action against two who join in their pleas and against whom, after a joint trial, a joint judgment is rendered, an appeal cannot be allowed at the instance of one defendant only, and if allowed by the County Court, the Superior Court acquires no jurisdiction to try the cause, but is bound on motion of the appellee to dismiss the appeal and award a *procedendo*. *Hicks v. Gilliam*, 217.

APPRENTICE.

1. An indenture of apprenticeship taken under the act of 1762 (Rev., ch. 68, secs. 19, 20), but which neither binds the master to teach the apprentice a certain trade, nor to read and write, and which was made by the chairman on behalf of the justices and "their" instead of "his successor," is valid as between the master and one who harbors his absconding apprentice. *Dowd v. Davis*, 61.

2. Every binding of an apprentice, under the act of 1762, must be by indenture. And every obligation thereby imposed upon the master which is to be vindicated by an action, must be the subject of express stipulation. *Ib.*, 64.

3. But it is otherwise with the payment of the allowance appointed for servants, because the remedy for its nonpayment is by petition. *Ib.*, 64.

4. An indenture of apprenticeship which does not conform to the act of 1762 is not absolutely void, but only voidable by the parties to it. *Ib.*, 66.

5. Such an indenture as to strangers creates the relation of master and servant. *Ib.*, 67.

6. But the apprentice is not a party to it, and *it seems* that it can only be avoided by the County Court. *Ib.*, 68.

7. And if the apprentice be a party to it, an avoidance of it by him must be by a formal act, with notice of the intent. Neither he nor a stranger can allege an abandonment of the service as an avoidance. *Ib.*, 69.

ARSON.

Upon a conviction of arson, the convict is ousted of his clergy. *S. v. Seaborn*, 305.

ASSUMPSIT.

An endorsement of a note, etc., is evidence to support a count for money lent or had and received; but is only *prima facie*, and if in fact the endorsement was by a mere agent for one who received the money, it will not sustain such a count against the agent. *Jones v. Cannady*, 87.

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ATTACHMENT.

1. A nonresident creditor cannot, under the act of 1777 (Rev., ch. 115, sec. 27), attach the property of his debtor in this State, when the latter has not absconded nor removed to avoid the ordinary process. *Broghill v. Wellborn*, 511.
2. Whether a nonresident creditor can attach the property of an absconding debtor resident in this State. Qu. *Ib.*, 511.

Vide Certiorari, 1; Partnership, 3.

BAIL.

1. *Per* DANIEL, J., *arguendo*. Bail in this State is special bail to the action, and if the declaration varies from the writ they are discharged, for the same reason that bail to the action is in England. *West v. Ratledge*, 41.
2. The act of 1777 (Rev., ch. 115, sec. 69) makes the sheriff special bail, when he neglects to return a bail bond, and to charge him as such no notice to him of his liability is necessary. *Gray v. Hoover*, 475.
3. Bail can take advantage of an omission to issue a *ca. sa.* only by a special plea. *Ib.*, 479.

Vide Limitations, statute of, 3.

BANK.

Money received by the cashier of a bank, on deposit, becomes the property of the bank, and he is accountable to the latter for it, although it is never repaid to the depositor. *Bank v. Locke et al.*, 533.

Vide Set-off, 1, 3.

BEQUEST.

1. Where one put a female slave in the possession of another, and by his will subsequently made, bequeathed that slave to the same person for life, and proceeded, "after her death, I give the same slave and her increase to," etc.: *Held*, that issue of the slave born between the date of the will and the death of the testator did not pass to the legatee for life. *Powell v. Cook*, 499.
2. Where a testatrix gave specific legacies to her sons W., D. and S., and after directing the residue to be divided between them, proceeded: "But in case either my sons D. or S. die, leaving no lawful issue then living, then my son W. and the surviving one to have his part of all that is willed to him; and in case they should both die, leaving no lawful issue then living, then my son W. to have the whole of what I have willed unto each of them"; and S. died leaving issue, and then D. died without: *It was held* (1) that the specific legacy given him, as well as his share of the residue, was subject to the limitation over; and (2) that W. alone succeeded, as there was no limitation in favor of the issue of S. *Ormond v. Gibbs*, 504.
3. Where a testator by one clause of his will gave his daughter two slaves absolutely, and by a subsequent clause gave her another, and proceeded as follows: "Which negro, together with those I formerly lent her, at her death to be divided between her children:" *Held*, that parol evidence that the slaves mentioned in the first clause had, before the making of the will, been lent by the testator to his daughter, was admissible, and that fact

BEQUEST—Continued.

being established, that the second clause reduced her property in them to an estate for life, with a remainder to her children. *Morton v. Edwards*, 507.

Vide Remainder in Personal Estate, 2.

BILL OF RIGHTS.

Vide Constitution, 2, 4.

BILLS AND PROMISSORY NOTES.

1. Promissory notes made out of this State, and payable where made, are within the acts of 1762 and 1786 (Rev., chs. 70 and 284), rendering certain securities negotiable; and endorsers of them are charged, under the act of 1827, ch. 2, as sureties, without notice of nonpayment by the maker. *Hatcher v. McMorine*, 122.

2. The law of the place where a note is payable determines what is a default by the maker. But the contract of the endorser is regulated by that of the country where the endorsement is made. *Ib.*, 123.

3. Whether the act of 1827 dispenses with that notice which is requisite to charge one who is secondarily liable. Qu. *Ib.*, 127.

4. What is reasonable notice to an endorser, depends on the local situation and respective occupation and pursuits of the parties, and is to be judged of by the court. *Johnston v. McGinn*, 277.

5. Where the parties resided thirty miles apart, the lapse of forty-seven days from the time of the endorsement to the service of notice on the endorser: *Held*, too long. *Ib.*, 278.

6. A bill drawn in favor of an agent for a debt due to his principal may be declared on in the name of the principal, and will support an action in his name against the drawer, where the agency was known at the time to the drawer. *Jordan v. Tarkington*, 357.

7. The acceptance of an order is an admission by the acceptor of having funds of the drawer in his hands. *Ib.*, 358.

Vide Assumpsit.

BONDS.

1. A sheriff's bond, executed by an acting justice of the peace, "to A, B, and the rest of the justices composing, etc.," is void. *Dickey v. Alley*, 43.

2. An official bond to an officer appointed to take it vests, upon his death or resignation, in his successors, although they are not named in it. *Dowd v. Davis*, 65.

3. Where an administration bond was made payable to A, B, and "*other justices of Person County*," and it appearing that the principal obligor was, at the time of executing it, a justice of said county: *Held*, that such bond was valid, and the words "*other justices*" were to be rejected as senseless and uncertain. *Vanhook v. Barnett*, 268.

4. A bond not executed pursuant to the provisions of the act of 1825 (Taylor's Rev., ch. 1276), though not good as an official, operates as a common-law bond. *Ib.*, 270.

5. *Delivery* is a question of fact for the decision of the jury, and the circumstances from which it is to be inferred must be sub-

BONDS—Continued.

mitted to them. It is error in the court to say what circumstances constitute a delivery. *Ib.*, 270.

6. The name of an obligor being omitted in the body of the bond is no objection to its validity. *Ib.*, 272.

7. A guardian bond not taken according to the act of 1762 (Rev., ch. 69, sec. 7) is nothing but a common-law bond, payable to the individuals on the bench, and if executed by one of them, is void. *Davis v. Somerville*, 382.

8. An insensible condition to a bond renders it single; but unmeaning words in the condition shall be rejected, so as to give the obligor the benefit of it. As where a forthcoming bond, dated in April, was for the delivery of property the fifteenth Friday before May court, the figures were rejected, and the County Court having a term in May, the delivery was held to be on the Friday before the ensuing term of that court. *Foster v. Frost*, 424.

9. A condition in the bond of the cashier of a bank "to account for, settle and pay over all moneys, etc.," is tantamount to a condition for "good behavior"; and if it were not, a clause in the charter prescribing the latter condition is only enabling, and does not preclude the insertion of the former. *Bank v. Locke, et al.*, 529.

Vide Ejectment, 1, 3, 4, 5, 6, 7.

BOUNDARY.

1. A call in a grant from a pond or river, "*west up* the river to a *stake*," is in law equivalent to "*with* the river," and the line must pursue the course of the stream. This sense of the word might possibly be controlled by a call for a line of marked trees, or a visible and permanent marked corner, and a meaning thereby given to them equivalent to "*up*," not "with the river"; but by no call less certain can they be controlled. *Rogers v. Mabe*, 180, 194.

2. A swamp is a natural boundary, and if a deed calls for one, the course and distance must be disregarded. But in such a call, whether the margin of the swamp or the run of it is intended, is a matter of fact which is, upon the evidence offered, to be found by the jury. *Brooks v. Britt*, 481.

BUNCOMBE TURNPIKE COMPANY.

Vide Toll.

CA. SA.

Vide Writs, 2, 3.

CASE, ACTION ON THE.

When a house under lease is pulled down by a trespasser, the owner can maintain case for the injury done to the freehold, and is in law entitled to recover damages, the amount of which depends upon the circumstances of the case. *Ott v. Grice*, 477.

CASHIER.

Vide Bank—Bonds, 9.

CATTLE.

Vide Towns, 4, 6.

CAVEAT.

A *caveat* implies that the land is vacant, and the contest is, which of the parties shall have the grant. *Graham v. Houston*, 235.

CERTIORARI.

1. A judgment by default on an attachment before a justice levied on land, and returned into the County Court for an order of sale, may, after execution issued, be set aside and a new trial awarded in the Superior Court, upon a writ of *certiorari*, founded on affidavit, showing merits and denying notice of the proceedings. *Dougan v. Arnold*, 99.
2. In such case, the writ is properly directed to the County Court, and not to the justice granting the judgment, because that court, having possession of the proceedings, can alone answer the writ. *Ib.*, 99.
3. The *certiorari*, in this State, lies either to correct errors in law, as a writ of false judgment, or as a substitute for an appeal. *Ib.*, 101.
4. It issues, where the party has been improperly deprived of his appeal, as of course; when he has lost the appeal by accident, upon affidavit showing *prima facie* case of merit. In the latter case, if on the return of the writ the merits sworn to be not answered by affidavits on the other side, the first judgment is set aside and a new trial had in the Superior Court. *Ib.*, 101.
5. In these cases the *certiorari* has the effect of the appeal for which it is substituted, in annulling the judgment, and giving a trial *de novo*, and it may be awarded upon a proper case, so long as the parties alone are interested, but not after third persons acquire an interest; *ex gr.* after a sale under the judgment; there the only remedy is by writ of error, or of false judgment. *Ib.*, 101.
6. Where a cause was removed, and the record certified on the removal was erroneously copied, upon advantage being taken of that error in the Supreme Court, the remedy is to move to stay proceedings until the record of the court where the trial was had is corrected, and then to bring up the record by *certiorari*. *Ballard v. Carr*, 575.
7. The writ of *certiorari* is used in this State, and as a substitute for an appeal. It never has been allowed in lieu of a writ of error. The latter writ being entirely efficacious for five years, there is no need of the former during that period; and after its expiration, the *certiorari*, being discretionary, should not be granted, as thereby the limitations to writs of error would be avoided. *Swaim v. Fentress*, 601.
8. The opinion of counsel as to the probable issue of a suit, does not justify a party in neglecting to appeal. *Ib.*, 603.

CLERGY, BENEFIT OF.

Vide Arson.

CLERKS.

1. A clerk appointed under the act of 1806 (Rev., ch. 693) has an estate in his office; and although the Legislature may destroy the office, and by consequence the estate in it, yet the act of 1832, which continues the office but transfers the estate in it

CLERKS—Continued.

into another, is unconstitutional and void. *Hoke v. Henderson*, 1.

2. The act of 1832 does not modify the tenure of the office of clerk. Neither does it affect the interest of the incumbents, but leaving the office and its privileges untouched, it directs the courts to remove one class of individuals without a trial and induct another. It is then judicial in its character and effects. *Ib.*, 14.

COLOR OF TITLE.

1. Where A purchases under an execution against B, takes a deed, and on the same day conveys to B, though the purchase and conveyance be at the request of B, and merely to give him a color of title, without any money paid or received, the conveyance to B is a sufficient colorable title within the statute of limitations. *Rogers v. Mabe*, 180.

2. *It seems* that a sheriff's deed gives, by relation, color of title from the sale. *Ib.*, 180.

3. Color of title depends not on the purpose of taking a deed, but on its apparently conferring an estate on the possessor of the land. *Ib.*, 195.

CONSTITUTION.

1. It is competent for the judiciary to declare an act of Assembly to be unconstitutional and void. But *prima facie*, every act of the Legislature is within its authority, and is to be declared unconstitutional only in cases where no doubt exists. *Hoke v. Henderson*, 7, 8.

2. The 4th section of the Bill of Rights, declaring that the legislative, executive and judicial powers ought to be distinct, deprives the Legislature of all judicial powers. *Ib.*, 12, 13.

3. A determination of conflicting rights between two classes of persons is a judicial act, although pronounced in the form of a statute. Neither does the generality of its terms affect its character. *Ib.*, 13.

4. A legislative act which deprives one person of a right and vests it in another, is not a "law of the land," within the meaning of the Bill of Rights. Neither is one which professes to punish the citizen or to deprive him of his property without a trial, according to the course of the common law. *Ib.*, 15.

CONTRACTS.

1. On a contract to deliver specific articles at a certain place, within a certain period, it not appearing that any *act* was to be done by the plaintiff to entitle him to recover for a breach of such contract, it is not necessary for him to prove that he was present at the place during the time appointed. *Cowper v. Saunders*, 283.

2. When *concurrent acts* are to be done, as the one party to deliver specific articles, on receiving the price, and the other to pay on receiving the articles, neither can sue the other for nonperformance without showing a performance or readiness to perform. *Ib.*, 285.

CONTRACTS—Continued.

3. Where a party is to deliver specific articles on or before a given day, if he intend to deliver before the last day, he must give reasonable notice of his intention to the other. *Ib.*, 285.

4. Where A transferred to B a note for $900 to secure the payment of $600, and it was agreed if the $600 was not refunded within three months, the note should be the absolute property of B, such contract, if intended as an absolute sale, is not void for the excess, for want of consideration; but, whether intended as an absolute sale, or a pledge only, should be left to the jury. *Alexander v. Smith*, 364.

5. The interest of A, in such a contract, is not negotiable, and his assignee cannot support an action at law against B in his own name without an express promise. *Ib.*, 364.

6. The sickness and consequent absence of a party is no excuse for nonperformance of his contract. *Ib.*, 367.

CONTRADICTORY DECLARATIONS.

Vide Evidence, 19.

COSTS.

1. Costs in the Supreme Court are in the discretion of the Court. The appellant is not entitled to recover them as of right upon a reversal of the judgment below, but may be adjudged even to pay them under circumstances. *Hicks v. Gilliam*, 217.

2. Executors, when they are defendants, have generally no privilege as to costs, and are subjected to them, unless some plea to the whole action be found in their favor. And where upon the *plene administravit*, the defendant was fixed with assets, as to the part of the plaintiff's demand, the latter recovers his costs. *King v. Howard*, 581.

Vide Executors and Administrators, 8.

COURTS.

1. In courts of supreme, original jurisdiction, everything as to the method of proceeding is presumed and taken to be right, unless the contrary appears. *S. v. Seaborn*, 305.

2. Notice is judicially taken of the time when the county and Superior Courts commence. *Foster v. Frost*, 427.

COVENANT.

1. In an action of covenant for uncertain damages, no set-off, or a claim in nature of a set-off, can be allowed; and hence, in an action against a lessee for breach of his covenant to build a mill within the term: *Held*, that he was not entitled to show in mitigation of damages the building of the mill after the term, more, especially when he had held over and put his lessor to bring ejectment against him—pending which the mill was built. *Dowd v. Faucett*, 92.

2. *It seems* that a part performance of the covenant, during the term, is an answer to the damages *pro tanto*. *Ib.*, 93.

Vide Warranty, 1, 2, 3.

DAMAGES.

Damages are not recoverable in debt, upon a penal statute, and where they were assessed by the jury, the judgment as to them was reversed at the costs of the plaintiff. *West v. Ratledge*, 42.

Vide Case, Action on the—Covenant, 1, 2—Mesne Profits—Trover, 4—Warranty, 2.

DEBT UPON A PAROL STATUTE.

Vide Damages.

DECLARATION.

Vide Usury, 2.

DEED.

1. A deed is evidence of its own existence against all the world, and, of course, of everything which necessarily results from its existence; but of the truth of the matters recited, acknowledged or declared therein, it is evidence only against parties and their privies. *Claywell v. McGimpsey*, 89.

2. In construing an informal deed conveying to A, a negro woman and her issue, except two children, which were given to B, and continuing as follows: "I also give to my daughter B a negro man named, etc., to her and her, etc., after my death, to hold all the said, etc., to them the said A and B, their heirs, etc., henceforth as their property absolutely, without any manner of condition: *It was held* that the reservation of the life interest applied only to the negro man given to B, notwithstanding the addition of a clause, that if A should die without issue, the property should revert to the donor. *Branch v. Byrd*, 142.

3. The appointment of a guardian to the donor does not give a testamentary character to a deed of gift. Neither does the reservation to the donor of a life interest in a slave. *Ib.*, 144.

4. If the description in a deed be so vague or contradictory that it cannot be ascertained what thing in particular is meant, the deed is void. But different descriptions will be reconciled if possible; or, if irreconcilable, yet if one of them point out the thing intended with certainty, a false or mistaken reference to another particular shall not avoid it. *Proctor v. Pool*, 370.

5. No positive rule can be laid down for ascertaining the intention of the maker of a deed or other instrument. But his intention is to be collected from the whole instrument taken together. *Ib.*, 373.

6. Where the description in a deed is by several particulars, and distinct things are found answering to each particular: Qu., Whether the deed be inoperative for uncertainty, or do all things, answering to the several particluars, passed by it. *Ib.*, 374.

7. *Quantity* is not generally descriptive, but it may be so—as if one own two lots, one of half an acre, the other of an acre, and grant his "acre lot," the larger lot will pass, though a few feet more or less than an acre. *Ib.*, 375.

8. Where a bargainor, having signed and sealed a deed, said to the attesting witness, "I acknowledge that to be my act and deed": *It was held* that these words, being addressed to one who was

DEED—Continued.

not intended to take possession of the deed, did not amount to a delivery. *Moore v. Collins*, 384.

9. And where, after the deed was thus executed, the agent of the bargainee offered to take it and carry it to him, he being out of town, but the bargainor objected, saying it might thereby be lost, and that he expected the bargainee back that night, and would himself hand it to him: *It was held* that this refusal of the bargainor to part with the custody destroyed the effect of his antecedent words. *Ib.*, 384.

10. *Held, also,* that the jury could not infer from the facts above stated a delivery at the time of the bargainee's return, but only at the time when the deed was proven to be in his possession. *Ib.*, 384.

11. Whether an instrument be a deed or not, is a question for the court; but whether it has or has not been canceled, is for the jury. *Horton v. Child*, 461.

Vide Evidence, 9, 10, 13; Land Sold for Taxes, 1, 3.

DEEDS IN TRUST.

1. An absolute deed with a parol proviso for redemption is not avoided by the act of 1820 (Rev., ch. 1037), for want of registration within six months, as that statute applies only to deeds which are on their faces securities. *Gregory v. Perkins*, 51.

2. Where a deed of trust was duly proved, but because of the sickness and death of the register, was not registered within six months, but was registered as soon as a successor was appointed, it is void as to the creditors of the bargainor. *Moore v. Collins et al.*, 384.

DELIVERY.

Vide Bonds, 5; Deed, 8, 9, 10; Ejectment, 7.

DEPOSITION.

1. Where a notice specifies that a deposition will be taken between certain hours of the day, the deposition cannot be read unless it appears to have been taken between the hours specified. *Harris v. Yarborough*, 166.

2. A party offering the deposition of a witness examined in the cause, for the purpose of contradicting him, will not be permitted to read part only of the deposition, but if he introduce it, must read the whole. *Burton v. Morphis*, 242.

3. The deposition of a woman far advanced in pregnancy, and who, it was proved on the trial, had probably just been delivered, comes within the spirit of the act of 1803 (Rev., ch. 633) and is admissible. *Ib.*, 244.

4. A commission directing the taking of a deposition to be read on the trial of a suit pending in the Superior Court of law and equity, is valid. *Armstrong v. Dalton*, 571.

DESCENT.

Vide Legitimation, 1, 2.

DEVISE.

1. C., by his will devises certain lands and slaves to his son R.; he then devises other lands and property to be sold on a credit of

DEVISE—Continued.

one, two and three years, and all the residue of his estate (not otherwise disposed of) to be sold on a credit of twelve months, "lands rented and negroes hired, except R.'s lot of land and negroes, the possession of which I wish him to have at my death." He then directs the money arising from the sale, rent, hire, etc., to be applied to the settlement of his estate, etc.: *Held*, that on the construction of the whole will, R.'s share was not exempted from the payment of debts, on a deficiency of the fund appropriated to that purpose by the testator. *Westbrook v. Croom*, 250.

2. A devise of lands to A for life, and after her death to be equally divided among the male or female heirs begotten of her body, and for want of such heirs then over, gives A an estate tail in the land, which by the act of 1784 (Rev., ch. 204) is converted into a fee. *Ross v. Toms*, 376.

3. When there is a particular and also a general paramount intent apparent in the same will, and they clash, the general intent must prevail. *Ib.*, 381.

4. Where a devisor gave a tract of land to A, excepting two acres which he devised to B, and before a severance of the latter, A purchased them from B, and held the whole together during his life as one estate, and by his will devised it as "the land whereon I now live," the whole passes thereby, although further described as of the quantity it would have contained, had there been an actual severance. *Dodson v. Green*, 488.

5. The number of acres in a tract of land is never, unless plainly so intended, a matter of description. *Ib.*, 491.

DOWER.

Vide Alien, 2; Estoppel, 3.

EJECTMENT.

1. A person entering into the possession of lands, under a voluntary parol agreement to convey, no rent being reserved, is not a tenant from year to year, and is not entitled to notice to quit. But there must be some act, as a demand of possession by the one party, or a refusal to deliver by the other, to convert the defendant into a trespasser, before an action can be maintained against him. *Carson v. Baker*, 220.

2. On the several demise of one tenant in common, the plaintiff in ejectment may recover his term in the undivided share of that tenant, but the lessors of the plaintiff must at their peril take out a writ of possession only for land to which they have title. *Godfrey v. Cartwright*, 487.

3. A bond given by one who applies to be made defendant in an ejectment, with a condition to be void if he shall pay all costs which may be adjudged against him, does not comply with the requisitions of the act of 1804 (Rev., ch. 658), and a *sci. fa.* cannot be brought on it as a bail bond. But it is valid as a bond at common law, and will sustain an action of debt. *Ricks v. Hayworth*, 584.

5. That bond is in all respects similar to bail bonds required by the act of 1777 (Rev., ch. 115, secs. 16, 17), except that it is not made to the sheriff, and does not require the defendant to enter his appearance. *Ib.*, 588.

EJECTMENT—Continued.

6. *It seems* that it should be made to the nominal plaintiff. *Ib.*, 588.

7. Its delivery may be inferred from proof of its being signed, sealed and deposited in the office of the court where the action is pending. *Ib.*, 591.

ELEGIT.

Vide Execution, 2, 5, 7.

ENTRY.

1. An entry of land is a mere equity to demand a grant upon payment of the purchase money in due time, and is not noticed at law, except in cases of *caveats* under the act of 1777 (Rev., ch. 114). *Featherston v. Mills*, 598.

2. And upon a proper case, one who first enters land has relief in equity against another who obtains a grant for it, with notice of the entry. *Ib.*, 599.

Vide Trespass, 2, 3.

EQUITABLE INTERESTS.

Vide Execution, 15, 16.

ERRORS AND DEFECTS CURED.

1. On an appeal from the judgment of a justice of the peace, after a plea in the County Court, the defendant cannot object to any irregularity which took place before the justice, as that the judgment was rendered after the return day of the warrant. *Arnold v. Shepherd*, 49.

2. A miscontinuance before a justice of the peace cannot be taken advantage of by the defendant after he has appealed and pleaded to the cause in the court above. *Shipman v. Mears*, 486.

ESTOPPEL.

1. Whether the estoppel upon tenant and bailee to deny the title of the landlord or bailor applies in any case but in an action to recover the possession of the thing, and possession only, as *detinue* and *ejectment*. Qu. But it is clear that one who has received property as the agent of another, to which he discovers that he has a title cast upon him by the law for the benefit of others, is under no estoppel in an action of trover to recover the value of the property. *Burnett v. Roberts*, 84, 85.

2. This species of estoppel is founded on good faith, and ought not to apply to any case where it will work injustice. *Ib.*, 85.

3. The judgment for dower is no estoppel to creditors. *Paul v. Ward*, 249.

EVIDENCE.

1. Where a defendant gives evidence of a part of a transaction in his defense, he cannot complain if the court permits the plaintiff to show the whole, whether the transaction be strictly relevant or not. *Cabiness v. Martin*, 106.

2. Where a common design is proved as to several persons, the act of one in the execution of it is the act of all, and so is his declaration accompanying and explaining the act. *Ib.*, 110.

EVIDENCE—Continued.

3. Where a private act requires the assent of a particular person to its validity, parol evidence of that assent may be given. But evidence that a person procured one to be passed, or subsequently assented to it, is not admissible to extend its effect, as where a bastard was legitimated, without saying to whom—evidence does not legitimate the bastard as to him. *Drake v. Drake*, 117.

4. One tenant in common cannot, in an action against his cotenant, be examined as a witness to defend his possession. *Rogers v. Mabe*, 180.

5. Competency of one tenant in common as a witness for his cotenant, stated by RUFFIN, C. J. *Ib.*, 196.

6. A widow who dissented from her husband's will, and had her dower and share of personal estate allotted to her, as in case of an intestacy, is a competent witness to prove declarations made to her by her husband in his lifetime, as to the *factum* of a paper offered, as his will, on an issue of *devisavit vel non*, to which she is no party. *Hester v. Hester*, 228.

7. The rule upon the subject of confidential communications is not denied, but does not apply to such as are made to the wife with a view of being by her communicated to others, nor to such as are made as to a matter of fact to be operated upon *after* his death, where it must be the wish of the husband that such operation should be according to the truth of the fact, as established by his declaration. *Ib.*, 231.

8. The record of a judgment against an administrator is not *prima facie* evidence of assets in the hands of the administrator, in a suit brought by the plaintiff in the original suit, on the administration bond, against the administrator and his sureties. *Vanhook v. Barnett*, 271.

9. The recital of a former in a subsequent deed is evidence of the existence of the former deed against a party to the latter and all claiming under him, but not against a stranger. *Hoyatt v. Phifer*, 273.

10. But when the admission contained in the recital is relied upon by a stranger for a fact operating in his favor, and there are also other facts disclosed which operate against him, the recital must be taken altogether. *Ib.*, 273.

11. A return on an execution by a sheriff of a private matter between himself and the plaintiff in the execution, *e. g.*, "payment to the plaintiff," or "indulgence by him," is no evidence for the sheriff in a suit brought against him by the plaintiff in the execution. *Bank v. Pullen*, 297.

12. But between third persons, such return is evidence. *Ib.*, 297.

13. In debt on bond, where the defendant offers a deed to the plaintiff in evidence, and relies on the consideration money therein expressed to be paid, as evidence of payment or satisfaction of the bond, it is competent for the plaintiff to prove that notwithstanding the deed purported to be made for valuable consideration, none was given or contemplated, but that a gift of the property conveyed was intended. *Johnson v. Taylor*, 355.

14. In a suit brought by a sheriff against his collector for arrearages of taxes, a settlement between the sheriff and the accounting

EVIDENCE—Continued.

officer for the county, is not evidence for him. *Ballenger v. Allen*, 358.

15. To prove a misdescription in a license to a coasting vessel, the license itself should be produced; a mistake in that part of the enrollment is not evidence of a similar mistake in the license. *Felton v. McDonald*, 406.

16. Whenever a conversation between two persons is proper evidence in action against others, it may be proved by either or both of the parties between whom it took place, as where A communicated to B a statement made to him by C, and upon his examination could not recollect its substance, C is a competent witness to prove it. *Green v. Cawthorn*, 409.

17. In an action for an assault and battery, all the circumstances accompanying the transaction are admissible in mitigation of damages; but it is otherwise of words spoken by either party, at a different time. *Ib.*, 411.

18. A conveyance by a stranger to the defendant, to indemnify him against loss, by reason of the action, is admissible against him, especially if it recites facts material to the issue, being similar to a declaration made in his presence and not contradicted. *Foster v. Frost*, 429.

19. Where upon the trial of an indictment for arson the evidence was that the prisoner had in his possession bank notes similar to some stolen from the house where the arson was committed, and that he gave contradictory accounts of the mode in which he obtained them, an instruction to the jury that these contradictions were evidence to prove that he did not come honestly by them is not erroneous. And these declarations lead to prove the guilt of the prisoner. *S. v. Gillis*, 606.

Vide Deed, 1; Wills, 26, 27.

EXECUTION.

1. Where a judgment was obtained against an infant heir by *sci. fa.* under the act of 1789 (Rev., ch. 311), with a stay of execution for one year, during which another creditor commenced suit and obtained judgment against the heir on a bond of his ancestor, and issued a *fi. fa.* before the expiration of the stay: *It was held* that a purchaser under it had a better title than one under a *fi. fa.* afterwards issued upon the first judgment. *Ricks v. Blount*, 128.

2. At common law, a judgment is an absolute lien upon land so long as an *elegit* can issue upon it, and that writ displaces all alienation posterior to the judgment including extents under junior judgments. *Ib.*, 131.

3. But the rule as to chattels is different; they are bound only from the *teste* of the *fi. fa.* And the *fi. fa.* first executed has the preference. *Ib.*, 131.

4. As to the heir and purchasers under him, the real assets are bound by process against the former. *Ib.*, 132.

5. But as to the purchaser under judgments in all respects junior to the process thus issued, the rule ought to be different. For an *elegit* in displacing an extent made under a junior judgment does nothing but postpone the satisfaction of the latter. *Ib.*, 132.

EXECUTION—Continued.

6. But it is otherwise if the title of a purchaser under a *fi. fa.* upon a junior judgment is divested by a sale under an elder. *Ib.*, 132.
7. From the case of *Den v. Hill*, 2 N. C., 72, and from the necessity of protecting sales of land under *fi. fa.*, it seems clear that an extent will not in this State divest the title of a purchaser under a junior judgment. And if so, it follows necessarily that the statute 5 Geo. II., subjecting land to sale under a *fi. fa.* abolished the execution by *elegit*. *Ib.*, 133.
8. In this State, the rules of the common law as to the lien of a *fi. fa.* upon chattels has been extended to land when sought to be subjected by that writ. *Ib.*, 134.
9. And after the sale of land under one *fi. fa.* the lien of another is regarded only in questions as to the application of the money raised by the sheriff. In all cases the title of the purchaser is protected. *Ib.*, 134.
10. And he is protected as well when the writ is against the real assets in the hands of the heir, as where the defendant in it is the original debtor. *Ib.*, 135.
11. The opinion of HENDERSON, C. J., that the *proviso* to the last section of the act of 1789, whereby executions against infant heirs are stayed, applies only where the guardian has sold property of the infant to pay the debt, is probably correct. But at all events, that *proviso* extends only to judgment upon a *sci. fa.* not to those in debt upon the bond of the ancestor. *Ib.*, 137.
12. Nothing but a writ in debt, or a *sci. fa.*, is "an action brought or process sued" within the act of 1789, to restrain alienation by an heir. *Ib.*, 138.
13. In this State the first execution finally acted on protects both the purchaser under it and the plaintiff in it. *Ib.*, 139.
14. Process against an heir creates a lien upon the real assets only as to him and purchasers under him—not as to other creditors. *Ib.*, 140.
15. Slaves held by a trustee in trust to be divided among the children of A who may now be living, and those who represent any deceased child in the proportion and after the same manner as if they were claiming the said slaves as next of kin of their father, are not liable to attachment or execution, at the instance of a creditor of one of the *cestuis que trustent*. *Gillis v. McKay*, 172.
16. Per RUFFIN, C. J., *arguendo*. The act of 1812 (Rev., ch. 830) subjecting equitable interests to sale by execution, does not authorize a sale of the interest of one of several joint owners of a chattel. *Ib.*, 177.
17. A *fi. fa.* issued upon a dormant judgment is not void, and the sheriff is bound to obey it. *Dawson v. Shepherd*, 497.

Vide Sheriff's Sale.

EXECUTORS AND ADMINISTRATORS.

1. A judgment *quando* does not alter the dignity of a debt, nor fix the defendant with assets; and as to a *sci. fa.* upon it, he may show that he has paid subsequent assets to debts of higher dignity, it follows that payment of a judgment *quando* upon a

EXECUTORS AND ADMINISTRATORS—Continued.

simple contract debt, after notice of an outstanding bond, does not protect the executor against the latter. *Rountree v. Sawyer*, 44.

2. A debt due an administrator by his intestate is, in law, paid the instant assets applicable to it are received, and nothing *ex post facto* will set it up again; as where an administrator was the obligee of a bond executed by his intestate and another, it was held to be satisfied by the receipt of assets rightfully applicable to it, although the obligee was afterwards compelled to pay other bond debts of his intestate, to which he was surety. *Chaffin v. Hanes*, 103.

3. Whether an obligee administering upon the estate of one of several obligors destroys his remedy as to the others. Qu. *Ib.*, 103.

4. It seems that the act of 1829, ch. 22, giving a surety who has paid the debt of a decedent, a claim against his estate equal in dignity to that of the principal creditor, does not enable him where he is both surety and administrator, to prefer a claim as surety to one payable directly to himself. *Ib.*, 105.

5. The giving of a bond by an administrator is not a condition precedent to his appointment. Where it appeared from the records of the court that A B was appointed administrator and qualified as such, though a blank bond was signed by him and his securities, the acts of such administrator were held valid until his letters were called in and revoked. *Spencer v. Cahoon*, 225.

6. The fourth section of the act of 1789 (Rev., ch. 308) barring creditors of a decedent who do not bring their actions within two years after the qualification of the executor and administrator, is a defense as well to the next of kin as the personal representative, and the latter in pleading it need not aver that he has delivered the assets to the former, and taken refunding bonds. *Goodman v. Smith*, 450.

7. Advertisements required before the act of 1806, establishing Superior Courts in each county, to be made at the distinct courthouses, may now be made at the county courthouses. *Ib.*, 458.

8. A plea of an outstanding bond and *assets ultra* is no defense to an action of *assumpsit* for rent due upon a parol demise, the latter being of equal dignity with the former. *Hubbell v. Thurston, admr.*, 502.

9. Upon *plene administravit*, the defendant is allowed the costs of an action brought against him in his own right, for a conversion of chattels, which he *bona fide* thought were of the assets of the decedent. *Leigh v. Lockwood*, 577.

Vide Appeal, 2; Bond, 2; Cost, 2; Evidence, 8.

FALSE JUDGMENT, WRIT OF.

Vide Certiorari, 3, 5, 7.

FEME COVERT, DEED OF.

Vide Husband and Wife, 6, 7.

FRAUD.

1. A deed absolute on its face, but executed upon a parol agreement for redemption, is in law fraudulent and void against the creditors of the vendor. *Gregory v. Perkins*, 50.

2. What is fraud in law, and when the fact of fraud must be left to the jury, and the effect of the vendor's retaining the possession, discussed by RUFFIN, C. J. *Ib.*, 53.

3. An absolute deed with a parol proviso for redemption is void under the act of 1820, without reference to its registration, because it is an evasion of that act, by which publicity was intended to be given to all conveyances which are securities. *Ib.*, 55.

4. Indebtedness at the time of making a voluntary conveyance of part only of the grantor's property is, in respect to *subsequent* creditors seeking satisfaction of the property conveyed, only evidence of fraud, the consideration of which belongs to the jury; but in respect to *prior* creditors whose debts can be otherwise satisfied, it constitutes fraud in law, to be declared by the court. *O'Daniel v. Crawford*, 197.

5. A voluntary conveyance will never be upheld to defeat a *prior* creditor, whatever be the amount of his demand; although the grantor reserve property amply sufficient to satisfy the debt, and the necessity of resorting to that conveyed, arise from the wasting of that reserved, many years after the conveyance. *Ib.*, 197.

6. Nor is there any exception from these principles in favor of disposition made by parents in advancement of children; the principle is universal in its application, that the voluntary conveyance yields to the *prior* debt so far as it is necessary to its satisfaction. *Ib.*, 197.

7. The functions of the court and jury in questions of fraud considered and distinguished, and the cases of *Morgan v. McLelland*, 14 N. C., 83, and *Mordecai v. Parker*, *ib.*, 427, and the cases in which this Court held the retaining of possession by a vendor, but evidence to be left to the jury, and not a fact *per se* establishing fraud in law, referred to and affirmed. *Ib.*, 197.

8. Distinction as to equitable relief, between cases of *actual* fraud, and fraud presumed only from the conveyance being voluntary; in the former equity relieves; in the latter the creditor is left to his legal remedy. *Ib.*, 203.

FRAUDS, STATUTE OF.

A promise by A to pay the debt of a third person, on his being discharged from custody, is not within the act of 1826, ch. 10, there being a *new* and *original* consideration moving between the parties. *Cooper v. Chambers*, 261.

Vide Sheriff's Sale, Slaves, gift or sale of, 2, 3, 4, 6.

FREE PERSONS OF COLOR.

Vide Slaves, carrying away or concealing of, 2.

GIFT.

Vide Slaves, gift or sale of, 1, 7, 8.

GRANT.

A grant can only be repealed at the suit of the State, or of a prior grantee. *Crow v. Holland*, 417.

Vide Scire Facias, 3, 4, 6.

GUARDIAN.

1. A guardian appointed by a court of chancery may, by order of the court, rightfully sell the personal property of his ward. And the act of 1762 (Rev., ch. 69) confers the same powers on the county courts of this State. *Harriss v. Richardson*, 279.
2. The appointment of guardian is matter of discretion, the exercise of which cannot be revised by this Court. *Bath v. Vick*, 294.

Vide Bonds, 7.

HALIFAX, TOWN OF.

Vide Towns, 7.

HEIR.

Vide Execution, 1, 4, 5, 10, 11, 12, 14.

HUSBAND AND WIFE.

1. It seems that at law the husband's assignment will pass every expectant interest of his wife, which would be legally transferable, were it an interest of his own, unless it is so limited that it cannot by possibility vest in possession during the coverture. But at all events an assignment of the husband, if not binding on the wife surviving, while the interest continues expectant, is certainly valid as a conveyance, when the interest falls into possession during coverture. *Burnett v. Roberts*, 84.
2. The husband of a female *cestui que trust* has no right to recover the interest of his wife without joining her. *Gillis v. McKay*, 172.
3. A bequest of a slave to a *feme covert*, "*for her own proper use*," does not vest in her a separate and exclusive right; but the legacy, if assented by the executor, goes to the husband. *Gilliam v. Welch*, 286.
4. The Court will not force a construction to give a legacy to the separate use of the wife. *Ib.*, 289.
5. Slaves of an infant *feme*, held in common with others, pass to her husband, *jure marito*, although they were hired out by her guardian before the marriage and the husband died during the term. *Pettijohn v. Beasley*, 512.
6. The deed of a *feme covert* does not bind her, when her private examination was taken under a commission by one commissioner only, and when she was neither a resident of another county, aged nor infirm. *Barfield v. Combs*, 514.
7. The acts of 1715 and 1751 (Rev., chs. 3 and 50) construed by DANIEL, J. *Ib.*, 514.

Vide Evidence, 7.

INDENTURE.

Vide Apprentice.

INDICTMENT.

Vide Religious Congregation. Slaves, carrying away or concealing of, 2. Towns, 2, 3.

JOINT TENANTS.

Vide Execution, 16; Partnership, 2, 4; Pleas and Pleading, 1.

JUDGE'S CHARGE.

1. When the plaintiff prays proper instruction as to the title of the defendant, which is refused, a new trial will be granted, although if the defendant had prayed proper instruction as to the plaintiff, the judgment would have been correct. *Walton v. Stallings*, 57.
2. Where general instructions are given to a jury, that upon the whole case, as appearing upon the evidence, the plaintiff is entitled to recover; if there be any defect in the title of the plaintiff upon any ground, the instruction is erroneous. *Paul v. Ward*, 247.
3. When a judge undertakes to decide on facts and inferences which ought properly to be left to the jury, the judgment will be reversed and a new trial awarded. *White v. White*, 257.
4. When a judge decides upon a question as being one of *law*, where it is really one of *fact*, and should be submitted to a jury, it is competent for him afterwards to correct his mistake, and submit the matter to the proper tribunal. *S. v. May*, 328.
5. It is not forbidden by the act of 1796 (Rev., ch. 452) for a judge to tell the jury that a witness "had given a fair and candid statement, and appeared to be a credible man," the statement being admitted to be correct. *S. v. Davis*, 612.

JUDGMENT.

1. In this State, when no judgment is formally entered upon a verdict, connected with the pleadings, which authorizes a judgment, the court is bound to intend such a judgment as ought to have been rendered. *Barnard v. Etheridge*, 295.
2. The Supreme Court is bound to render such judgment as upon the inspection of the whole record, ought to have been rendered in the court below. *Binford v. Alston*, 353.
3. An advance of money made by a stranger for a judgment, upon an assignment of it to him is not a satisfaction of it. *Foster v. Frost*, 429.

Vide Execution, 2, 3, 17.

JUDGMENT QUANDO.

Vide Executors and Administrators, 1.

JURISDICTION.

The agreement of parties cannot bestow on a court an authority to decide a case on any other principles than those prescribed by law for its decision. *Fagan v. Jacocks*, 264.

JURY AND JURORS.

1. A statement in the record that "on balloting the following jurors are duly elected, sworn and charged to serve as grand jurors," etc., is a sufficient compliance with the provisions of the act of 1779 (Rev., ch. 157). *S. v. Seaborn*, 305.
2. An irregularity in the mode of impaneling a grand jury can only be taken advantage of by plea in abatement upon the arraignment, and the object comes too late after verdict. *Ib.*, 305.

JUSTICES' JURISDICTION.

1. The expression "liquidated accounts," used in the act of 1826, ch. 12, as explained by the act of 1829, ch. 32, means "signed accounts," and therefore, where A and B were partners in trade, and A gave his own promissory note for a debt of the firm, and B wrote a letter to A, stating that he would pay the debt to the creditor, it was thereby held that the account was not thereby *liquidated* against B so as to give exclusive jurisdiction of the demand to a single magistrate, although the note was given, letter written and action brought before the act of 1829. *Wilson v. Jennings*, 90.
2. An account offered upon the trial of a warrant, for a sum exceeding sixty dollars, stated to be "due by account," must be signed. *McFarland v. Nixon*, 141.
3. A promise by A to pay the debt of a third person, on his being discharged from custody, though the debt be payable "in trade," is within the jurisdiction of a single magistrate. *Cooper v. Chambers*, 261.
4. The act of 1820 (Rev., ch. 1045) and of 1829 (ch. 32) do not give justices of the peace jurisdiction beyond sixty dollars, except when the debt is secured by a bond or note, or a liquidated account, and an attachment founded upon two former judgments, for a sum exceeding that amount, is void, and is not a justification to an officer acting under it. *Bryan v. Washington*, 479.

JUSTICES.

A justice of the peace may, under the act of 1803 (Rev., ch. 627, sec. 3), postpone a cause pending before him, for thirty days, excluding Sundays. *Shipman v. Mears*, 484.

LAND SOLD FOR TAXES.

1. The requisition of the act of 1798 (Rev., ch. 492) amending the revenue laws, as respects the land tax, must be strictly complied with by the sheriff, or the estate of the owner is not divested, and where land was, under the fourth section of the act, stricken off to the Governor, and the sheriff, instead of executing his deed at the County Court succeeding the sale, as the act requires, did it at a subsequent term, the deed is inoperative. *Avery v. Rose*, 549.
2. In this State, sales of land for taxes are *quasi* sales under process of execution, and are governed by rules analogous to those regulating sales under *fi. fas. Ib.*, 555.
3. Where the sheriff has no authority to sell, or where his deed shows that he has exceeded his power, no title passes to the purchaser. *Ib.*, 556.

LEGACY.

If a legatee takes possession of property, claiming it under the will, and retains the possession of it for many years, this is evidence which will warrant the presumption of an assent to the legacy by the executor. *White v. White*, 259.

Vide Husband and Wife, 3, 4.

LEGISLATURE.

Vide Constitution, 1, 2, 4; Office, 2, 3, 5.

LEGITIMATION.

1. Where the putative father of a bastard procured the passing of a private act of the Assembly, whereby the name of the latter was changed to that of the former, and he was declared "forever hereafter to be legitimated, and made capable to possess, inherit and enjoy by descent, etc., any estate, real or personal, to all intents and purposes as if he had been born in lawful wedlock:" *It was held* that, as the bastard was not made legitimate to any particular person, the only effect of the act was to change his name. *Drake v. Drake*, 110.

2. An act legitimating a bastard to his putative father does not render the collaterals of the latter capable of succeeding to the former. *Ib.*, 118.

3. A levy by a sheriff upon goods, where they remain in possession of the defendant, is no payment or satisfaction of the judgment, and a new execution may issue, as well where there are several defendants, as where there is but one. *Binford v. Alston*, 351.

LICENSE.

Vide Evidence, 15.

LIMITATIONS, STATUTE OF.

1. A surety who pays money for his principal may maintain an action against his cosurety for his ratable part, without first making a demand, and the statute of limitations, therefore, begins to run from the time of the payment of the money. *Sherrod v. Woodard*, 360.

2. Where a note is payable on demand, *semble* that the statute of limitations begins to run from its date. *Ib.*, 362.

3. The act of 1777 (Rev., ch. 115, sec. 16) authorizes the sheriff to dispense with a bail bond, upon executing *mesne* process; but he thereby becomes special bail, and the nonpayment of the amount with which he may be fixed is a breach of his official bond; and the act of 1810 (Rev., ch. 800), limiting the time within which actions may be brought upon sheriffs' bonds, does not protect his sureties until six years after final judgment against him as bail. *Barker v. Munroe*, 412.

4. Although no *laches* are imputed in the State, and as to it the rule is *nullum tempus occurrit*, etc., yet this is not the case as to those bodies to whom the execution of public trusts are confided. And where the County Court brought an action of *assumpsit* against a treasurer of public buildings, *it was held* that the act of limitations was a bar. *Armstrong v. Dalton*, 568.

Vide Executors and Administrators, 5; Possession, 1, 2, 3, 4, 6, 8; *Scire facias*, 5.

LIQUIDATED ACCOUNTS.

Vide Justices' Jurisdiction, 1, 2, 4.

MAIL COACH.

Vide Toll.

MALICIOUS PROSECUTION.

Suing out a warrant "for taking a false oath" in a certain suit, "knowing it to be false," is a prosecution for perjury. *Cabiness v. Martin*, 106.

MESNE PROFITS.

It seems that, in an action of *mesne* profits, the jury may consider in mitigation of damages, permanent improvement honestly made by the defendant, and actually enjoyed by the plaintiff. *Dowd v. Faucett*, 95.

MONEY HAD AND RECEIVED, OR LENT.

Vide Assumpsit.

MORTGAGE.

1. A deed executed to secure recited debts is a mortgage, although it contains neither a *proviso* for redemption, nor a declaration of its trusts, and the fact of the trust of the surplus being declared in a separate and unregistered paper will not vitiate it as a security for the recited debts. *Skinner v. Cox*, 59.
2. The nonregistry of a separate declaration of the trusts of a mortgage does not affect it, except as to the trusts thus declared. *Ib.*, 60.

NEW TRIAL.

1. The admission of testimony, even if improper without an objection, is not a reason for granting a new trial. *Green v. Harman.*
2. A new trial will not be granted for error in the opinion of the court below, where that error appears to this court not to affect the right of the parties. *Graham v. Houston*, 236.
3. Where there is in the record no exception or case stated on which the motion for a new trial was founded, a new trial will not be granted; and if no error is perceived in any other part of the record, the judgment will be affirmed. *Lawson v. Smith*, 249.
4. The refusal by the court to permit a witness to be examined is no ground for a new trial in this Court, it being discretionary with the court below to permit it or not. *Barton v. Morphis*, 240.

Vide Judge's Charge, 1, 3.

NOTICE TO QUIT.

Vide Ejectment, 1.

OFFICE.

1. An office is the property of the incumbent. *Hoke v. Henderson*, 17.
2. In the absence of a constitutional restriction, the creation, continuance, duties and emoluments of an office are matters of political expediency, and to be judged of solely by the Legislature. *Ib.*, 19, 20.
3. But it cannot continue an office, and oust the incumbent and transfer his right to another. *Ib.*, 21.
4. Distinction between offices which are mere political agencies, and those to which a personal interest are attached. The first

OFFICE—Continued.

may be vacated at any time, and second only upon conviction for default. *Ib.*, 21.

5. An office created by statute may be destroyed by the Legislature; but it cannot continue the office, and either lessen the tenure of the incumbent, or transfer it to another. *Ib.*, 24.

Vide Clerk, 1, 2.

OFFICIAL ACTS.

1. Generally, the execution of powers and the performance of official duties must literally conform to the terms prescribed. *Avery v. Rose*, 552.
2. But the exact observance of form by an officer is not required to give effect to his acts, when it will defeat the primary object of the Legislature. As in execution sales, the object being to enhance the price, for the encouragement of bidders, they are not affected by irregularity in the prior acts of the sheriff. *Ib.*, 553.
3. It is otherwise when the regularity is such as must be known to, or is procured by the purchaser, as if he buy at private sale. *Ib.*, 554.

OFFICIAL BONDS.

Vide Bonds.

OUSTER.

Vide Possession, 1; Tenants in Common, 1, 2.

PARTITION.

1. A proceeding for partition at law cannot take place except there be a common possession; and a common possession is always implied from a common title until the contrary be shown. *Thomas v. Garvan*, 223.
2. But if an actual ouster be made by one tenant in common of his cotenant, there is no longer a common possession, and the remedy is not by petition for partition, but by ejectment. *Ib.*, 223.

PARTNERSHIP.

1. Receiving the promissory note of one partner in *payment* of an open account against the firm, and delivering up the account in writing, does not of itself discharge the original demand. *Wilson v. Jennings*, 90.
2. Whether the title of land purchased by partners, but which is not conveyed to them as partners, survives under the act of 1784 (Rev., ch. 204), or descends to the heir of the deceased partner. Qu. *Ricks v. Blount*, 130.
3. On an attachment against one partner for his separate debt, only the separate property of that partner can be seized; the partnership effects cannot be taken. *Jarvis v. Hyer*, 367.
4. Partners are joint tenants of their debts and merchandise, but the *jus accrescendi* only holds to enable the survivor to get in the debt and settle the affairs of the firm. *Ib.*, 369.
5. Where a partner executed a bond in the name of the firm, and upon being informed it did not bind his partners, took it back, and, with the consent of the obligor, removed the seal and

PARTNERSHIP—Continued.

redelivered it with an intent to bind the company, it is effectual as their promissory note. *Horton v. Child*, 460.

6. The simple contract debt of a partnership is not merged by the several bond of a partner. *Ib.*, 462.

PATENTS.

Vide Scire Facias, 3, 4, 6.

PERJURY.

Vide Malicious Prosecution.

PLEAS AND PLEADINGS.

1. Where one of two joint owners of a chattel sues alone in *trespass*, advantage can only be taken of the *nonjoinder* by plea in abatement, and the objection comes too late after the defendant has pleaded in chief. *Graham v. Houston*, 238.
2. The failure to serve the defendant with the copy of a declaration, filed in the County Court, five days before the first day of the term, can only be taken advantage of by plea in abatement, and not by a mere motion to dismiss. *Laverty v. Turner et al.*, 275.

Vide Jury and Jurors, 2.

PLEDGE.

Vide Contract, 3.

POSSESSION.

1. Where A has two coterminous grants, and B another, which covers a part of one of them, and is the oldest, and a fence of A upon the tract to which he has title, runs very near the line of the two tracts, and encloses a small portion of B's land, which was also covered by A's grant: *It was held*, B not being in possession—

   1st. That a possession of seven years gave A a title to all the land within his enclosure.

   2d. That the enclosure being of a part so small, that B might reasonably conclude it was a mere mistake in running the fence, it was not, as to him, an entry upon the land to which he had title, and was not an ouster of him beyond the enclosure.

   3d. That although cutting timber and overflowing the land of B, by A, were not in themselves ousters of B, so as to constitute an adverse possession by A, yet these facts, taken in connection with the fence running upon his land, were proper to be left to the jury, as testimony from which they might infer an ouster. *Green v. Harman*, 158.
2. Overflowing land by stopping a stream below is not a possession which will perfect a defective paper title. *Ib.*, 160.
3. Neither is cutting timber—there must be some act which is equivalent to residence or cultivation. *Ib.*, 160.
4. Making turpentine is probably an occupation of land which, if continued for seven years, will perfect a defective paper title. *Ib.*, 161.
5. When the owner of one or two adjoining grants runs his fence so near the line as to induce a belief that he intended to follow

POSSESSION—Continued.

it, but actually includes land not his own, the possession thus acquired is not adverse. *Ib.*, 163.

6. Under the act of 1791 (Rev., ch. 346), a possession of twenty-one years, with color of title under known and visible boundaries, constitutes a valid title, and no evidence tending to rebut the presumption that a grant had in fact issued, can defeat such title. *Graham v. Houston*, 232.

7. Possession of a whole tract of land, in virtue of the actual possession of part, holds only where no other person is in the actual possession of any part; as soon as another takes possession of part, either with or without a proper title, the plaintiff loses possession of that part. *Ib.*, 232.

8. The design of the act of 1791 was to give that protection to individuals against the State which the act of 1715 afforded to them against each other; in other words, to render possession a positive bar. *Ib.*, 235.

POWERS.

Vide Official Acts, 1.

PRACTICE.

Vide New Trials, 4; Pleas and Pleadings, 2; Removal of Causes, 2, 4.

PRESUMPTION OF A GRANT.

1. Where lands have been overflowed by a mill pond for forty years, without any claim for damages by the owner, a jury may from the acquiescence presume a grant of easement. *Wilson v. Wilson*, 154.

2. From long and uninterrupted possession of land as owner, a grant will be presumed. This presumption is founded mainly upon the known inadequacy of human tribunals to ascertain the real truth of remote transactions, and does not depend upon a supposed correspondence between the facts and the presumption in such particular case, and its character is determined by its origin. It is not merely a presumption of fact which a jury *may* make; nor is it a presumption of law which cannot be rebutted; but it is a presumption which the law requires, and the Court should direct the jury to make, unless proof is offered which shows the fact to be otherwise. *Rogers v. Mabe*, 180.

3. To raise this presumption between individuals, twenty years is sufficient, and (in cases not within the act of 1826, ch. 28) less than twenty years is not; as against the State, the precise period is not determined, but forty years is certainly enough. *Ib.*, 180.

4. This presumption extends not only to grants and deeds, but to everything necessary to support the title of the possessor. *Ib.*, 180.

5. When, however, one enters originally not as owner, but under the title of another, even a very long possession will not raise this species of presumption. There, time, however long, has only its usual and natural effect, as the foundation for an inference of fact, which the jury may draw or not, as they may

PRESUMPTION OF A GRANT—Continued.

or may not believe the fact in the particular case to compare with the inference. *Ib.*, 180.

6. The doctrine of presumption discussed and its foundation stated by RUFFIN, C. J. *Ib.*, 188.

PRIVATE ACT OF ASSEMBLY.

Vide Evidence, 3; Legitimation, 1, 2.

PROBATE.

Vide Wills, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25.

PROMISE TO PAY THE DEBT OF ANOTHER.

Vide Frauds, Statute of; Justices' Jurisdiction, 3.

REGISTRATION.

Vide Deeds in Trust, 1, 2; Mortgage, 1, 2.

RELIGIOUS CONGREGATION.

The disturbing of a congregation assembled for the purpose of religious worship, by laughing and talking, and indecent actions and grimaces, during the performance of divine service, is a misdemeanor, and *per se* indictable. *S. v. Jasper*, 323.

REMAINDER IN PERSONAL ESTATE.

1. A limitation over of slaves, after a bequest for life, upon the executor's assent to the legacy, becomes a vested estate which may be assigned and which cannot be destroyed by any act of the legatee for life. *Barnett v. Roberts*, 81.

2. A, by his will devised his property to his two children, and if either of them died without leaving issue, the whole of his estate, both real and personal, to go to the survivor. B, one of the children, upon a bill for an account against the executors of A, obtained a decree for a sum of money, in part performance of which he accepted certain negro slaves, which were not of the property of his testator. On the death of B, without leaving issue, the survivor is not entitled to recover these slaves from a stranger to whom they had been *bona fide* sold by B. *Southerland v. Webb*, 245.

REMOVAL OF CAUSES.

1. It is not necessary, in an affidavit for removal of cause, that the *belief* of his affiant should be stated; it is sufficient if it sets forth the *facts* on which he grounds his belief. *S. v. Seaborn*, 305.

2. An order of removal to "C..... County," without saying the "Superior Court," of the county, is sufficient. *Ib.*, 305.

3. The judge of the Superior Court can alone decide on the sufficiency of the facts stated in an affidavit for removal, and his decision is final. *Ib.*, 314.

4. Where the time of holding a court mentioned in an order of removal, differs from the true time fixed by law, it is mere surplusage, and does not vitiate the subsequent proceedings. *Ib.*, 322.

RENT.

Vide Executors and Administrators, 7.

SATISFACTION.

Vide Judgment, 3; Levy.

SCIRE FACIAS.

1. A *scire facias* to revive judgment, though to some purposes a new action, is yet in the main to be regarded as the continuation of a former action. *Binford v. Alston*, 353.
2. Where a *sci. fa.* to revive a judgment issues against three, and only two are summoned, and it is admitted that the third is insolvent and removed out of the State, the plaintiff may have execution against the two who are summoned. *Ib.*, 354.
3. A grantor cannot, under the act of 1798 (Taylor's Rev., Appendix, p. 193), maintain a *scire facias* to repeal a grant for the same land, when the latter is older than the grant to him. *Crow v. Holland*, 417.
4. A deed for land which is held adversely to the vendor passes no interest to the vendee, and he cannot maintain a *scire facias* to repeal a grant under which the person in possession claims. *Hoyle v. Logan*, 495.
5. An actual adverse possession of seven years is a bar to a *sci. fa.* to vacate the grant under which the defendant holds. *Ib.*, 496.
6. The act of 1798 (Taylor's Rev., Appendix), establishing a court of patents, does not enable a patentee in a junior patent to repeal an elder one, although his entry was prior to that of the patentee in the latter. *Featherston v. Mills*, 596.

Vide Execution, 11, 12.

SET-OFF.

1. Where a dealer with a bank had a balance to his credit upon a general cash account, and died indebted to it by judgment, and upon simple contract, the bank has a right, independent of the statute of set-off, to apply the balance to the latter debt. *Bank v. Armstrong*, 519.
2. A debt due to one of several defendants by the plaintiff cannot be pleaded as a set-off. *Ib.*, 522.
3. The balance of a general cash account due by a bank to a depositor, is a *debt*, which may be set off to any claim of the bank against the depositor, and is not *money* which the latter may apply at his election to either of those claims. *Ib.*, 526.

Vide Covenant, 1.

SHERIFF.

1. *Nulla bona* is the proper return for a sheriff, where one creditor postpones the sale, and another then proceeds to sell and exhaust the property. *Bank v. Pullen*, 300.
2. A sheriff who has seized property sufficient to satisfy an execution, and surrendered it upon receiving a forthcoming bond, is entitled, upon a breach of the bond, to recover the amount of the judgment; although he may not have paid it to the plaintiff in the execution. *Foster v. Frost*, 437.

Vide Bail, 2; Bond, 1; Land Sold for Taxes, 3.

SHERIFF'S RETURN.

Vide Sheriff, 1; Evidence, 11, 12.

SHERIFF'S SALE.

A sale of lands by the sheriff under execution is not within the act of 1819 (Rev., ch. 1016), making void parol contracts for the sale of lands and slaves. *Tate v. Greenlee*, 149.

Vide Official Acts.

SLANDER.

1. The repetition of a slanderous report is actionable, and the defendant cannot justify by proving the existence of the report, without also proving it to be true. *Hampton v. Wilson*, 468.
2. Per RUFFIN, C. J., *arguendo*. The rule that one who repeats a slanderous report, and gives the name of his author, may justify by pleading that fact, has been doubted, and must depend upon the intent with which the report and the name of the author are mentioned. It *seems* that it does not obtain in actions for libels. *Ib.*, 468.

SLAVES, GIFT OR SALE OF.

1. The act of 1806 (Rev., ch. 701), requiring the due and fair execution of deeds of gift for slaves to be proved on the trial, does not introduce a new rule of proof, but only repels the idea that they may be read under an *ex parte* probate for registration. *Andrews v. Shaw*, 71.
2. One claiming a slave against a subsequent purchaser from his vendor, must produce a bill of sale registered according to the act of 1784 (Rev., ch. 225), or prove a delivery of the possession, which under the act of 1792 (Rev., ch. 363) will dispense with it. And where a slave was sold at auction, and the plaintiff being the highest bidder, the crier said to the slave, "There is your master," and the vendor being present did not object, but entered the plaintiff's name and bid in the account of sales, and gave him time to comply with the terms, but afterwards sold the same slave to the defendant: *It was held* that no title vested in the plaintiff so as to enable him to recover the slave in detinue. *Mushat v. Brevard*, 73.
3. Whether the entry of a purchaser's name and bid, in an account of auction sales, made by the vendor, is a note or memorandum within the meaning of the act of 1819 (Rev., ch. 1016). Qu. *Ib.*, 76.
4. Questions under the act of 1819, wording parol contracts for the sale of slaves, etc., can only arise in actions for the breach of executory contracts. *Ib.*, 77.
5. Delivery of a slave in order to vest the title in the vendee, need not be by manual touching of him, but must by some act proving unequivocally that the possession is changed. *Ib.*, 78.
6. A crier who does nothing but proclaim the bids made at an auction sale is the servant of the vendor, and has no authority to bind him in any respect. *Ib.*, 79.
7. A parol gift of slaves is, in law, void against creditors and purchasers. *Harris v. Yarborough*, 166.
8. It is not essential to the validity of a deed of gift for slaves, under the act of 1806, that the subscribing witness should be able to testify to the *delivery*, as well as to the *signing* and *sealing*. That fact may be proved by other testimony. *Vines v. Brownrigg*, 265.

SLAVES, CARRYING AWAY OR CONCEALING OF.

1. Upon an indictment under the act of 1825 (Taylor's Rev., ch. 1289) "for carrying, conveying and concealing a slave on board a vessel, with the intent and for the purpose of conveying the slave beyond the limits of the State; and of enabling her to effect her escape out of the State, a verdict finding the prisoner 'guilty of the felony of carrying, conveying and concealing, as charged in the bill of indictment,'" is defective. *S. v. Edmund*, 340.

2. A mulatto free man of color is a citizen of the State, and a slave, a person within the meaning of the act. *Ib.*, 340.

SPECIFIC ARTICLES.

Vide Contract, 1, 2, 3.

STATUTES, CONSTRUCTION OF.

A different rule prevails in construing public and private statutes; the latter are never extended beyond their words, or a necessary implication from them, and are restrained in favor of those who are not mentioned in them. *Drake v. Drake*, 116.

STATUTES CONSTRUED OR COMMENTED UPON.

13 Eliz., ch. 6 }
27 Eliz., ch. 4 } *O'Daniel v. Crawford*, 197.
5 Geo. I., ch. 13. *West v. Ratledge*, 31.
5 Geo. II., ch. 7. *Ricks v. Blount*, 128.
1715, Rev., ch. 2. *Sherrod v. Woodard*, 360.
" " ch. *Armstrong v. Dalton*, 568.
" " ch. 3. *Barfield v. Combs*, 514.
" " ch. 7. *O'Daniel v. Crawford*, 197.
" " ch. 10. *Pratt v. Kitterell*, 168.
1741, Rev., ch. 28. *Jones v. Cannady*, 86.
1751, Rev., ch. 50. *Barfield v. Combs*, 514
1756, Rev., ch. 57, sec. 7. *Bank v. Armstrong*, 519.
1762, Rev., ch. 69, secs. 19 and 20. *Dowd v. Davis*, 61.
" " ch. *Harriss v. Richardson*, 279.
" " ch. sec. *Davis v. Somerville*, 382.
" " ch. 70. *Hatcher v. McMorine*, 122.
1777, Rev., ch. 115, sec. 35. *West v. Ratledge*, 31.
1777, Rev., ch. 115, sec. 58. *Pratt v. Kitterell*, 168.
" " sec. 25. *Gillis v. McKay*, 172.
" " sec. 75. *Hicks v. Gilliam*, 217.
" " sec. 73. *Laverty v. Turner*, 275.
" " sec. 16. *Barker v. Munroe*, 412.
" " sec. 69. *Gray v. Hoover*, 475.
" " sec. 27. *Broghill v. Wellborn*, 511.
" " secs. 16 and 17. *Ricks v. Hayworth*, 584.
1779, Rev., ch. 157. *S. v. Seaborn*, 305.
1784, Rev., ch. 225. *Mushat v. Brevard*, 73.
" " ch. 204, sec. 6. *Ricks v. Blount*, 128.
" " ch. 225. *Harris v. Yarborough*, 166.
" " ch. 204. *Ross v. Toms*, 376.
" " ch. 204, sec. 11. *Old v. Old*, 500.
1786, Rev., ch. 248. *Hatcher v. McMorine*, 122.
" " " sec. 2. *Hubbell v. Thurston*, 502.
1789, Rev., ch., 311. *Ricks v. Blount*, 128.
" " ch. 312, sec. 5. *Harris v. Richardson*, 279.

STATUTES CONSTRUED OR COMMENTED UPON—Continued.

1789, Rev., ch. 308. *Redmond v. Collins*, 430.
" " " sec. 4. *Goodman v. Smith*, 450.
1791, Rev., ch. 346. *Graham v. Houston*, 232.
1792, Rev., ch. 363. *Mushat v. Brevard*, 73.
1794, Rev., ch. 414. *Arnold v. Shepherd*, 49.
1796, Rev., ch. 469. *Gillespie v. Hymans*, 119.
" " ch. 452. *S. v. May*, 328.
" " ch. 452. *S. v. Davis*, 612.
1798, Tay. Rev., App., p. 193. *Crow v. Holland*, 419.
" " " *Hoyle v. Logan*, 496.
" " " *Featherston v. Mills*, 599.
" Rev., ch. 492. *Avery v. Rose*, 547.
1802, Private Laws. *Drake v. Drake et al.*, 115.
1803, Rev., ch. 627. *Shipman v. Meares*, 486.
" " " *Arnold v. Shepherd*, 44.
1804, Rev., ch. 658. *Ricks v. Hayworth*, 584.
1806, Rev., ch. 693. *Hoke v. Henderson*, 1.
" " 701. *Andrews v. Shaw*, 70.
" " " *Vines v. Brownrigg*, 265.
1807, Rev., ch. 722. *Sherrod v. Woodard*, 360.
1808, Rev., ch. 745. *S. v. Seaborn*, 305.
1810, Rev., ch. 800. *Barker v. Munro*, 412.
1819, Rev., ch. 1016. *Mushat v. Brevard*, 73.
" " " *Tate v. Greenlee*, 149.
" " 1004. *Hester v. Hester*, 228.
1820, Rev., ch. 1037. *Gregory v. Perkins*, 50.
" " " *Walton v. Stallings*, 56.
" " " *Moore v. Collins*, 384.
" " 1045. *Bryan v. Washington*, 479.
1824, Tay. Rev., ch. 1258. *Turnpike Co. v. Newland*, 463.
1825, Tay. Rev., ch. 1289. *S. v. Edmund*, 340.
1826, Pamphlet, ch. 12. *Wilson v. Jennings*, 90.
" " ch. 10. *Cooper v. Chambers*, 261.
1827, " ch. 2. *Hatcher v. McMorine*, 122.
1829, " ch. 32. *Wilson v. Jennings*, 90.
" " ch. 22. *Chaffin v. Hanes*, 103.
" " ch. 32. *Bryan v. Washington*, 479.
1832, " ch. 2. *Hoke v. Henderson*, 1.

STATUTE, ENGLISH, NOT IN FORCE.

The statute of 11 Hen. IV, ch. 9, is not in force in this State. *S. v. Seaborn*, 310.

SUPREME COURT.

The Supreme Court acquires jurisdiction as a revising tribunal only by appeal, and its jurisdiction differs from that of those courts which take cognizance of causes by writ of error. *Binford v. Alston*, 351.

Vide Appeal, 1. Costs, 1. Judgment, 2. Verdict, 3.

SURETY.

1. Where two persons engage in one common risk, as sureties for a third, and one of them subsequently takes an indemnity from the principal debtor, such indemnity enures to the benefit of all the sureties. *Fagan v. Jacocks*, 263.

SURETY—Continued.

2. The implied contract between co-sureties, is a contract for mutual indemnity, and there is a complete cause of action whenever the injury is sustained. *Sherrod v. Woodard*, 363.

3. Notice should be given by a surety to his co-surety, of the payment of money for their principal, before the commencement of the suit. *Ib.*, 363.

Vide Executors and Administrators, 2, 3. Limitations, Statute of, 1.

TENANT IN COMMON.

1. The sole enjoyment of the property by one tenant in common, is not of itself an ouster of his co-tenant, the possession of one being the possession of all. But the sole enjoyment for a great number of years (say 21), without claim from another having right, and under no disability, becomes evidence of title, and raises the legal presumption of an ouster. *Thomas v. Garvan*, 225.

2. The possession of one tenant in common is, in law, the possession of all—and the sole, silent occupation by one of the entire property, without an account to or claim by the others, is not an *ouster*, or evidence from which an ouster can be inferred, unless continued for twenty years. *Cloud v. Webb*, 290.

Vide Ejectment, 2. Evidence, 4, 5. Partition, 1, 2.

TOLL.

A carriage used for the transportation of the mail and of passengers, is a pleasure carriage within the act of 1824 (Tay. Rev., ch. 1258), incorporating the Buncombe Turnpike Company, and subject to a toll of two dollars and fifty cents. *Turnpike Company v. Newland*, 463.

TOWNS.

1. Under the provisions of the private acts for regulating the town of Halifax, the commissioners of the town have authority to call out the hands and command the personal labor of those residing within its corporate limits, for the purpose of repairing its streets. *S. v. Commissioners*, 345.

2. The commissioners of a town are not of common right bound to repair the streets, and therefore an indictment against them for not repairing must set forth on its face how that obligation has been imposed upon them. *Ib.*, 345.

3. In an indictment against the commissioners of a town, it is not sufficient to allege a general breach of duty, but the indictment must charge specifically which of the duties imposed has been neglected. *Ib.*, 350.

4. An ordinance of the commissioners of a town, directing under a penalty, cattle to be penned at night, applies only to residents of the town, not to those living beyond the corporation limits, although their cattle may stray into the town. *Commissioners v. Pettijohn*, 591.

5. One who is not a corporator, but who comes into a corporation and violates any of its ordinances, is subject to the penalties imposed therefor. *Ib.*, 593.

6. Whether the commissioners of a town have power to forbid cattle to range in the streets, and to impose a penalty from the owner, or distrain the cattle. QU. *Ib.*, 594.

TRESPASS.

1. One who rents turpentine boxes, agreeing to give a certain part of the turpentine for rent, is not a tenant, has no interest in the soil, and the owner may bring *trespass quare clausum fregit* for an entry upon the land, *et semble*, for taking away the turpentine also. *Graham v. Houston*, 232.
2. For acts done after an ouster, no action lies till a re-entry, but only for the first entry. *Ib.*, 232.
3. In *England*, an actual re-entry on the *locus in quo* is necessary to entitle a party to recover for a trespass committed subsequent to the first ouster, because there, possession by actual occupation of the very part is requisite to maintain trespass. But here a *constructive* possession suffices. *Ib.*, 239.

TROVER.

1. The plaintiff in trover must have both the right of property and of present possession, and where one who had hired a slave for one year, sold him, and the owner brought trover during the term: *It was held*, that he could not recover, although the defendant claimed an absolute interest in the slave. *Andrews v. Shaw*, 70.
2. Where one residuary legatee, who had hired a slave, part of the residue, from the executor for a year, sold him tortiously, in the presence of a joint legatee, who did not disclose his title, the executor can not maintain trover against the latter. *Oxley v. Freeman*, 472.
3. One who stands by, while property in which he has an interest is sold, waives his title in favor of the vendee. But he does not thereby become guilty of a conversion, as to a third person. *Ib.*, 474.
4. A person, not the guardian of infants, who takes upon himself to hire out their slaves, making the bonds payable to himself, is a *wrongdoer*, and may be rendered liable for a conversion; and the proper measure of damages is the amount of the hiring, with interest from the expiration of the credit. *Dunston v. Hardy*, 572.
5. The doctrine of conversion stated by RUFFIN, Judge. *Ib.*, 572.

Vide Estoppel, 1.

UNCONSTITUTIONAL ACTS.

Vide Clerks, 1. Constitution, 1.

USURY.

1. In debt for usury, the declaration stated a loan to A, but the proof was a loan negotiated by A, as the avowed agent of B: *Held*, that the proof did not support the declaration. *Jones v. Cannady*, 86.
2. If an usurious loan be effected by making a note payable to an agent of the borrower and endorsed to the lender, whether a declaration setting out the facts specially, without averring the loan to be either to the maker or endorser, be sufficient. QU. But if the declaration aver a loan to one of them, the plaintiff must show a transaction which, in fact and in law, makes a loan to that person. *Ib.*, 87.

USURY—Continued.

3. In questions of usury, the real transaction may always be shown, as well to support as to avoid the security. *Ib.*, 88.

Vide Verdict, 2.

VARIANCE.

1. Where the plaintiff declared on a single bill of the defendant for four hundred and forty-seven *dollars* and sixty-six cents, and the instrument offered in evidence corresponded with that set forth, except that it wanted the word "*dollars*": *Held*, that this was no *variance*, and that the word "*dollars*" must be supplied by construction. *Stephens v. Smith*, 293.

2. A variance between the bond declared on and that produced in evidence, can only be taken advantage of upon the trial; it forms no ground for arresting the judgment. *Souter v. Davenport*, 600.

Vide Amendment and Jeofail, 1. Usury, 1.

VERDICT.

1. A general verdict upon a declaration containing a defective count, will not entitle the plaintiff to judgment. But when it appears that the evidence applied only to the good count, the verdict will be corrected. *West v. Ratledge*, 42.

2. So where in debt on the statute of usury, one count was for double the sum lent, and another for double the amount lent and interest received, and the verdict was for the first sum, it was applied to that count. *Ib.*, 42.

3. The Supreme Court can not set aside a verdict, although in their opinion found on slight testimony. *Goodman v. Smith, Admr.*, 459.

WARRANTY.

1. In the sale of a chattel, neither the words "warrant and defend" nor the words "warrant to be good, sound property and healthy," constitute a covenant of title. The first is for quiet enjoyment, and the last apply to the state and quality of the animal sold. *Cowan v. Silliman*, 46.

2. Nominal damages only can be recovered upon a covenant of title, when the action of the person having the title is barred by the act of limitations. *Ib.*, 47.

3. A covenant for quiet possession is not broken by a demand of possession made by one having title. *Ib.*, 47.

WIDOW.

1. A widow, when her husband dies intestate, must, under the act of 1796 (Rev., ch. 469), file her petition for a year's support at the term of the county court, when letters of administration upon his estate are taken out. *Gillespie v. Hyman*, 119.

2. Whether a widow, who has dissented from her husband's will, can not file her petition for a year's support at the time of entering her dissent. Qu. *Ib.*, 121.

WILLS.

1. The act of 1819 (Rev., ch. 1004), only applies to complete and finished instruments, but does not prohibit the introduction of

WILLS—Continued.

parol evidence to show that a paper writing offered for probate was never in fact the will of the deceased. *Hester v. Hester*, 228.

2. There is a presumption arising on the face of every imperfect testamentary paper that it was not intended to operate in its then unfinished state; but this is a presumption of fact, and liable to be rebutted by other testimony. *Robeson v. Key*, 301.

3. A clause of attestation being annexed to a paper not attested, is not *conclusive* evidence of the abandonment by the testator of his intention that it should operate as his will. *Ib.*, 301.

4. Whether it was the testator's intention that a paper purporting to dispose of both real and personal estates, should operate as a disposition of one, unless it can take effect as to both, is a question of fact for the consideration of the jury. *Ib.*, 302.

5. Where a will, giving the executors power to sell land, and directing them to pay the interest of the personalty to a married woman for her life, and after her death to divide the whole, and the rents of the land, between her children, was propounded by the executors, and upon the *caveat* of her husband, was rejected, the sentence is conclusive both upon her infant children then in being and those born afterwards. *Redmond v. Collins*, 430.

6. A mistake in a verdict in the county court, finding against a proposed will, without collusion between the executors and the caveator, is no reason for permitting it to be repropounded by a legatee, although the result would have been different had the executors appealed. *Ib.*, 435.

7. An erroneous verdict and sentence against a will can not be set aside in the court of probate, except on an allegation and proof of newly discovered testimony. *Ib.*, 436.

8. A sentence for or against a will is not binding on those who are not parties or privies. But privies are those who claim through a party, or who have notice of the proceeding. *Ib.*, 437.

9. Probate in common form is where the next of kin have no notice. Probate in solemn form is where they are cited to see the proceeding. *Ib.*, 437, 438.

10. Similar in its effect to the last is the case of intervention by the next of kin, although not cited. *Ib.*, 438.

11. In none of these cases can a sentence be re-examined at the instance of one who is a party or privy to it. And this privity may be shown *dehors* the record by proof in *pais*. *Ib.*, 438.

12. Probate in common form may ordinarily be revoked at the instance of the next of kin; because its form implies they are not privy to it. *Ib.*, 439.

13. This presumption may be repelled by lapse of time, or notice of a contest between the executor and another of the next of kin. *Ib.*, 439.

14. But courts of probate act upon different principles in applications to revoke letters of administration, and repropound a will which has once been rejected. *Ib.*, 439.

15. This never is done at the instance of the executor who formerly propounded it, except in cases of fraud, surprise or newly discovered testimony. *Ib.*, 440.

WILLS—Continued.

16. A legatee may propound a will when the executor renounces. *Ib.*, 440.
17. But the executor is both *pars principalis* and *legitimus contradictor*, and sentence against a will *bona fide* propounded by him, binds all persons interested under it, except under special circumstances. And neither infancy, coverture, non-residence, nor that the legatee was not *in esse*, are such circumstances. *Ib.*, 442, 443.
18. It is probable that in this State a rejection of a will, when offered *ex parte* by the executor, would neither bind him nor a legatee. But it is otherwise of an issue formally made up between the executor and one of the next of kin, resulting in a sentence against the will. *Ib.*, 443.
19. The act of 1789 (Rev., ch. 308), does not alter the law in these respects, but only directs a trial by jury, and a new mode of proof. *Ib.*, 443.
20. Devisees are not represented by the executor, and are not affected by a sentence against a will when propounded by him, unless they are parties to the proceeding. But they can not repropound it, and demand probate of it, as a will of land as well as chattels. *Ib.*, 445.
21. Their remedy is by proving it in an ejectment for the devised premises, which may be done when it has been rejected on the allegation of the executor, without notice to them. *Ib.*, 446.
22. In an issue of *devisavit vel non*, under the act of 1789, the Court can not notice equitable interests in land devised in the will. It is sufficient if the devisee in trust is a party. *Ib.*, 448.
23. If on the trial of that issue, the trustee betrays the interest of the *cestui que trust*, the remedy of the latter is in equity. *Ib.*, 448.
24. So when a power over land is created by the will, the depository of the power is the only actor in the court of probate. *Ib.*, 449.
25. And whenever the trustee or depository of a power is bound by the sentence of a court of probate, the *cestui que trust*, or person interested under the power, is, in that court, also bound. *Ib.*, 449.
26. A witness to a will of land, who was at the time of his attestation, a presumptive heir to the devisor, is not interested in the devise, within the meaning of the 11th section of the act of 1784 (Rev. ch. 2041). *Old v. Old*, 500.
27. An attesting witness to a will, who has become interested since his attestation, need not be produced by the person propounding it, but the will may be established by proof of his handwriting. *Ib.*, 502.

Vide Bequest—Devise—Evidence, 6.

WITNESS,

Vide Evidence, 4, 5, 6, 16. Wills, 26, 27.

WRIT OF ERROR.

The Supreme Court may, by writ of error, reverse the judgments of the county courts, but can not, in any way, quash them, or supersede them as nullities. *Swaim v. Fentress*, 603.

Vide Certiorari, 5, 7.

WRITS.

1. Innovations upon the established form of writs, especially of such as concern the personal freedom of the citizen, ought not to receive judicial sanction. *Finley v. Smith*, 95.
2. A writ commanding to take the body and safely keep, etc., "*until the sheriff make a sum of money, and to have that money in Court at the return day*," is not a *ca. sa.* but a novelty unknown to our law. *Ib.*, 95.
3. Whether the sheriff would be justifiable in obeying, or punishable for refusing to obey it. QU. But it is, at all events, not sufficient to charge bail. *Ib.*, 95.
4. The seal of the court is indispensable to the validity of a writ running out of the county in which the court sits. Without the seal, the writ is a mere nullity. *Ib.*, 97.