CITATIONS INCLUDE 181 N. C.

NORTH CAROLINA REPORTS
VOL. 2

CASES ADJUDGED

IN THE

SUPERIOR COURTS OF LAW AND EQUITY

OF THE

STATE OF NORTH CAROLINA

FROM 1789 TO 1798

JOHN HAYWOOD, REPORTER
(One of the Judges of the Superior Courts of Law and Equity)
VOL. I

2D ANNOTATED ED.
BY
WALTER CLARK

REPRINTED BY THE STATE
MITCHELL PRINTING COMPANY, STATE PRINTERS
1921

CITATION OF REPORTS

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JUDGES

OF THE

SUPERIOR COURTS

1789 TO 1798

SAMUEL ASHE
SAMUEL SPENCER
JOHN WILLIAMS
* SPRUCE MACAY
† JOHN HAYWOOD
‡ DAVID STONE
‖ ALFRED MOORE

ATTORNEY-GENERAL

ALFRED MOORE, resigned 1790.

JOHN HAYWOOD, elected 1790, *vice* Moore resigned.

BLAKE BAKER, elected 1793, *vice* Haywood appointed judge.

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* Additional judge elected 1790.
† Elected 1794, *vice* Samuel Spencer, deceased.
‡ Elected 1795, *vice* Samuel Ashe elected Governor.
‖ Elected 1798, *vice* David Stone, resigned.

NOTE.—In 1790 the judges (previously three in number) were increased to four. The eight districts were divided into the Eastern and Western Ridings, each of which was held by two judges. The Superior Courts were held at Halifax, Edenton, New Bern, and Wilmington for Eastern Riding, and at Morganton, Salisbury, Hillsboro, and Fayetteville for Western Riding.—103 N. C., 474.

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HISTORY OF THE SUPREME COURT REPORTS OF NORTH CAROLINA AND OF THE ANNOTATED REPRINTS

BY THE ANNOTATOR

The annotated reprint of our Reports has been made under the authority conferred on the Secretary of State by Laws 1885, ch. 309, and subsequent statutes, now C. S., 7671.

It may be of interest to the profession and to the public to give some data as to our original Reports and the Annotated Edition. All the volumes from 1 to 164, inclusive, have been reprinted with annotations.

The first 7 volumes of N. C. Reports were not official, but, as in England till 1865, reporting was a private enterprise. When the N. C. Supreme Court as a separate tribunal was created in November, 1818, to take effect from 1 January, 1819, the Court was authorized to appoint a Reporter with a salary of $500 on condition that he should furnish free to the State 80 copies of the Reports and one to each of the 62 counties then in the State, and it seems that he was entitled to the copyright. Later this was changed to 101 copies for the State and counties and a salary of $300 and the copyright. In 1852 the salary was raised to $600 and the number of free copies to the State and counties and for exchange with the other States was increased, 103 N. C., 487.

The price charged by the Reporter to lawyers and others was 1 cent a page, so that the 63 N. C. was sold at $7 per volume, the 64 N. C. at $9.50, and the 65 N. C. at $8. Being sold by the page, it was more profitable and much less labor to the Reporter to print the record and the briefs of counsel very fully without compression in the statement of facts. These prices being prohibitive, the Official Reporter was abolished, Laws 1871, ch. 112, and the duties were put on the Attorney-General who was allowed therefor an increase of $1,000 in salary, and the State assumed all the expense of printing and distributing and selling, 5 per cent commission being allowed for selling. Code, 3363, 3728.

In 1893, ch. 379, the system was again changed and the Court was allowed to employ a Reporter for $750. This has been amended by subsequent acts, so that now the Reporter is allowed a salary of $1,500, $500 for room rent, and a clerk at $600 per annum. C. S., 3889.

When the small editions originally printed were exhausted many volumes of the Reports could not be had at all and others brought $20 per volume. To meet this condition, Laws 1885, ch. 309, with the amendments above referred to, being now C. S., 7671, was passed to authorize the Secretary of State to reprint the volumes already out of

print and such others as from time to time should become out of print, with a provision that no money should be used for the purpose except that derived from the sale of the Reports. As the price of the Reports had been reduced to $2 per volume, and later to $1.50, this work of reprinting could be done only by omitting briefs and by cutting out all the unnecessary matter in the statements of facts, as had been done by Judge Curtis of the U. S. Supreme when he reprinted the first 58 volumes of that Court in 21 volumes. In our Reports these statements of cases (until a very recent date) were always made by the Reporters, and not by the judges, and the briefs were already omitted in our current volumes.

The Secretary of State at first tried the experiment of reprinting a few volumes without eliminating the unnecessary matter and without annotations, and without correcting the numerous typographical errors; but this proving unsatisfactory to the profession, and the expense entirely too great, after consultation with the Governor and Attorney-General, the then Secretary of State requested the writer to annotate the volumes in order to make them more salable and to reduce the expense of the work (which was necessary) by condensing prolix statements and omitting briefs of counsel. This has been done ever since. The annotations have been made, for the most part, without any aid, as Shepard's Annotations (which, besides, required to be checked for possible errors) were not issued until 1913, after most of these reprints had been annotated. Besides this, in the first four volumes, as issued, there was no index of Reported Cases, and there was no reverse index to the Reported Cases till 84 N. C. There was no table of Cited Cases until 92 N. C., and no reverse Index of Cited Cases till 143 N. C. The Annotator had therefore to correct these defects by putting in full indices and reverse indices of Reported Cases and Cited Cases and has supervised the revised proof of all 164 volumes. For these labors, the payment at first was $25 per volume, including annotations, condensing the Reporter's statements of fact when unnecessarily prolix, and all work of every kind. But the later volumes being larger and the annotations more numerous, $50 per volume was allowed. Any lawyer will see that this work was undertaken in the interest of the profession and the State, and not for the compensation.

Owing to the fact that as to these *Reprints* there was no Reporter to be paid, either by profits of sale as formerly, or by salary as now, the reprints have all been issued at a considerable profit to the State. It is probably the only work of any kind from which the State has received any pecuniary profit. In November, 1915, the State lost by fire 47,000 of the Reports then stored in Uzzell's Bindery, with the result that many

additional volumes were required to be reprinted, and others that had already been annotated and reprinted were reprinted a second time, the annotations, however, being brought down to date.

The current Reports were sold till recently at $1.50 from which the commission of 12½ per cent for selling was deducted, *i. e.*, about 19 cents, making the net return to the State $1.31 per volume, while, owing largely to the increase in the cost of typesetting, presswork, paper and binding, the cost to the State of the 174 N. C. is $1.94 per copy, without charging into the cost of production any part of the compensation of the Reporter and his clerk. The price of the current Reports has since been raised.

In all the more recent volumes the statement of the cases has been made by the judges themselves in each case, and hence in reprinting those volumes there has been no abbreviation of the statement of the case. In the earlier volumes there has been a saving often of 50 per cent by condensation of the prolix statement or of the record, which was often used instead of a statement, and by the omission of the briefs. Even in using the original reports, notwithstanding the prolix matters printed therein, it has sometimes been found useful by the Court to refer to the original record.

In England there was no official reporter till 1865. Prior to that time all the reporters were volunteers without any supervision. As a result many of the English Reports are very inaccurate, as has been shown from investigations made in the Year Books and the Court Records by Professor Vinogradoff and others. See Holdworth's "Year Books"; Pollock & Maitland's History of English Law. These reporters were sometimes incompetent and more often careless, which is to be regretted, as the opinions of the English judges were usually, if not always, delivered orally from the bench and the reporters were not always careful to correct themselves by examination of pleadings and records. And as the common law is made up of these decisions of the judges, under the guise, it is true, of "declaring the law," it was often different from what was really announced by the Bench. See Veeder's "English Reports." Besides, down till Blackstone's time, the pleadings and records were kept in dog Latin (and he strongly censured the change to English), and for several hundred years the oral pleadings and the decisions of the judges were in Norman French.

Nowhere outside of the English-speaking countries are the opinions of the Courts allowed to be quoted as precedents. In France and all other countries the Court makes a succinct statement of the facts, numbered under headings, and then merely cites the section of the Code—applicable, without comment. In English-speaking countries, in which alone the Reports of decisions are allowed to be cited at all, the number of the

volumes of the Reports in 1890 were 8,000. These have now increased to 30,000 volumes. This system is breaking down under its own weight. No private library and few public libraries can possibly keep up with the rapidly rising flood of Reports. It is only by the aid of compilations like "Cyc." and its second edition, the "Corpus Juris."; A. & E., and R. C. L., and the like, that we can have any access to the vast quantity of reported decisions.

In those countries where citations of former decisions are not allowed, the argument is that the Courts of the present day are more likely to be right than those in the past, and that to cite former decisions is simply a race of diligence in counting conflicting opinions, a precedent being readily found to sustain any proposition. We have been accustomed to the present system and are still able to wade through by use of the compilations cited; but this relief, in view of the steadily increasing output of Reports, is only temporary, and the profession and the Courts must inevitably be submerged beneath the ood. What the remedy will be is a matter engaging the attention and arousing discussion among the ablest men of the Bench and Bar.

On an average, the opinions of this Court now require three volumes a year. If the briefs and redundant statements were still inserted as in the earlier reports, it would require ten volumes per year, taxing the shelf room and purses of lawyers. It was therefore eminently proper in reprinting to cut out the briefs and reduce the superfluous records. This required the exercise of judgment and much labor, but it was absolutely necessary in order that the receipts might furnish funds for other Reprints as required by the statute. Many of the Reprints are consequently from a third to a half the size of the former volumes. The American Bar Association, voicing the general sentiment, has passed resolutions requesting all Courts to reduce the size of current Reports by the judges shortening their opinions, a request which has been presented to this Court through a distinguished member of the Association and of the Bar of this Court. The General Assembly had already given a similar intimation by providing that "The justices shall not be required to write their opinions in full, except in cases in which they deem it necessary." C. S., 1416.

RALEIGH, N. C., 1 September, 1921.

CASES ADJUDGED

IN THE

SUPERIOR COURTS

OF

NORTH CAROLINA

1789 TO 1798

HALIFAX—OCTOBER TERM, 1789

ARRINGTON v. ARRINGTON.

In a gift of personal chattels a symbolical delivery is sufficient.

DETINUE, for a negro boy given to the plaintiff by his uncle Sandifer. The boy being in Virginia at the time of the gift, and no delivery made, except of a dollar instead of the boy.

SPENCER, J., ruled that delivery of possession in such cases is principally in order to identify the property, and that it might also answer the purposes of notoriety; but when the identity of them could be proven, the gift was good without delivery. Verdict for the plaintiff accordingly. If there had been two boys of the same name, a delivery might have been necessary; but as there was only one, the proof of identity was easy.

HALIFAX—OCTOBER TERM, 1790

BAKER v. LONG.

Where there is judgment and execution against the ancestor in his lifetime, no *sci. fa.* is necessary against heirs or devisees. The demurring of the parol does not hold in this State.

WILLIAMS and SPENCER, JJ. The lands were devised after payment of debts to the plaintiff, and there was judgment against the ancestor in his lifetime. It is adjudged no *sci. fa.* was necessary in order to affect the lands in the hands of the heir or devisee after the death of the ancestor or devisor, because the lands never descended; and if they had,

it was *cum onere* of the judgment, and the *sci. fa.* is only necessary where a new party is to be charged; but in this case execution was taken out in the lifetime of the ancestor, and the Court held that attached upon the land and went with it to whoever it came. Also, the demurring of the parol had its origin in feudal principles, and does not apply here.

Cited: Bowen v. McCullough, 4 N. C., 686.

STATE v. RANSOME.

One may be indicted for perjury, though the false affidavit be not signed.

WILLIAMS, J. A man may as well be indicted on an affidavit not signed as if it was signed. The signing is only for the sake of evidence, to prevent one man being mistaken for another; and it shows, also, that it was done with deliberation.

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(2)

FARRELL v. PERRY.

If a father, at the time of the daughter's marriage, puts a negro or other chattel into the possession of the son-in-law, it is *prima facie* a gift. Interest in the event of the question, but not of the cause, will not exclude a witness.

WILLIAMS, J., delivering the opinion of the Court: If a father, at the time of his daughter's marriage, puts a negro or other chattel into the possession of the son-in-law, it is in law a gift, unless the contrary can be proven. For, otherwise, creditors might be drawn in by false appearances. In this case it was ruled, *per curiam,* that a man interested in the event of the question on which the defendant's title hangs, though not in the event of the cause, must be admitted as a witness, *contra,* Reeves and Symonds, and the cases there cited. If we begin to exclude from testimony for bias, we shall be without a rudder or a polar star to direct us—for friendship, resentment, religious opinions, sense of honor in different men, etc., are to be considered, in order to find out the bias which will probably be in each witness, and of these the Court cannot know anything in most instances. It is best to adhere to the ancient rule, that interest shall alone exclude.

Cited: Parker v. Phillips, post, 452; *Hollowell v. Skinner,* 26 N. C., 172.

MONTFORT'S EXECUTORS v. ALSTON.

The rate of exchange of foreign money must be calculated by the legal sale.

BOND for Virginia money.

PER CURIAM. When Virginia money is contracted for in this State, payable here, it must be determined according to the rates established by law, not according to the exchange; otherwise were it contracted in a foreign country and there payable. But if in State contracts the exchange at Halifax, for instance, shall be the measure, when it is different at Edenton, and still more so at other places, this would be a strange mode of administering justice.

MORGANTON—MARCH TERM, 1791

ANONYMOUS.

A purchase by sheriff at his own sale is void.

SPENCER, J. Henderson moved against the sheriff for not returning the execution; and among other things it appeared the sheriff had bought part of the property himself. The sale is not lawful, and the sheriff ought to be punished. This opinion is grounded on a decision that took place at Salisbury some time before.

Also, see *Ormond v. Faircloth*, 5 N. C., 35. It is a general rule that all persons who stand in the character of trustees for the benefit of others are prohibited from purchasing at their own sale. *Gordon v. Finley*, 10 N. C., 239.

Cited: *McLeod v. McCall*, 48 N. C., 89.

HILLSBORO—APRIL TERM, 1791

(3)

STATE v. COULTER.

A person entitled to a reward, offered by the General Assembly, on the conviction of an offender, is a competent witness against such offender.

INDICTMENT for horse stealing. The General Assembly, at their last session, had offered a reward to any person who would apprehend him, to be paid upon conviction. Stokes apprehended him for stealing his horse; and now upon trial of the indictment for stealing this horse, Stokes was offered as a witness on the part of the State; and it was strongly objected that he ought not to be received, as it depended upon Coulter's conviction whether he should be entitled to the reward promised by the General Assembly, and that he could not be entitled to it unless Coulter should be convicted.

SPENCER and MACAY, JJ., *Held* he is a competent witness, and must be received; and he was received and gave evidence accordingly, and upon his evidence Coulter was convicted, and received judgment of death, and was executed. *Vide* 2 H. H. P. C., 304, 280, 281.

MORGANTON—SEPTEMBER TERM, 1791

SWANN v. GAUGE.

Note executed to wife *eo instanti* becomes property of the husband.

NOTE given to a married woman who lived separate; the husband never assented to the contract, and the debt was attached as due to him.

Held, per WILLIAMS, the only judge in Court, assent of the husband is not necessary; the debt becomes his immediately upon delivery to the *feme.*

GREENLEE, ASSIGNEE, v. YOUNG.

An assignee, two years after the assignment, sues the drawer, and takes him in execution by *ca. sa.*, from which he is discharged by an insolvent act. Recourse to the assignor is gone by the delay (*Quere*, whether one year would not be too long?), also by the *ca. sa.* and discharge therefrom. A witness may be introduced to show the consideration of an assignment.

ASSIGNEE brought an action against the drawer, having waited two years after the assignment, obtained judgment, and took the drawer in execution by *ca. sa.*

PER CURIAM. He has forfeited his recurrence to the assignor by so long delay. Certainly a year ought to be considered the longest time to be allowed. Credit in this country is never given for a longer time, and indeed it is much to be doubted if that is not too long. Secondly, he has taken the drawer in execution by *ca. sa.*, who hath discharged himself of the debt by the insolvent act. Now, suppose the present plaintiff should recover against the assignor, and he should sue the drawer, the drawer will plead his former discharge, and it will be good. So by this means you will subject the assignor, and yet leave him without remedy, which is not law. Thirdly, a witness might be introduced to explain the condition of the assignment.

See *Brown v. Craig, post*, 378, and *Alston v. Taylor, post*, 381.

MCKINNIE'S EXECUTORS v. OLIPHANT'S EXECUTORS.

When trover, trespass, etc., will lie against executors.

WILLIAMS, the only judge in Court, held that trover, trespass, deceit, or any other action of the like nature, will lie against executors, where the thing itself has been used so as to go into and increase the testator's estate, so that the benefit thereof comes to the possession of the executor; otherwise where the thing is destroyed, as if a man take my bullock and eat him. *Hambly v. Trott*, in Cowper is not law; and further, I never knew a case in Cowper to be received as law in our courts. (4)

See *Decraw v. Mone, post*, 21; *Clark v. Hill, post*, 308; *Avery v. Moore, post*, 362. In the last case cited the article of property for which the action was brought did not go into and increase the estate of the testator; but it was decided that that made no difference. There is authority that the expression attributed to WILLIAMS, J., in this case, that he "never knew a case in Cowper to be received as law in our courts," is a mistake, and was never used by him.

BLANTON v. MILLER.

The grantor is sufficient to prove loss of a deed so as to admit secondary evidence.

WILLIAMS, J. The Court have never departed from this rule: where the party hath lost his deed, or is out of possession thereof, he himself, and no other person for him, must make oath of the loss, before he shall be permitted to read a copy, because no other can safely swear of his want of possession; and so the plaintiff was called, though it was (4) urged to the Court he was in a foreign country.

See *Wright v. Bogan, post,* 177; *Park v. Cochran, post,* 410; *Nicholson v. Hilliard,* 4 N. C., 24.

Cited: Harper v. Hancock, 28 N. C., 127.

SALISBURY—SEPTEMBER TERM, 1791

STATE v. MANN.

The word "command" construed.

WILLIAMS, J. The meaning of the word *command,* as applied to the case of principal and accessory, is where a person having control over another, as a master over his servant, orders a thing to be done.

Cited: S. v. Kittelle, 110 N. C., 583.

MADOX v. HOSKINS.

A person interested in the question, but not in the event of the action, is incompetent as a witness.

DEFENDANT had purchased a negro of Ward, who pretended a title under the plaintiff, and called a man who also had purchased one other negro of Ward, who claimed it in the same manner. Objected, he is

interested in the question. To this it was answered that the case of *Farrel v. Perry,* in Halifax, October, 1790, *ante,* had settled this point, and had determined that the objection must be as to his interest in the event of the cause.

WILLIAMS and MACAY, JJ., held, where a man is plainly interested in the event of a question, he hath been excluded by all authorities. And per WILLIAMS, I remember something of that case at Halifax, but the circumstances must have been different from this.

NOTE.—Overruled, *Farrell v. Perry, ante,* 2.

HILLSBORO—OCTOBER TERM, 1791

STATE v. JOHN G. BLOUNT AND THOMAS BLOUNT.

Whenever one person has the money of another, and knows what sum he ought to pay, he must pay interest for the same.

DEFENDANTS had received of the State at different times for the purpose of discharging the debt due from this State to the Government of Martinique, by commodities to be purchased and shipped, £1,300. Eleven hundred pounds they laid out accordingly, the rest they never applied; and the question now was, whether interest should be allowed. Mr. Moore urged it was to be considered in the nature of a loan, and insisted that in all cases where a man retains another's money, the amount whereof he knows, interest ought to be allowed, and cited 3 Wils., 205; 2 Re. Re., 761; 1 Burr., 151; 2 Bur., 1085; Doug., 724. (5)

PER CURIAM. Wherever the party knows what sum he ought to pay, there he ought to pay interest. Here they well knew how much of the money they had appropriated to the purposes they received it for, and for the balance they ought to pay interest; and it was allowed by the jury accordingly by way of damages.

This case may have been decided in April, 1792. The original note has no date to it.

Cited: Devereux v. Burgwyn, 33 N. C., 495; *McRae v. Malloy,* 87 N. C., 199.

STRUDWICK v. SHAW.

In 1728 the land in dispute was granted to A., who in 1730 conveyed to B., who soon afterwards went to England. B. sold to C., who in 1764 came to this country, but soon went back again. In 1771 C. returned to Carolina, where he remained, and in 1787 brought suit. One D. settled on the lands in question in 1751, lived upon them thirteen years, and died in possession, leaving a son. The son assigned to some person, who assigned to the defendant, who had lately procured a grant. Under these circumstances it was *Held*, that the plaintiff's *jus possessionis* was lost.

IN 1728 the premises in question were granted to one Foster; in 1730 Foster conveyed to Governor Burrington, who soon afterwards went to England. On 10 April, 1754, Burrington sold and conveyed to Strudwick, by a general description of all his lands in North Carolina. Strudwick came to this country in 1764, but soon went to England again, and in 1771 returned to Carolina, where he remained, and in 1787 brought suit. One Hopkins settled on the lands in question in 1751, and lived upon them thirteen years, when he died in possession, leaving a son. This right of possession was afterwards assigned by him to some person, who assigned it to the defendant, who, under this right, had lately procured a grant from the State.

W. R. Davie for the defendant: The plaintiff has shown a title, as his counsel alleges, to the premises mentioned in the declaration, and the location being settled by former determinations, shall not be brought into question at present; but there are several material objections against the plaintiff's recovery.

1. It does not appear that there has been any actual possession in the lessor of the plaintiff, or the persons under whom he claims, since 1728; therefore, if the plaintiff ever had a right to recover in an action of ejectment, that right has been lost by his laches.

(6) The nature of the title to lands is such as to make it divisible into three distinct species of property or kinds of right. It may consist of the *naked possession* or a *right of possession,* or a *mere right of property.* The first may happen where a person in this country should enter upon a woodland, though granted estate, and settle and cultivate it, and thus actually occupy, without the shadow of right or color of title, as it is called in our courts. The second will take place where the patentee submits to the unsanctioned occupation of the settler, who has the actual possession, while the right of possession resides in the person to whom the land was granted. The third species of property will be found where the grantee may have "the true ultimate property of the lands in himself, but by the intervention of certain circumstances, either by his own negligence, the solemn act of his ancestor, or

the determination of a court of justice, the presumptive evidence of that right is strongly in favor of his antagonist, who has thereby obtained an absolute *right of possession.*" 2 Bl. Com., 195, 196, 197; Co. Lit., 345, 385; Gilb. Ten., 18.

Ejectment being a possessory action, it lies only where the lessor of the plaintiff could rightfully enter, and the title to support a recovery must therefore be inseparably connected with the right of possession, and must have this ingredient at least. The title of the defendant is entirely out of view. It is an old maxim that a man must recover by the strength of his own title in ejectment, not in consequence of any weakness in that of his adversary. Every plaintiff in ejectment, says *Lord Mansfield,* in *Atkins v. Horde,* must show a right of possession, as well as a right of property; therefore, the defendant need not plead the statute, and the plaintiff must show that his lessor had a *right to enter;* and this can only be effected by proving a possession within seven years in the plaintiff, his ancestors, or the persons under whom he claims, and such possession must be an actual possession. 1 Burr., 119; Runn., 112, 113.

By the statute of 21 Jac. I., ch. 16, "None shall make an entry into land but within twenty years after their right or title shall first descend or accrue." Our own act of limitations only alters the phraseology to "shall thereunto enter or make claim," and shortens the limitation to seven years; so that the English decisions may be considered authorities as to the operation of this part of the statute; and it will appear by all these, as well as the opinions of every writer on the subject, that where there hath been no possession during the time limited in (7) the statute, either in the lessor, his ancestors, or the persons under whom he claims, the plaintiff in this action will be nonsuited, unless his case may be brought within some of the exceptions allowed by the act of Assembly. The action of ejectment is only competent where the plaintiff may enter; and the right of entry is, in this case, completely taken away by the statute, and the claimant, by such default, utterly excluded and disabled from any entry, or claim to be made, after the seven years are expired. This is not only the plain letter of the law, but the construction has been uniform. Runn., 14 to 17; Salk., 205; 5 Bur., 2635; 6 Mod., 44; Cas. K. B., 573; 2 Keble, 127; 1 Bur., 119.

Thus the neglect of the plaintiff, in this case, to enter, or make claim, as I take it, has wrought an actual bar; not by the defendant acquiring title, but by his losing or destroying his own right of action; and to the authorities already adduced may be added the case in Strange, 1142, and the law as stated in 2 Bl. Com., 196, 197, 198. The law presumes that the tenant in possession either had at first a good title, in consequence of which he entered on the lands in question, or that since his entry he

had acquired one; and, therefore, after so long an acquiescence his possession shall not be disturbed without inquiring into the absolute and real right of the property, unconnected with the right of possession.

He said that the legal notions of possession in this country have been extremely vague and indefinite, but he did not recollect any case in which this doctrine had been settled with due precision. The constructive possession, mentioned in some cases by our judges, is a doctrine unknown to the common law; but he held that the correct idea of that possession, which would arrest the operation of this act, is such a possession as is described by Coke Inst., 15. *Quasi pedis positio.* That the claim must be made by suit in law under the express terms of the second section of the act, and that the entry must be an actual entry, and the possession an actual possession. Bul., 102, 103; I Salk., 285.

Independent of the operation of the second section of our act of limitation, by the determinations in England, received as authority here, seven years adverse possession is not only a negative bar to the action, or remedy of the plaintiff, but a positive title to the defendant; and, therefore, where A. had the possession of lands for twenty years in England, without interruption, and then B. got into possession, on which A. was put to his ejectment here, though A. was plaintiff, yet his
(8) possession for twenty years was deemed a good title, and he recovered accordingly. This was ruled by *Holt, C. J.*, saying that a possession for twenty years was like a descent, which tolls an entry, and gives a right of possession, which is sufficient to maintain an ejectment. Salk., 421.

In the present case there has been an actual uninterrupted and adverse possession for thirty-six years by the defendant and those under whom he claims, whereby he has acquired a title, upon the strength of which he could recover in this form of action against the plaintiff himself, who has now nothing left but the mere right of property.

The Court will also please to observe that this objection, under the form of the title acquired by the defendant from possession, collects additional force from a comparison of the statute of James with the act of North Carolina. The third section of our acts is an abstract from the first section of the English statute, and operates on the right or title of the person who is out of possession, without appearing to touch in any manner whatsoever the right or title of the tenant in possession.

The second section of our law enacts, "That all possessions of or titles to any lands, tenements, or hereditaments whatever, derived from any sales made either by creditors, executors or administrators of any persons deceased, or by husbands and their wives, or husbands in right of their wives, or by endorsement of patents, or otherwise, of which the

purchaser or possessor, or any one claiming under them, have continued or shall continue in possession of the same for the space of seven years, without any suit in law, be and are hereby ratified, confirmed, and declared good and legal, to all intents and purposes whatsoever, against all and all manner of persons; any former or other title or claim, act, law, usage or statute to the contrary in any wise, notwithstanding." In the whole of the statute of James there is nothing like this section, yet the adjudications in this country have always followed the construction of that statute, and have generally fallen short of them, without noticing the extensive and beneficial operation of this clause.

It will be remarked that this clause relates only to the right of the tenant in possession, operating in such a manner as to ripen an inchoate or defective right into a complete title; that the act embraces "all possessions of lands," as well as "title to lands," derived from any sales made to creditors, etc., or by indorsement of the patents, (9) or *otherwise.* Thus every "sale," whether of the possession, or right of occupancy, or the title, comes within the purview of this clause, which goes to the absolute confirmation of the title of the purchaser.

The act appears to have embraced expressly both the cases of a mere *right of occupancy,* and what is usually called a *title,* by the expressions of "all possessions of" or "titles to" "which the purchaser or possessor." So that sales of the right of occupancy, a very common case in this country ever since its first settlement, are clearly within the letter and policy of the act. The sale and assignment of the possession by the heir of Hopkins, connected with a continued possession, a possession that has not been interrupted by any suit at law, we contend has now ripened into a complete title, absolutely ratified and confirmed by this act to the defendant, any former or other titles notwithstanding.

It is not necessary to inquire in this case whether the defendant has acquired a title under the second section of this act that would resist a writ of right. The Court, however, would permit him to observe that if this act contained no more than the statute of James, there could have been no question as to this point; but our law has a much higher regard from possession, and connecting it with the circumstances of time makes it the strongest evidence of title; and it is from the full and strong expressions of this clause of the act that he had held a title like this could not be disturbed by a writ of right in this country.

The statute of limitations, as far as it respects real estates, is a law of the utmost importance to the peace and happiness of the community. The leading motive of entering into society was the protection of property, and the great object of the law is to secure and quiet men in the possession of it. This policy is strongly expressed in the preamble of the act: "Whereas great suit, debate, and controversy hath heretofore

been, and may hereafter arise, by means of ancient titles to land derived from patents granted by the Governor of Virginia, the conditions of which patents have not been performed, nor the quit-rents paid, or the lands have been deserted by the first patentees, or for or by reason or means of former entries or patents granted in this Government; for prevention whereof, and for quieting men's estates, and for avoiding suits in law, be it enacted," etc.

The case under the consideration of the Court is precisely one of the cases contemplated by the act. Where patentees have deserted their lands, still a wilderness, and others, ignorant of such appropria-
(10) tion, have settled upon them and improved them by the labor of many years, expecting to acquire a title in the course of time, on the usual terms from Lord Granville or the King, it would be incompatible with the principles of justice, or the policy of an infant government struggling with the difficulties of settlement and a feeble population, to turn the improving tenant out of possession.

He said he relied with confidence upon these objections arising out of the statute, supported by an uniform train of decisions, and no determination in this country could be said to have shaken these authorities, unless the case of *Mallett v. Mims* in this Court should be considered as militating in some measure against the construction contended for on the first point. In that case two points were determined: (1) That the delivery of the grant to grantee should raise a constructive possession, sufficient in law to preserve the grantee's right of entry where there is not an adverse possession. (2) That the plaintiff shall be put to prove an actual possession in himself within seven years only where the defendant sets up an adverse possession for that time. In this case there has been an actual adverse possession ever since 1751, and for more than seven years by the defendant himself; so that this new doctrine of constructive possession, which owes its birth to this case of *Mallett v. Minns,* will not serve the plaintiff in this instance.

It may perhaps be said that the absence of Burrington beyond sea, as well as that of the lessor of the plaintiff, and the time struck out on account of the intervention of the war, will bring this case within the exception of the act of Assembly.

To this he answered that the proviso of the act of Assembly saves the right of action to persons beyond seas only for eight years after their title shall accrue, the words of the act being, "or persons beyond seas, within eight years after the title or claim becomes due, shall take benefit and sue for the same." So that it becomes necessary to bring suit within eight years after the adverse possession took place, even upon the doctrine delivered in the case of *Mallett v. Mims.* It is also to be observed that Mr. Strudwick came to this country in the year .....,

after the sale of Burrington to him, and that the act certainly attached upon his right at that time, and his returning to England would not prevent the statute running; so that after striking out the ten years from March, '73 to '83, there is sufficient time for the (11) statute to have complete effect; and when the act begins to run it cannot be suspended on account of any after defect or impediment whatsoever. To prove this point, he cited Plowd., 368 to 376, saying that indeed this was the case of a fine, but that the reason and principle was the same in a common case under this act; and that the determination upon the statute of limitations had ever since followed the decision in *Stowell v. Lord Zouch.* See 2 Will., 582-3; 1 Will., 134; Stra., 556.

There is one other point of great importance which has not yet been sanctioned in this country by any direct decision. He said: I admit the doctrine has been questioned, but there is no part of the common law more clearly settled than that, when a descent is cast, the heir of the disseizor has the *jus possessionis,* because the disseizee cannot enter upon his possession and evict him, but is put to his real action, because the freehold is cast by the law upon the heir. Howell was thirteen years in possession, died in actual possession, and the law cast the freehold upon his son; and the reason of the law as stated in 2 Bl. Com., 177, applies to this country as strongly as any other. The law, says he, will presume that the possession which is transmitted from the ancestor to the heir is a rightful possession, until the contrary be judicially shown; and, therefore, the heir shall not be evicted by a mere entry, although such a measure would have been competent in law to have dispossessed the ancestor. The alteration by the statute of 32 Henry VIII. of this common-law rule only requires that the disseizor should have five years peaceable possession next after the disseizin, and a descent cast under these circumstances tolls an entry, unless the disseizee should have made continual claim. He therefore concluded that there being a descent cast in this case, the right of entry of the lessor was also thereby taken away, and that, therefore, the plaintiff could not recover in this action, and relied, as to this point, upon Inst., 250, 225, sec. 426; Gilb. Ten. from 21 to 36.

Mr. Moore, in reply, cited Burr., 60, to show the doctrine of seizin and disseizin, and to prove there could be no disseizin in this country.

WILLIAMS and MACAY, JJ., after advising together on the bench for some time, said that the *jus possessionis* was lost by the plaintiff; and without giving their opinions at large, directed the plaintiff to be called; and accordingly he was called and nonsuited.

Cited: Tyson v. Harrington, 41 N. C., 335.

HALIFAX—OCTOBER TERM, 1791

(12)

MERRITT v. WARMOUTH.

In detinue, though plaintiff gets possession after commencement of action, he may proceed to judgment.

DETINUE. Warmouth had hired the negro in question of Waller, and the negro had been demanded while in his possession; but before the issuing of the writ he delivered the negro to Waller, so that the negro was not in the defendant's possession at the time of the action brought.

ASHE and SPENCER, JJ., held a recovery may be had against him, and ruled accordingly, and plaintiff had judgment.

Cited: Morgan v. Cone, 18 N. C., 238.

COBBS v. FOWLER.

A discontinuance against one defendant in trespass is a discontinuance of the cause.

ASHE and SPENCER, JJ., held that as in this case there were five defendants in trespass, and four had been taken and pleaded to issue, and the process had not continued against the other for several terms, it was a discontinuance of the whole cause.

Davie, for the discontinuance, cited 11 Co., 6, where it is said there was trespass against four, and judgment by default against one, and a writ of inquiry awarded to prevent a discontinuance. In the present case a discontinuance was entered accordingly, though much opposed by the counsel on the other side.

MORGANTON—MARCH TERM, 1792

WITHERSPOON v. ISBELL.

In an action for slander, if the words are laid more than six months before action brought, statute of limitations is a good plea, though the words were actually spoken within six months.

THE words were laid in the declaration to have been spoken in some month of the year 1788, and the writ appeared to be dated above six months after that time, and the act of limitations was pleaded in bar; and on the evidence it appeared the words were actually spoken a considerable time after the time laid in the declaration.

WILLIAMS, J. There is a difference between laying a fact after the time it really happened and before the time it really happened. In the first case the declaration is supportable; in the second it is not. So the plaintiff was nonsuited. *Quere de hoc, et vide* Salk., 662; Cro. J., 428; Bull., 33; L. Ev., 241; Co. Litt., 283; Cro. Car., 514, 228; I Sid., 308; Trials *per pais*, 394; Cro. J., 94; Touch. Pre., 264, 549; 5 Mo. C., 287; 1 Bac. Ab., 102; 2 H. H. P. C., 291.

STATE v. GRISHAM.

A count for burglary and for larceny may be joined, and the verdict may acquit of the burglary and convict of the larceny.

INDICTMENT for feloniously and burglariously breaking and entering into the dwelling-house of one Rice, and feloniously and burglariously stealing thence a twenty-shilling bill, etc. The jury find him guilty of the larceny, but not guilty of the burglary.

WILLIAMS, J., at first thought he could not be punished; but at length, seeing the authorities in H. H. P. C., Book 1, 559, 560, and Book 2, 302, where it is said two or three several charges may be contained in an indictment of burglary, and if he be found not guilty of the other charges, he may be punished as if he were only indicted for them, he gave judgment that the prisoner should be branded in the hand; which was accordingly done in presence of the Court.

See *S. v. Allen*, 11 N. C., 356, in which the principle of this decision is again recognized; also *S. v. Twitty*, *post*, 102.

Cited: S. v. Fleming, 107 N. C., 909; *S. v. Spear*, 164 N. C., 457.

(13)

STATE v. JOSEPH AND REUBEN WHITE.

An indictment for trespass in taking and carrying away negroes out of the possession of one may be sustained, although it may have been done at the command of the party who had the real title to the property.

INDICTMENT for trespass in taking and carrying away two negroes from and out of the possession and ownership of William Bailey. After the facts were proven on the part of the State, Mr. Avery, on the part of the defendants, offered to produce several witnesses to prove that the property of these negroes was in one Samuel Scott of South Carolina, and that the defendants had taken them for him and by his command.

WILLIAMS, J. Property here is not the question. The law prescribes a method whereby Scott might have regained possession of that property if he had a right to it—that is to say, by a civil suit. Such methods of acquiring possession as these defendants have taken are in violation of the rules of law, and of evil example to the public; and if such kind of evidence should be received, would render property of this kind very insecure; for great numbers of negroes have been brought hither from other states, and they may all be taken and carried away again to other states, if there should be any claimants of them there, and the honest purchaser here would be left almost without a remedy.

There was a verdict for the State.

See *S. v. Flowers*, 4 N. C., 13; *S. c.*, 6 N. C., 225; *S. v. McDowell*, 8 N. C., 449.

SALISBURY—MARCH TERM, 1791

BILLEWS, ADMINISTRATOR, v. PATRICK BOGAN.

By WILLIAMS, J. An acknowledgment made to an executor will prevent the operation of the statute of limitations as well as if made to the testator. ASHE, J., *contra*. Verdict against evidence is not sufficient for a new trial, if justice is done by it.

IN this case the debt had accrued above three years before the commencement of the action, but there was an acknowledgment of the note having been executed within three years.

WILLIAMS, J. On a motion for a new trial, that is sufficient to prevent the bar by the statute, as well in the case of an executor as of the

party himself who made the contract. He relied upon Salk., 29; Pl., 19. Adopted by 3 Bac., 517; L. Ev., 181; 1 Morg. Ess., 331.

But ASHE, J., *contra,* relying upon *Greene v. Crain,* Salk., 28, (14) and L. Ray., 1101.

But both of the judges: The jury in this case have found the debt not barred by the act of limitations; whereas it is contended by the counsel it really was barred. Suppose this to be true, yet this verdict, although it be against evidence, has done justice between the parties, and therefore the Court will not grant a new trial. Where the equity and justice of the case is with the verdict, the circumstances of its being against evidence is not of itself sufficient to set aside the verdict.

New trial refused.

Overruled: Oates v. Lilly, 84 N. C., 645; *Wells v. Hill,* 118 N. C., 907.

See, also, *Bank v. Sneed,* 10 N. C., 500. As to the point of the new trial, see *Allen v. Jordan,* 3 N. C., 132; *Jones v. Zollicoffer,* 9 N. C., 492; *Smith v. Sheppard,* 12 N. C., 461.

HILLSBORO—APRIL TERM, 1792

——— v. JACKSON.

A person, who did not make it his ordinary employment, undertook to carry goods for hire. He is not to be taken as a common carrier, and liable to the same extent, but is bound only to common prudence.

PLAINTIFF, a merchant, employed defendant, for a reward, to bring goods and merchandise from Virginia to Hillsboro, in this State, in his wagon. Defendant received the goods in Virginia, and in bringing them to Hillsboro, when about to cross a river, the flat receded from one of the fore wheels of the wagon, and it ran with the goods into the river, and the goods were greatly damaged and impaired in value. Defendant did not make it his common and ordinary employment to carry goods, but was employed on this occasion only.

Moore for plaintiff.
Haywood for defendant. (15)

MACAY and WILLIAMS, JJ., instructed the jury that a person carrying goods for hire must be intended of one who makes it his common employment and the means of his livelihood. 2 L. Ray., 918, where it is said a carrier to be absolutely liable must be understood of a person of that description. Suppose the plaintiff, in the present case, had gone to the defendant's with the common price for the carriage of goods from Virginia to Hillsboro, and required of him to proceed to Virginia and receive the goods, and to bring them to Hillsboro—might not the defendant have refused? Was he bound to undertake the business assigned him? No, certainly he was not. And why? Because he had not undertaken to serve the public generally, or, in the words of *my Lord Holt* (Salk., 249), "all persons indifferently for hire in carrying goods from place to place." If he is not thus bound, he is not that common carrier spoken of in the law books and, in the cases produced, who is liable in all events, except for the acts of God and public enemies;

(16) and he must then stand upon the ground of a person whose common business it is not undertaking to do an act for another at his request and for him—the employer knowing him not to be commonly conversant in that business. 3 Bl. Com., 166. In other words, he is not liable to the political rule before mentioned, but to the rule only which results from natural justice, which requires no more of him than common and usual prudence and diligence in the performance of what he has undertaken, and does not subject him to answer for accidents which have not happened for want of that prudence and diligence.

Under this direction, the jury found for defendant.

BERRY'S ADMINISTRATORS v. PULLIAM.

1. Letters of administration not demandable after issue joined.
2. Administrator may bring detinue upon his own possession.
3. Statute of limitation in detinue runs only from plaintiff's knowledge of conversion.

PER CURIAM. Upon argument, held that letters of administration need not remain in court, and are not demandable after issue joined, and cited *Wymark's case,* 5 Rep., 74.

Secondly. That the administrator may sue as administrator upon his own possession; and that it is better for him to sue in that manner, because then the judgment affords evidence against him of assets.

Thirdly. That the act of limitations will not run where A. detains the chattel of B., but only from the time when B. knows where the chattel is, and that the same is adversely claimed. *Vide,* 3 Rep., 79-b.

See, also, *Elmore v. Mills, post,* 360, and *Executors of* ——— *v. Oldham. post,* 165.

Cited: Elwick v. Rush, post, 28.

MOORE v. SUTTRIL'S ADMINISTRATOR.

Quere: When one is sued as administrator in right of his wife, whether capias will issue.

DOCTOR UMSTEAD was sued as administrator in right of his wife; a *capias* issued to Chatham, where he did not live, etc.

Objected by Mr. Moore, a *capias* ought not to have issued, but a summons; and the attachment is irregular, being founded on such a *capias;* and the suit is improperly brought. It ought to have been against Mrs. Umstead, also; for suppose she had died, it would have abated; if he had died, it would have abated also, as the case is circumstanced; but had it been brought against both, and he had died, it would have survived against her.

The plaintiff being not ready, was nonsuited.

Cited: Leake v. Gilchrist, 13 N. C., 84.

RHODES v. BROWNLOW.

Issuance of writ of false judgment is to be decided upon affidavits

PER CURIAM. A writ of false judgment is to be obtained upon affidavits, which may be opposed by affidavits on the other side; and the Court, upon consideration of the affidavits, will either dismiss the writ or proceed to do what else is proper to be done on examination of the proceedings below; and that upon the obtaining of this (17) writ the falsity of the judgment below is to be assigned in the manner mentioned in Nelson's Abridgment. False Judgment. And that it differs from the assignment of errors, *vide Co. Litt.,* 60.

See *Anon., post,* 398; *Anon., post,* 469.

ALLEN v. WILLIAMS, GARNISHEE.

If an attachment improvidently issue, the remedy is *certiorari*, and not writ of error.

ALLEN sued Hamilton by attachment in the County Court of GRANVILLE, and Williams was summoned as a garnishee, attended four days, and by the record it did not appear he was solemnly called as the act directs, or that any *sci. fa.* had ever issued against him; but yet judgment was entered against him. On the part of the plaintiff below, it was acknowledged there was error in the proceedings; but it was insisted on for him that a writ of error should be brought, and not a *certiorari*, as had been done in the present instance. *E. contra*, the counsel for Williams, the garnishee, cited Salk., 263, and insisted that the *certiorari* lay in this case, and, indeed, was the only proper writ, the attachment law being not according to the course of the common law. And so the Court determined, and reversed the judgment against the garnishee.

HALIFAX—APRIL TERM, 1792

JAMES TILLER GEE v. JARRET YOUNG.

Where the life tenant dies April 1, the remainderman is entitled to the crops, subject to the value of labor of life tenant's husband in preparing the crop.

CASE for the use and occupation of a plantation. Young had married the widow of Drury Gee, to whom Drury had devised the plantation for her life, remainder to the plaintiff. She died 1 April, 1789, and the defendant had then sown part of the land in oats, and other parts he had broken up and prepared for the reception of Indian corn. The following cases were cited, to wit: 2 Inst., 81; 2 E. C. Ab., 464; 2 Bl. Com., 122, 146, 403; Co. Litt., 55; 5 Rep., 116; L. Ev., 242 to 252.

SPENCER, J., who delivered the opinion of the Court, said the defendant ought to be allowed for his labor in preparing the ground for tillage, that is, the ground intended for Indian corn; but yet the plaintiff is entitled to recover, and recommended to the jury to give a verdict for

the plaintiff for the value of the use of the plantation, after deducting the value of the defendant's labor; which was done accordingly, and plaintiff had judgment.

Cited: King v. Foscue, 91 N. C., 119; *Hayes v. Wrenn,* 167 N. C., 230.

(18)

CLEMENTS v. EASON & WRIGHT.

Covenant executed by two cannot be proven by showing the admission of one of the parties.

COVENANT, brought upon an instrument executed by two, and appearing to be under seal, but not attested by any subscribing witness. There was no witness to the execution, but proof was offered by the plaintiff of an acknowledgment by one of the covenantors that the instrument was executed by both; which SPENCER, J., would not admit, and no other evidence being offered, the plaintiff was ordered to be nonsuited; the Court saying he ought to have brought his action on the case, and proof that the instrument was acknowledged is no proof of the sealing, and will not make it to be a deed.

HILLSBORO—OCTOBER TERM, 1792

DOOK v. CASWELL.

Assignor of a bill can strike out assignment and sue as obligee.

DEBT on a single bill, and payment pleaded. The bond had been assigned by Dook, the obligee, to Benton, and had the assignment scratched out with a pencil. Objected, the assignment had transferred the interest of the bond to Benton, and therefore his executors were the proprietors. To this it was answered, the assignors having possession of the bond, is evidence of his having paid the money to the assignee, and that enables the assignor to sue in his own name; besides, the endorsement was struck out.

ASHE, J. The possessor had a right to strike out the endorsement, and now the case is no more than that of a bond made to the obligee, which he has an undoubted right to recover the money upon; and so a verdict was given for the plaintiff and he had judgment.

Cited: Price v. Sharp, 24 N. C., 421; *Smith v. St. Lawrence, post,* 174; *Casey v. Harrison,* 13 N. C., 245.

TUNE v. WILLIAMS.

When there is a judgment, an agreement to credit with sums due before judgment cannot be enforced.

JUDGMENT had been given for plaintiff on a bond, in the County Court of WARREN, for £29, and Williams, alleging he ought to have credits to a considerable amount, plaintiff agreed to come to a settlement, and credit the judgment with such sum as he had paid. They came to this settlement, and credited all but fifty shillings; and Williams assumed to pay that sum if Mr. Lyne had not paid it for him to plaintiff. Mr. Lyne in fact had not paid it, and a warrant was brought upon this assumpsit, and judgment for plaintiff and the suit removed by *certiorari* to this Court. Upon the evidence here, it was objected by Colonel Davie, that there being a judgment now existing for this fifty shillings, no action upon assumpsit could be brought for it; and so ruled the Court and nonsuited the plaintiff. Colonel Davie cited Bull., 128, which cites Cro. J., 206.

See *Bain v. Hunt,* 10 N. C., 592.

HALIFAX—OCTOBER TERM, 1792

(19)

NELIUS v. BRICKELL'S ADMINISTRATORS.

Proof of the handwriting of the wife of obligor is not admissible. The mark of a subscribing witness, who is dead, may be proved to let in testimony of the obligor's handwriting.

DEBT on a bond, and general issue pleaded. The bond was attested by Nancy Brickell, wife of the obligor, and by another person who made

his mark. The plaintiff's attorney would have proven the handwriting of Nancy Brickell, relying on the case in Stra., p. 34, where a witness to a bond having become the administrator of the obligee, proof of his handwriting was admitted.

PER CURIAM. In that case the witness was competent at the time of his attestation, and having become disqualified whilst living, by being a party to the suit, his handwriting was the best proof which could reasonably be expected; but here the witness was incompetent from the beginning, and if she could not be admitted as a witness, much less ought her handwriting to be received as evidence; but if you can prove there was once such a man as that who has made his mark, and that he is now dead, or not to be found, and also that he used to make his mark in the manner that it appears to be made to this bond, it will be such a presumption as will let you into the further proof of the handwriting of the obligors. *Coghlan v. Williamson,* Doug., 93.

Whereupon plaintiff's attorney proved there was such a man, who was alive about the time of the date of the bond, in the neighborhood where it was given, and that he was dead; and that he used to make his mark as it appeared upon the bond; and that the name of the obligor was in the obligor's handwriting.

Verdict and judgment for plaintiff.

Cited: Devereux v. McMahon, 108 N. C., 145.

COWPER v. EDWARDS, ADMINISTRATOR OF WEBB.

An amendment will only be permitted, under the act of 1790, as to matters which might be demurred to.

ACTION of debt against defendant, naming him executor. Plea in abatement, that he is administrator and not executor. Plaintiff moved to amend upon the act of 1790, and cited Strange, 89, where, after issue joined, the Court permitted an amendment by laying the assumpsit to be made to the plaintiffs themselves instead of its being made to their testator. But the Court said the act of 1790 is but a repetition of the provisions before made by the acts of amendment and jeofail, and that by this act nothing could be amended but what the other (20) party might have demurred to and specially set down as the cause of his demurrer, which was not the case in the present instance. The amendment of writs, to make that maintainable which before the amend-

ment was not so, might be productive of great hardship; for very possibly the reason of the bail entering into a bail bond was his knowledge that the action on the defective writ could not be supported, and then the amendment would entrap him.

Motion denied.

NOTE.—Our judges have expounded the act of 1790 with great liberality, saying, "Anything may be amended at any time." See *McClure v. Burton*, 4 N. C., 84; *Davis v. Evans, ibid.*, 411; *Williams v. Lee*, 4 N. C., 578; *Justice of Camden v. Sawyer*, 9 N. C., 61; *Boyt v. Cooper*, 6 N. C., 286; *Wilcox v. Hawkins*, 10 N. C., 84.

MERRIT V. MERRIT AND BREHON V. TUTON'S ADMINISTRATOR.

If defendant is insolvent, execution will issue against plaintiff for his own costs.

PLAINTIFFS in these respective suits had recovered judgments, and executions having been issued against the defendants respectively, *nulla bona* were returned; and thereupon in the latter of these causes the clerk had issued execution for plaintiff's costs against the plaintiff himself; and the propriety of this measure being moved to the Court, they said unanimously that the plaintiff is liable for his own costs where the defendant is insolvent, and that the clerk was justifiable in what he had done.

The original note of this case is without date, and perhaps it may be misplaced in point of time.

Cited: Office v. Lockman, 12 N. C., 147; *Office v. Allen*, 52 N. C., 157; *Jackson v. Maultsby*, 78 N. C., 176; *Dunn v. Clerk's Office*, 176 N. C., 51.

HILLSBORO—APRIL TERM, 1793

FERGUSON AND WIFE V. TAYLOR.

To take the case out of the statute of limitations the acknowledgment must be of a liability for the debt, not merely that it has not been paid.

PLAINTIFF'S wife, while *sole*, lent to defendant specie certificates, to be returned in three weeks, or at any time when requested. Plaintiff

did not bring suit until after the expiration of three years from the end of the three weeks; but plaintiffs proved Taylor had acknowledged receiving the certificates within three years before the action brought, and said he had not settled for them, but would pay them to the administrator of plaintiff's first husband, one Leonard.

MACAY, J., said: Here is no acknowledgment of the debt, but only acknowledgment it was not paid. There must be an acknowledgment of the debt. The authorities cited, which are 2 Burr., 1097, and Doug., 652, went upon the acknowledgment of the debt, not of a fact which shows it to be unsatisfied; and the jury found accordingly.

See, also, *Bank v. Sneed*, 10 N. C., 500, in which counsel took an extended view of all the cases upon the subject, and the Court recognized the principle of those which require an acknowledgment of a present subsisting debt to take a case out of the statute.

Cited: Wells v. Hill, 118 N. C., 907.

JONES v. BRINKLEY.

Handwriting of witness to a bond can be proven when he cannot be found.

DEBT upon two bonds subscribed by a witness, who upon search could not be found. This being proved to the Court, his handwriting was proved, and the bond given in evidence.

Cited: McKinder v. Littlejohn, 23 N. C., 71; *Bright v. Marcom,* 121 N. C., 87.

HALIFAX—APRIL TERM, 1793

(21)

HIGHTOUR v. MURRAY.

Sureties in an attachment are simply bail, and may surrender their principal.

HIGHTOUR had sued one Bowers, who had removed to avoid his creditors, by original attachment; and Murray had replevied the property attached. Hightour obtained judgment in the County Court of FRANKLIN, and Murray surrendered Bowers as his bail in discharge of himself.

Hightour then took his *sci. fa.* against Murray, to subject him to the debt, alleging he had no power to surrender, having become bound for Bower's performance of the judgment of the court. The county court gave judgment for Murray. Upon which Hightour appealed.

Davie on the part of Murray.
Haywood for Hightour.

WILLIAMS and ASHE, JJ. An original attachment is only intended to compel appearance, and where sureties are given, they are exactly to all purposes as bail, and may surrender.

Judgment for defendant.

See Act of 1777, Rev., ch. 115, sec. 30.

Cited: Summers v. Parker, 4 N. C., 581, 583; *Deaver v. Keith,* 27 N. C., 376.

EDENTON—APRIL TERM, 1793

DECROW v. MONE'S EXECUTORS.

Trover will lie against executors for conversion by their testator.

TROVER. In this case the Court, consisting of ASHE and WILLIAMS, JJ., decided that trover would lie against executors for a conversion in the time of their testator. *Vide* Cowper, 371; 4 Mo., 404, and a case at Wilmington, May, 1796.

SNODEN v. HUMPHRIES.

When a motion in arrest of judgment is refused on appeal, the trial is *de novo.*

THIS was an action of debt, and verdict for the plaintiff. Motion in arrest of judgment, and upon argument the motion overruled. From which sentence the defendant appealed, and now, on motion of Mr.

Hamilton that the cause should stand not on the reasons in arrest, but as a new cause on the issue to the country, it was so ruled by ASHE and WILLIAMS, JJ. *Ex relatione.*

Cited: Clark v. Cameron, 26 N. C., 164.

MORGANTON—SEPTEMBER TERM, 1793

HAYLE v. COWAN.

Witnesses subpœnaed and attending can prove their attendance, though not examined.

PETITION to rectify error in a patent, heard by the Court without the intervention of a jury; and the error was ordered to be rectified agreeably to the act of Assembly. This was in the case of a royal patent, and Hayle had summoned four witnesses, the dispute being only whether the first line described in the certificate annexed was (22) really north 54 degrees east or south 54 degrees east. Mr. Avery then moved that as two of these witnesses had not been sworn at all, and as there could be but one fact to be established, that the defendant should not be subject to the payment of these two witnesses.

ASHE and MACAY, JJ. You informed us a while ago, you had a witness summoned who does not attend. These two witnesses not sworn might be intended to counteract his testimony, and your not producing him might be the reason why they were not called upon. We cannot undertake to say they were to prove the same fact the other two were sworn to.

Motion denied.

Cited: Holmes v. Johnson, 33 N. C., 59; *See Carpenter v. Taylor,* 4 N. C., 689.

HALIFAX—OCTOBER TERM, 1793

BRADFORD v. HILL.

In the case of boundaries expressed in deeds and patents, the courses and distances mentioned in such deeds or patents must be observed, except when a natural boundary is called for and shown, or when marked lines and corners can be proved to have been made at the original survey.

EJECTMENT. The boundaries expressed in the deed to Bustin, under whom Hill claimed, were: Beginning on Fishing Creek, thence east 320 poles to Pollock's corner, thence north same number of poles to Bryant's, thence along Bryant's line west 320 poles to the creek: Bryant's corner being 4 degrees to the east of north from Pollock's corner, the line from Pollock's corner intersected Bryant's line considerably to the west of Bryant's corner. It was proven there was an old marked line leading from Pollock's to Bryant's corner, but that in running by the compass from Pollock's corner north 54 degrees east, which was the general course of that line, the marked line would be sometimes on one side, sometimes on the other side of that run by the compass; wence it was taken by the jury to have been run by some person after the survey; the triangle formed by the said north line, part of Bryant's line, and a line from Pollock's corner to Bryant's corner, included the land in dispute.

It was insisted for the plaintiff that the expression of the word *north* was a mistake in the surveyor, as the line would give but about half the complement of acres; that it would not measure the distance called for by the deed, as it would intersect Bryant's line before the distance was gained, and because from the point of its intersection with Bryant's line, along Bryant's line to the creek, would be only 130 poles; whereas the deed called for the whole length of Bryant's line, to wit, 320 poles. Add to this, that the true grammatical construction of the words used in the patent, "to Pollock's corner, thence to Bryant's," will determine the sense to Bryant's corner, not to Bryant's line, there being no line antecedently mentioned.

(23) *E. contra,* it was argued by Davie, and agreed to by WILLIAMS, J., that in all cases where there are no natural boundaries called for, the dispute must be decided by course and distance, or by proving the line and corner; that supposing the marked line running from Pollock's to Bryant's corner not to be the line run by the surveyor, there was nothing but the description of the deed by courses and distances to direct us; that, indeed, if the line was terminated by a natural boundary,

then if the distance expressed in the deed was shorter than the distance to that natural boundary, the distance expressed in the deed would be disregarded. It is true, mistakes have been committed by surveyors, but on account of the great danger there would be of controlling deeds by parol testimony, they must be adhered to, unless in cases of very obvious mistake and where the evidence of the mistake is of a nature hardly capable of deceiving us—as where there was a line, and marked trees, and a corner, which could be proven to be the line run by the surveyor; in which case the mistake should not prejudice, for there would be not only parol evidence to control the deed, but the additional evidence, also, of the marked line and corners where nature itself would lend its aid to evince the error by the appearance of the line and in proving its age.

Branch v. Ward; Eaton v. Person, and *Person v. Roundtree,* 1 N. C., 69, were cited. The case of *Branch v. Ward* was said to be this: Beginning on the creek, and running north and so round to the creek, and along that to the beginning; but expressed in the patent "to the beginning on the creek, thence running south, and so round to the creek," whereby the land was thrown upon the opposite side of the creek; but that it was proven on the trial that there was a north line, and a corner marked at the termination of it, the same that was mentioned in the patent; that the line was old enough to have been made when the land was first surveyed, and that was the line run for the patentee by the surveyor. Upon which evidence the plaintiff recovered. *Eaton v. Person* was, that the land in fact was included in a first, second, and third line, and a river for the fourth; but the deed, after describing the first line, called next for a course and distance which carried the second line through the body of the land, leaving out a triangular piece included in the second and third lines really run; but the second and third lines really run were marked and proven, and the corners also, by persons present at the running them for the patentee; and upon (24) that, by direction of the Court, the claimant under the patentee recovered. *Person v. Roundtree, supra,* it was said, was a similar case to the last, but that these were the only cases where the Court had ever ventured to depart from the letter of the deed or patent; and the claimant under the patentee in the present case, not being able to prove a line run by the surveyor for the patentee, between these two corners, the jury, under the direction of WILLIAMS, J., then the only judge in court, found a verdict against him. The other party claimed the triangular piece in dispute, by a State grant of a late date.

NOTE.—See *Wynne v. Alexander,* 29 N. C., 237; *Brown v. House,* 118 N. C., 879; *Higdon v. Rice,* 119 N. C., 626, and *Cherry v. Slade,* 7 N. C., 82, in which last *Chief Justice Taylor* makes an able review of all the cases upon this

subject, and deduced four rules relative to boundary: (1) That whenever a natural boundary is called for, in a patent or deed, the line is to terminate at it, however wide the course called for it may be, or however short or beyond the distance specified. (2) Whenever it can be proved that there was a line actually run by the surveyor, was marked and a corner made, the party claiming under the patent or deed shall hold accordingly, notwithstanding a mistaken description of the land in the patent or deed. (3) where the lines or courses of an adjoining tract are called for in a deed or patent, the lines shall be extended to them without regard to distance, provided those lines and courses be sufficiently established, and no other departure be permitted from the words of the patent or deed than such as necessity enforces or a true construction renders necessary. (4) Where there are no natural boundaries called for, no marked trees or corners to be found, nor the places where they once stood ascertained and identified by evidence, or where no lines or courses of an adjacent tract are called for: in all such cases we are of necessity confined to the courses and distances described in the patent or deed. See, also, *Reddick v. Leggat*, 7 N. C., 539; *Orbison v. Morrison*, *ibid.*, 551; *Campbell v. McArthur*, 9 N. C., 33; *Slade v. Green*, *ibid.*, 218; *Tatum v. Sawyer*, *ibid.*, 226; *Fruit v. Brower*, *ibid.*, 337; *Haughton v. Roscoe*, 10 N. C., 21; *McNeill v. Massey*, *ibid.*, 91; *Tatum v. Paine*, 11 N. C., 64.

Cited: Miller v. White, 1 N. C., 227; *Cherry v. Slade*, 7 N. C., 86; *Hurley v. Morgan*, 18 N. C., 431; *Wynne v. Alexander*, 29 N. C., 238; *Brown v. House*, 118 N. C., 879; *Higdon v. Rice*, 119 N. C., 626; *Tucker v. Satterthwaite*, 126 N. C., 959; *Ipock v. Gaskins*, 161 N. C., 683.

SALISBURY—MARCH TERM, 1794

DEN ON DEM. OSBORNE v. WOODSON.

In ejectment, the word tenement, with metes and bounds, is sufficiently certain. Sale of land by sheriff, when there is sufficient personal property, is good as to purchasers. The want of forty days advertisement, or the land's not being sold until a day or two after the day appointed, will not vitiate the sale. *Dictum* by the Court: If a sheriff sells real property, when there is sufficient personal, he will be liable to an action by the party grieved, unless the party does not show personal property sufficient to satisfy the execution.

EJECTMENT. The declaration stated the lease to be of a messuage and tenement, bounded by metes and bounds particularly expressed, including a tract of 263 acres of land. Objected, this description is too

uncertain. The word tenement is so uncertain the sheriff will not know how to deliver possession. But *per curiam,* it is certain enough. The word *tenement* includes all things which may be holden; and a tenement bounded in such manner as described in this declaration is the same thing as a parcel of land so described, and as certain and more legal. The defendant's attorney then informed the Court he was prepared to prove that the sheriff who sold this land to the plaintiff under an execution issuing from Hillsboro Court, in behalf of the State, has seized the land when there was personal estate enough in the defendant's possession to satisfy the debt; and also that the sheriff had not sold the land on the day appointed by the advertisement, but a day or two afterwards; and, also, that he had not advertised for the space of forty days previous thereto, as the law required; and if the Court thought these evidences material, that he could produce them. Thereupon WILLIAMS, J., said if the sheriff sells real property when there is personal enough, it makes the sheriff liable to an action of the party grieved, but will not vitiate the sale to the purchaser; otherwise, no man would be safe in purchasing lands at a sheriff's sale; and that he had never known it required that plaintiff in such case, who was the purchaser, should prove forty days advertisement, which it certainly would have been at some time or other, if it ever had been thought material or necessary; and moreover, the sheriff may lawfully sell the land of the defendant where he (25) does not show him personal property sufficient to satisfy the execution. It would be absurd to say that the sale of land should in no case be good where the defendant had personal property. Were this the law, defendant might conceal his personal property. Suppose the sheriff comes with his execution, and the defendant shuts his doors against the sheriff, the sheriff cannot break them open; and shall this disappoint the judgment creditor? As to his not selling on the day appointed, but a day or two after, this is not absolutely unlawful. He may adjourn his sale, sometimes for the benefit of the defendant, when he expects a better day or more bidders, and gives notice to those attending that the sale will be made at that future day. Sometimes, indeed, the sheriff may have so many goods to sell to satisfy the execution that he cannot make sale of all in one day; and shall he then be obliged to wait till another ten or forty days shall intervene? No; he shall continue the sale by adjournment till the whole be sold.

Verdict and judgment for plaintiff.

ESTHER KENEDY v. ISAAC ALEXANDER.

Notice to take a deposition at a certain place in Tennessee on the fifth or sixth days of a particular month, held good.

NOTICE given by plaintiff of taking deposition of one Jones, who lived near Knoxville, that it would be taken on the fifth or sixth days of such a month, and it was taken on the fifth. Objected for defendant, that this notice is not properly given, for if he might say on the fifth or sixth, he might go on and say, or on the seventh or eighth, and for a long time.

WILLIAMS, J. In a case at New Bern on the last circuit (*Harris v. Peterson,* 4 N. C., 358), one of the parties had given notice of taking depositions at Albany in such a week; and it was held a good notice; because at so great a distance the taker of the deposition might not know how to procure the witness's attendance on any particular day; the witness might be absent, or not be found; after going thither, some accident might delay the party intending to take the deposition; and he might not arrive on the very day, and it would be extremely inconvenient to force him first to go thither, and know when the witnesses would attend, and then come back and give notice of the time, before he could take the deposition. Wherefore in this case let the deposition be read.

It was read accordingly.

DEN ON DEM. OF TYCE v. LEDFORD.

Where a cause had been depending three years in the county and five years in the Superior Court, and the plaintiff for the last three years had been uniformly ready for trial, the Court ordered the defendant to pay the costs of the plaintiff's witnesses during the term as the condition of another continuance.

(26) DEFENDANT made an affidavit, in the usual form, that one Davis was a material witness for him; that he had been summoned and did not attend, etc. But on the other side it being alleged that this cause had been depending three years in the county court, where at length the plaintiff obtained a verdict; that the defendant then appealed to this Court, where the cause had been depending five years; that the plaintiff for the last three years had been uniformly pressing for a trial, and the defendant delaying it under various pretenses; and the act of 1779 being read and insisted on, which directs that where the judge shall be of opinion that the party praying a continuance ought not

to obtain the same without payment of costs, that the judge may require him to pay the costs of that term before granting the continuance and that though afterwards he should eventually prevail, that he should not be allowed such costs in the taxation of costs. The Court in this case, WILLIAMS, J., being on the bench, made such order; and the defendant, before the continuance granted, was required to pay, and did pay, the costs of the attendance of all the plaintiff's witnesses during the term. Some of the bar requesting to know if this was intended to be a general rule for the future, the judge answered, "No—only for cases circumstanced like the present."

See *Park v. Cochran, post*, 178.

HUGHES v. GILES.

A and B both have bills of sale for a horse from a person who had borrowed him for a particular purpose. A, whose bill of sale is the oldest, has him in possession. B by some means gets him from A and sells him to C. A is entitled to recover him of C in the action of trover.

THE case was: A intrusts the horse to B for a particular purpose; B remains at Salisbury some time, and contracts debts with several persons, and gives a bill of sale for the horse to Hughes, and also to one Brem; his sale to Hughes is prior to the date of the bill of sale to Brem. Brem by some means gets possession of the horse from Hughes, who had him, and sells to Giles. And now, amongst other things, it was insisted for Giles that Hughes ought not to have a verdict against him and recover damages, for that a recovery by Hughes, who was not the proprietor, would be no bar to A to hinder him from bringing his action at a future day against Giles, and recovering also. The books indeed say that he who has a special property may recover in this species of action, as in the case of a carrier, bailee, or finder, a sheriff who has seized goods in execution, or the like; but the reason is that those persons are liable over for the goods to a third person, and they are allowed this action in order that they may have it in their power to indemnify themselves by recovering against the wrongdoer that value which they have to pay to the owner; and it is because they are entitled to recover that they are said to have a special property. But surely if the carrier, bailee, etc., voluntarily sell or dispose of the property, they cannot afterwards maintain an action for it. They are estopped by their own act; but yet their sale conveys no prop-

erty, because they had none themselves; and in order to convey an interest or property by sale, the vendor must have the general or absolute property. A special property only enables him to sue a wrongdoer, not to convey the property; because in so doing he commits a breach of trust, unless where he has the property for the purpose of selling it, as in the case of the sheriff, and then what he does is only good by virtue of his authority. That the conveyance of such persons in general conveys no property is proved by this, that if the carrier, bailee, or finder sells it, his vendee is liable to the action of the owner; but in this case B, who sold both to Hughes and Brem, though he is liable to A's action, yet he cannot recover against either of them; because as to him they are neither of them wrongdoers; and surely the plaintiff Hughes cannot be said to have a special property, that comes only by the delegation of the owner, and *potestas delegata non potest delegari.* This is not in the circumstances of a carrier, bailee, etc., or of any of those persons who are liable over by means of a trust; and as there is no such liability over in his case, there is no reason why the law should give him an action to recover against the defendant. If he should not recover, he can never be charged by A. What reason, then, is there to say he ought to recover, when he has not the general property, and when there is no necessity that he should be deemed to have a special one in order to his own indemnification?

WILLIAMS, J. Notwithstanding these arguments, the plaintiff has a right to recovery. Hughes had purchased the property that B had, and was in possession, and is to be considered as having a special property until a better could be shown; and no one but the rightful owner could interfere with his possession, or lawfully deprive him of it. This is an advantage which should not be taken from him by a third person.

Verdict and judgment for plaintiff.

HILLSBORO—APRIL TERM, 1794

ELWICK'S EXECUTORS v. RUSH.

Demand is necessary to sustain the action of detinue, and it must be made by the claimant himself, or by some person for him, and so made known at the time of the demand. Said *arguendo* by the judge, that the statute of limitations begins to run from the time that the plaintiff knew where the negroes were, and that the defendant claimed them as his own, although no demand had been made.

WALLER *v.* BRODDIE.

DETINUE. Plaintiff, by one Tally, proved that Barton, who was a legatee, went with him to Rush, and informed Rush that the negroes mentioned in the declaration were of the estate of Elwick; that he, Barton, was a legatee, or heir of that estate; and that Colonel Taylor was executor and demanded the negroes.

WILLIAMS, J. A demand is necessary to entitle to the action, and it must be made by the plaintiff, or by some one by his authority. Here he did not inform the defendant of his authority at the time of making the demand, or say that he demanded in the name of the plaintiff; Therefore it was not a good demand, and the plaintiff was nonsuited.

NOTE.—In the arguing of this case JUDGE WILLIAMS said the act of limitations would run in detinue, without a demand, if the plaintiff knew where the negroes were, and that they were claimed by defendant as his own, and did not bring suit within the time prescribed in the act; but this he said *arguendo* only. See the case of *Berry v. Pullam, ante*, 16.

NOTE.—The opinion of the judge on the first point of this case is doubted of by Haywood in his note to *Lewis v. Williams, post*, 150, and overruled in an anonymous case, 3 N. C., 136, and *Shepard v. Edwards, ibid.*, 186.

WALLER v. BRODDIE.

Under the act of 1787 a *certiorari* cannot be obtained *in forma pauperis.*

CERTIORARI. The plaintiff, after obtaining the *certiorari* to remove this cause from the court below, into which it had come by appeal from the judgment of a justice of the peace, had removed into South Carolina; and now, upon motion to the Court for that purpose, WILLIAMS, J., upon the bench, it was ordered that unless, by the next term or before, the plaintiff put in sureties for prosecuting this cause and for paying costs in case he fail therein, that this cause shall be dismissed. The judge said upon this occasion that the act of 1787 frequently operated with hardship, and peculiarly so in the case of poor persons who had suffered injuries and were unable to give security; and in some cases the Court, since that act, had permitted such persons to sue *in forma pauperis,* without any such security; but as the act was passed by the Legislature, the Court was bound by it. That the word *writ,* in the act, extended to the case of a *certiorari,* as well as to cases of bills in equity; in which case it had been decided that such security should be given.

STATE v. ————

The act of 1793, authorizing the Attorney-General to take judgment against the receivers of public moneys, by motion, and that their delinquencies should be sufficient notice to them, was declared to be unconstitutional and void by WILLIAMS, J., but was afterwards allowed by MCCAY and ASHE, JJ., ASHE, J., hesitating at first.

AT the last session of the General Assembly it was enacted that judgments might be obtained by the Attorney-General against receivers
(29) of public money, by motion; and that their delinquencies should be sufficient notice to them that they were to be proceeded against; and upon this act the Attorney-General now moved for judgment against several, and produced the act to show how he was authorized so to do.

But WILLIAMS, J., stopped him, saying he could not permit judgments to be taken in that manner; that he conceived the act to be unconstitutional; it was to condemn a man unheard. Bill of Rights, Art. 12, says: "No freeman ought to be taken, imprisoned, or disseised of his freehold, liberties or property, etc., but by the law of the land," and these words mean, according to the course of the common law, which always required the party to be cited, and to have day in Court upon which he might appear and defend himself. Sec. 14 declares that the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable. The ancient mode of trial by jury was that after the defendant was cited, and had pleaded, and the other party had denied his plea, or some part of it, then the point in controversy was submitted to the decision of a jury; but here, though a jury may be sworn, what will it be upon? It will be upon a default taken against the party who does not appear and plead, because he has no knowledge that any proceedings are intended to be had against him; and so in truth it is not a trial by jury according to the ancient mode. The defendant has no opportunity of making any defensive allegations which may be submitted to the decision of a jury; but the jury here are merely to pronounce what is the sum to be recovered, and in this they are to be governed by the report of the Comptroller, which is made evidence against the defendant by another act of the Assembly; so that in reality the jury have nothing to determine on—it is mere form for the sake of which they are to be impaneled. Such a trial is a mere farce. I think the act unconstitutional, and I cannot, as at present advised, give my assent to its being carried into effect. The judges of the land are a branch of the government, and are to administer the constitutional laws, not such as are repugnant to the Constitution. It is their duty to resist an unconstitutional act. In fact, such an act made by the General Assembly, who are deputed only to make laws in conformity to the Constitution, and within the

limits it prescribes, is not any law at all. Whenever the Assembly exceeds the limits of the Constitution, they act without authority, and then their acts are no more binding than the acts of any other (30) assembled body. Suppose, when met together, they should pass an act to continue the Assembly for two years—the Constitution says it shall continue but for one; and suppose in the second year they should pass an act—would the judges be bound to effectuate it? Surely not. No more are they bound to regard an act not made agreeable to the Constitution. I am alone on the bench. I am sorry to be obliged to prevent the execution of an act which the Legislature thought necessary to be passed, and no doubt might be of public utility. But what end is an equivalent for a precedent so dangerous as that where the Constitution is disregarded by the Legislature, and that disregard sanctioned by the judiciary? Where, then, is the safety of the people, or the freedom which the Constitution meant to secure? One precedent begets another, one breach will quickly be succeeded by another, and thus the giving way in the first instance to what seems to be a case of public convenience in fact prepares the way for the total overthrow of the Constitution—the surest palladium of our rights. I cannot consent to it; but the Attorney-General, if he pleases, may again move the subject when we have reflected a little more upon it.

Next day, at the sitting of the Court, Haywood, the Attorney-General, moved the subject again, as follows: The clauses of the Constitution that are objected to the validity of this act are declarations the people thought proper to make of their rights; not against a power they supposed their own representatives might usurp, but against oppression and usurpation in general. The second clause, for instance, could not be intended as a restraint upon the Legislature; it could not be supposed the Legislature would ever attempt to oppose the right of the people to regulate their internal government. It was intended to assert the right of the people against the power of the British King and Parliament, and against all other foreign powers who hereafter might claim a right, under any pretense whatsoever, of interfering with the affairs of this Government; and to serve as a standing and perpetual memento to posterity that the least intermeddling by any foreign power with the internal policy of this Government is an invasion of their privileges. Such, also, is the manifest meaning of section 5. Who were the convention suspicious of when they declared, "That all power of suspending laws, or the execution of laws, by any authority, without the consent (31) of the representatives of the people, is injurious to their rights, and ought not to be exercised"? This is not a restraint upon the legislative power of the Assembly. From the experience of what had hap-

pened in older governments, they apprehended that in the vicissitudes of human affairs some ambitious men might usurp the power of dispensing with laws, or claim the right of exercising such a power. It had been frequently done in that government which they were the most intimately acquainted with, to the great oppression of the people. They also had other reasons. The event of that dangerous war in which they were then engaged was doubtful. In case of an adverse event, they were determined by this solemn declaration that the rights of the people should be proclaimed and handed down to posterity; that this solemn declaration should be a monument of them, to keep the genius of freedom alive, and to impel posterity, by this lesson left them by their ancestors, at some future day to erect again the standard of liberty. This I take to be the true meaning of the Declaration of Rights; and if we attend to the 12th clause, we shall find it was copied almost *verbatim* from the chapter 29 of *Magna Carta,* and of the occasion of which our Bill of Rights were very similar—the struggle of the people against oppression. This clause in both has nearly the same meaning. And then the spirit of this clause is in exact unison with the other clauses, not intended to restrain the Legislature from making the law of the land, but a declaration only that the people are to be governed by no other than the law of the land. *Per legem terrae,* were words used in the charter granted by Henry I., King Stephen, Henry II., King John, and Henry III., whose confirmation seemed finally to give stability to this charter; and this term, in those times, had a certain appropriate meaning which in latter periods came to be a little altered. In the three former of these reigns the term *per legem terrae* was employed in contradistinction to the civil law, then called the *Italian law,* having been lately discovered and adopted in Italy, and which had been, or were then begun to be, introduced in England in exclusion of the laws of Edward the Confessor, or, in other words, in the law of England. Henry I. in his charter promised, among other things, to confirm and observe all the laws of Edward the Confessor. 1 Goldsmith's England, 133 Stephen, his immediate successor, promised a restoration of the laws of Edward the Confessor in his charter. 1 Goldsmith's England, 145. These laws of Edward
(32) the Confessor were the ancient laws, usages, and customs of the different parts of England, collected and digested into one code. 1 Bl. Com., 66; 4 Bl. Com., 405. It appears from the frequent stipulations contained in the charters of these times, promising to observe and restore these laws, that they had been neglected and some other law introduced in their place. Indeed, we are expressly informed of this in the preface to 8 Rep., page 8, where immediately after the author has been speaking of King Stephen's character, he says: "King Stephen forbade by public edict that no man should retain the laws of Italy,

formerly brought into England." In these times, therefore, the term *lex terrae* meant the English law in contradistinction to the laws of Italy, or of any other foreign country. And in like manner in our Constitution, where the Convention are declaring the rights of the people, and use the words of the *Magna Carta* of England, they mean to assert, in general, that the people of North Carolina have a right to be governed by their own laws, and not to be subject to laws made by any foreign power upon earth; in like manner as in the 2d clause they declare that the people of this State ought to have the sole and exclusive right of regulating the internal government and police thereof—by all which they mean to vindicate the sovereignty of this country, and the inherent right of the people thereof to govern themselves. The term *lex terrae,* in the times of Kings John and Henry III., began to have a meaning additional to what it had in the former reigns. These princes were guilty of great abuses under the pretense of prerogative. They had confiscated the estates of many of their subjects; they had exiled and destroyed many, also, by the power of prerogative. It is remarkable that in King John's charter it is stipulated that no freeman shall be taken, or imprisoned, or disseised of his free tenements and liberties, or outlawed, or banished, unless by the legal judgment of his peers, or by the law of the land, and all who suffered otherwise in this and the two former reigns shall be restored to their rights and possessions. I Goldsmith's England, 233. This plainly evinces that the words *per legem terrae,* here spoken of, import an acting by a pretended prerogative against or without the authority of law. 1 Goldsmith's England, 224, 225, 219, 220. And thus the term, *law of the land,* is to be understood in our Constitution, beside the meaning already ascribed to it, to declare that the people of this State are not to be deprived of liberty, property, the benefit of the law, nor exiled from their country, by any power whatsoever acting without or contrary to the established (33) law of the country, or by any proceeding not directed or authorized by that law. The meaning of the words *lex terrae* may, therefore, be thus shortly defined— a law for the people of North Carolina, made or adopted by themselves by the intervention of their own Legislature. This definition excludes the idea of foreign legislation, of royal or executive prerogative, and of usurped power; and leaves the power of inflicting punishments, or rather of passing laws for that purpose, in their own Legislature only. In this sense, the *lex terrae* of North Carolina at present is the whole body of law, composed partly of the common law, partly of customs, partly of the acts of the British Parliament received and enforced here, and partly of the acts passed by our own Legislature. 2 Inst., 46. If this body of laws is not the *lex terrae* designated in our Bill of Rights, but the common law only, then the common law is immut-

able, and the Assembly cannot alter it by any legislative act. Should the Assembly in any instance attempt to alter any rule of property, with respect to its transmission, descent, etc., so as to entitle any other person to it than is entitled by the common law, he that is entitled by the rule of the common law may say, "No man is to be deprived of his property or rights, but according to the law of the land, or the common law." If an act not punishable by the common law, or punishable only in a smaller degree, should be rendered penal, or more penal than it was by the common law, by any legislative act, the party to be affected by it might say, "I am not to be imprisoned, or exiled, or disseised of my freehold, or in any manner destroyed, but according to the law of the land, or, in other words, the common law." It is easy to see into what a labyrinth of confusion this would lead us. It would contradict the very spirit of the Constitution, which in establishing a republican form of government must have been inevitably led to foresee the great alteration that the new state of things would make necessary in the great fabric of the common law; they must have intended such changes therein by the legislative power as would more perfectly adapt it to the genius of that species of government, many of the maxims of which are so diametrically opposed to all those of the common law which have any view towards the support of the kingly power or that of the nobles. Such a construction would destroy all legislative power whatsoever, except that of making laws in addition to the common law, and for cases not pro-
(34) vided for by that law. It would lop off the whole body of the statute law at one stroke, and leave us in the most miserable condition that can well be imagined. All capital punishments ordained by the statute law for murder, rape, arson, etc., would be done away, and every malignant passion of the human heart let loose to roam through the land, unbridled by fear, and free from all manner of restraint except those very ineffectual ones the common law imposes. This cannot, therefore, be the true meaning of the term *law of the land,* made use of in the Bill of Rights. It must be that which I have already contended for, or something very similar to it; and if that be the true meaning of the term, how do these words at all imply that the Legislature have not a right to pass such an act as that which is the subject of our present discussion? Do they not, on the other hand, prove that as this is neither the act of any foreign Legislature nor the arbitrary edict of any usurped power acting independent of the people, but the act of their representatives assembled for the purpose of legislation, and to consult together for the public welfare, is such an act as ought to be respected? Does it follow, because the Constitution hath declared the right of the people to be exempted from all foreign jurisdiction, and from all power acting independently of the laws, that their own representatives cannot

make a law which is useful and necessary for the public good? There is no part of this Constitution that directs the process by which a suit shall be instituted, or carried on, and the Legislature are therefore free to direct what mode of proceeding in courts they think proper; and accordingly, in a great variety of instances, both in England after *Magna Carta* and in this country since the Constitution, judgments have been rendered against the defendants without their having had any previous actual notice, and the judges have never intimated a doubt of the constitutionality of these proceedings. I will instance in the case of statute merchant, statute staple, and recognizance in England. There, after the recognition and day of payment arrives, no process issues against the debtor to show whether he has paid or obtained a discharge, but execution issues without any further notice. I will instance in the case of outlawries: a man's whole property may be taken away, and yet he never may have had any actual notice of his appearance in court being required. Both before and since the Revolution in this country, and until 1783, bonds, called judgment bonds, were in use here, and many judgments were taken upon them, after the formation of this (35) Constitution, without any notice at all to the defendants, and the judges did not say it was an unconstitutional proceeding; and I suppose it would have been practiced to this day had it not been for the legislative interposition in 1783. See Rev. Laws, ch. 188. The necessity for this interposition proves that it was an inconvenience the judiciary could not remedy upon the ground of its unconstitutionality. Had it been such, as it was a public evil, the judges would most certainly have opposed to it the principles of the Constitution. I would instance in the case of the attachment laws: the property of an absentee is seized, judgment is obtained against him, and his property sold, when perhaps, and very probably, too, he has not the least intimation of it. The attachment law is a law of public convenience, but yet it is liable to all the objections which have been made to this act for taking judgments. Without any previous notice actually given to the defendant, a judgment by default is taken, and the jury is sworn to ascertain the *quantum* of damages, the defendant not being present, and indeed knowing nothing of it. Yet the validity of the attachment law was never questioned by the judges, nor did they, that I ever heard, express the least reluctance to its execution. If a bill in equity is filed, and the defendant cannot be found within the State, to be served with process, it is published in the *Gazette* that such a bill is filed, and if the party should not appear by the prefixed day, though he hath no actual notice, yet a decree is passed against him. If a judgment is obtained against the principal, and two *sci fa's* against the bail are returned *nihil,* here a judgment passes against the bail, though he has no actual notice of

this proceeding, and of course no opportunity to plead in his defense a matter to be submitted to a jury. All the confiscation laws lately passed in this country, what are they but proceedings to take away the property of absentees, who perhaps knew nothing of these intended proceedings? If to proceed to judgment before actual notice be given to the defendant be against this clause of the Constitution, how hath it happened that so many proceedings of this nature have been established by the uniform decisions and practice of the judiciary? It may be fairly inferred that all these are so many proofs that such a proceeding is not unconstitutional, and that the Legislature may enact such laws. But to obviate these objections in every shape, let it be granted, for the sake of
(36) argument, that the phrase *lex terrae* in our Bill of Rights really means the common law, and that the common law requires notice to be given to the defendant before the plaintiff can proceed to judgment it also allows an exception to the rule when the defendant voluntarily renounces that privilege by the nature of his contract. It is one of the maxims of this very common law that *Quilibet potest renunciare juri pro se introducto.* And maxims, being the foundations of the common law, when they are once declared by the judges, are held equal in point of authority and force to acts of Parliament. Wood's Inst., 6. The maxim that *Quilibet potest, etc.,* extends even to cases where the life of the renouncer is concerned; the accessory by renouncing his right not to be tried before the conviction of the principal may put himself upon his trial, and be hanged for it. 2 Inst., 501, 183. If the rule of renunciation extends thus far, it will hardly be contended that a man may not renounce some lesser advantage, such as the having of actual notice of the State being about to proceed to judgment against him. But if this point be established, yet the question recoils—have the receivers of public moneys in this State agreed to renounce this privilege? To prove that they have, we have nothing more to do than to refer to the several acts of the Legislature for the better security of the revenue, 1784, Rev. Laws, ch. 219. The Legislature directed judgments to be taken against delinquents by the Treasurer, in the name of the Governor, and declared that such judgments should be as valid as if the usual processes of law had been observed; the same, in effect, is repeated in 1787, Rev. Laws, ch. 269. Now, surely, every officer who hath received his appointment since 22 October, 1784, must be deemed to have taken it under the condition prescribed by these laws, and must in the very act of accepting the office have consented that in case of delinquency he would be subject to the operation of these laws; and is he not, then, as much bound as in the case of the judgment before mentioned? And I would remark that these acts of 1784 and 1787 were so far from being viewed as unconstitutional by the judiciary at first, that no scruple was ever entertained with respect

to them, from the time of passing the act of 1784 until some time in 1788, but in this interval judgments for the public were uniformly entered as the act directs, without actual notice to the defendant. The records of this court will verify the assertion, and the gentleman concerned for the State at that time can certify the same thing. [Mr. Moore was this gentleman, who was then present.] (37)

In 1788 a judgment was moved for, and the Court for the first time inquired if the defendant had been served with notice of the motion, and being answered in the negative, refused to give judgment. This determination was followed by a practice of giving notice, productive of enormous expense to the State.

In order to prevent this expense for the future, and to leave no doubt in the mind of the Court with respect to the will of the Legislature upon this subject, they have unequivocally expressed it in the most pointed terms in their act of the last session. Since 1784 there have been nine Assemblies of this State. The most of them have approved, some have amended this part of the revenue laws, and none has ever thought proper to repeal it. Would so many Assemblies, each of whom has done something upon the revenue business, have suffered those clauses to have remained unrepealed had they believed them to be unconstitutional? Are these legislative bodies, charged and entrusted by their countrymen with their most important concerns, to be all regarded as men who either could not discover the unconstitutionality of a law or were willing to countenance it? What interest have they in the continuance of an unconstitutional act more than the rest of their fellow-citizens? Had the clauses been repugnant to the Constitution, they would undoubtedly have repealed them. The Legislature, though frequently blamed, are undoubtedly in general entitled to this commendation, that they seek the good of their country; with men elected as they are, and for such a period, it can hardly be otherwise.

In doubtful cases the *argumentum ab inconvenienti* is of weight, and I conceive it may be properly introduced on the present occasion. If the inconvenience of declaring this act to be unconstitutional be considerable, I presume this consideration will not be entirely overlooked by the Court. It was to avoid great public inconvenience that this act was passed. The expense of sending a messenger to all parts of the State to give notice to delinquents cost the State annually not less than £1,000; and besides this, the parties well knowing it to be the duty of the Treasurer to take judgment after the first day of October in each year, either go out of the neighborhood or conceal themselves about the time when the messenger is expected, so that after traveling a great distance he frequently returns without seeing any of them; but he must still be recompensed for his services out of the public coffers. Sometimes he is fortu-

(38) nate enough to serve the notice upon one of several parties to a contract, and immediately some of the family are sent off to give notice to the others that the State messenger is about; the consequence of which is that he cannot see the others; and thus he returns, having served one only, who perhaps of himself is not able to satisfy the demand. Frequently the county courts take seventeen, or eighteen, or twenty sureties, in order to indemnify themselves. The messenger must serve all these with notices; to serve notice upon some of them only will not do; if they are to be charged jointly, they must all be proceeded against; and most frequently for the reason just mentioned, it is improper to proceed against any one of them alone. The public debtors also frequently move away into other states, so that notice cannot be served upon them; and if they have left any property which might be attached, the Treasurer, or his messenger, knows not where it is; nor do they generally receive any intelligence of the danger of the public debt till private creditors have swept away the whole property.

All these evils, so detrimental to the public, and which the Legislature have manifested so much anxiety at different times to remove, will still be continued if the Court should adhere to its opinion of yesterday; and, moreover, by such a decision the Legislature will be utterly deprived of every power competent to its remedy. It will be in vain for them to pass any act similar to the present, or to adopt any other mode but that of the old time, which has prevailed since the year 1788. At this time there are but a few hundred pounds in the Treasury, and the situation of public affairs renders it probable that the Legislature may be convened before the day of its usual meeting. How are they to be supported? Should the public emergencies require the advancement of any considerable sum, which is not improbable, how is it to be obtained if the public judgments are not now taken? Or how is the Treasury to be supplied for the expenses of the next meeting of the Assembly?

I do not urge the latter arguments as properly possessing any such force as should have an influence in the decisions of a constitutional question, but only as reasons why we should carefully examine the question now before us before we proceed to reject this act entirely. While we are considering the permanent and remote consequences of such a decision, the immediate and transient one should not entirely be overlooked, especially as it may put a stop to the affairs of Government for some time, at this critical period when the approach of war is univer-
(39) sally expected.

It has been said, amongst other objections to the clause now in question, that this is a retrospective law. Does any part of our Constitution prohibit the passing of a retrospective law? It certainly does

not. The objection is grounded upon section 24 of our Bill of Rights, which prohibits the passing of an *ex post facto law*. This prohibition is essential to freedom and the safety of individuals. This is a declaration that no power whatsoever shall be entrusted with the arbitrary disposal of the lives of our citizens. If the whole people should become prejudiced against a fellow-citizen, he is not to fall a sacrifice to popular caprice or resentment. The representatives of the people shall not condemn him by any act of attainder, nor yet by declaring any former act of his to be now capitally criminal, or indeed more criminal, than it was at the time of its commission. Examples of popular frenzy exhibited in the ancient republics against some of the people's best friends pointed to the propriety of this regulation; and this clause, I admit, is in restraint of legislative power in this particular. This indeed prohibits the passing of a retrospective law so far as it magnifies the criminality of a former action, but leaves the Legislature free to pass all others and without such a power no government could exist for any considerable length of time without experiencing great mischiefs. The exercise of such a power has been found frequently necessary here since the Revolution, and divers retrospective acts which the Legislature have passed have been carried into execution and sanctioned by the judiciary. See Iredell's Rev. 276, sec. 24; 289, 318, sec. 100; 386, sec. 4; 424, 454, 463, 487, 489, sec. 5; 573, secs. 6, 7, 9, 10, 11, 16. The fact is, the affairs of Government will sometimes, nay, often, require the exercise of this power. These instances may serve to show the necessity of it. And it is not like an *ex post facto* retrospective law any way incompatible with the safety of a free people. The Convention foresaw the necessity there would be for sometimes enacting such laws, and therefore they have been careful to word section 24 so as not to exclude the power of passing a retrospective law, not falling within the description of an *ex post facto* law. The Convention meant to leave it with the Legislature to pass such laws when the public convenience required it. I will not stir this point any further, but conclude with expressing my hope that the Court will suffer us to take judgment.

WILLIAMS, J., still adhered to his opinion of yesterday, giving (40) nearly the same reasons he then gave.

At Halifax Court, a few days after, the Attorney-General again moved the Court, consisting of ASHE and MACAY, JJ., and stated to them the arguments which had been used at Hillsboro. After hearing him the Court took time to advise for a few days; when the matter being moved again, ASHE, J., gave the opinion of the Court, saying he and MACAY, J., had conferred together; that for himself he had had very considerable doubts, but that MACAY, J., was very clear in his opinion that the judgments might be taken, and had given such strong reasons that his (ASHE,

J's.) objections were vanquished, and therefore that the Attorney-General might proceed—but that yet he did not very well like it. So the judgments were taken.

See *Bank v. Taylor*, 4 N. C., 20; *S. c.*, 6 N. C., 266.

Cited: Hoke v. Henderson, 15 N. C., 16; *Worth v. Cox,* 89 N. C., 48; *Wilson v. Jordan,* 124 N. C., 715.

QUINTON v. COURTNEY.

A common innkeeper is liable for any loss which his guest may sustain in his property, except it be by the agency of a servant or companion of the guest himself, or when the guest is admitted upon terms when the inn is full. The possession of money gives the property of it as to any disposition which the possessor may make of it.

CASE. Courtney was a tavern-keeper, and Quinton, a traveler, who had saddle-bags in which were $218. Upon alighting at the inn, he gave the bags to a servant of the tavern-keeper, but did not inform either the servant or the tavern-keeper that money was in the bags. These bags were placed in the bar-room, and were afterwards found on the lot, cut open, and the money gone. The declaration was in these words, to wit:

HILLSBORO DISTRICT. } *ss.* April Term, 1793.
NORTH CAROLINA. }

David Quinton complains of William Courtney, Jr., in custody, etc., for that whereas according to the laws in this State ordinary keepers who keep ordinaries to lodge travelers therein who abide in the same, are bound to keep their goods and chattels being within these ordinaries, day and night, without diminution or loss, so that no loss or damage might happen to any such traveler or travelers, by reason of the defect of due and proper care by such ordinary keepers or their servants in these ordinaries; and the said David, on the 13th day of January, in the year of our Lord 1793, in the county of Orange, in the district of Hillsboro, being lodged in the ordinary of the said William, had a pair of leather saddle-bags, in which were contained the sum of two hundred and eighteen Spanish milled dollars, of the value of one hundred and nine pounds of the current money of this State, in that ordinary, and delivered the same saddle-bags and money to the said William, then and there to be safely kept; nevertheless the said William, knowing the said bags and money to be within his said ordinary, he, the said William, on the same day and year first aforesaid, in the county and district aforesaid, did so

negligently keep the said bags and money that the said bags and money, for want of safe-keeping thereof by the said William and his servants, were lost, stolen and carried away from and out of the said ordinary; whereby the said David hath totally lost and become deprived from thence hitherto of the said bags and money, and of the whole use, profit, benefit and value thereof; and the said William hath not delivered to the said David the said bags and money, although the said William, on the 14th day of January, in the year of our Lord 1793, in the county aforesaid, was thereto requested, but hitherto hath and still doth refuse so to do, or to make him any satisfaction for the same; whereby the said David saith he is injured and endamaged to (41) the value of.....pounds, and therefore he brings this suit, etc.

And whereas, also, the said David afterwards, to wit, on the same day and year aforesaid, in the county and district aforesaid, being lodged in the dwelling-house of the said William for a certain time, therefor to be paid to the said William, had one other pair of leather saddle-bags in which were contained other two hundred and eighteen Spanish milled dollars, of the value of one hundred and nine pounds of the current money of this State, within the same dwelling-house then and there being, and delivered the same to the said William, then and there to be safely kept for a certain time, received, to wit, the sum of.....to be paid by the said David when the said William for the safe-keeping thereof; nevertheless the said William, well knowing the premises, on the same day and year last aforesaid, in the county and district aforesaid, so negligently kept the said bags and money that the said bags and money, for want of such due care as aforesaid, were lost from and out of the said dwelling-house and possession of him, the said William; whereby the said David hath totally lost and been defrauded of the said bags and money, and of the whole use, profit, value, and benefit thereof, and the said William hath not delivered to the said David the said bags and money, although the said William on the 14th of January, in the year of our Lord 1793, in the county aforesaid, was thereto required, but hitherto hath refused, and still doth refuse so to do or to make any satisfaction for the same; whereby the said David saith he is injured and endamaged to the value of.....pounds, and therefore he brings this suit, etc.

And whereas, also, the said William afterwards, to wit, on the aforesaid 13th day of January, in the year of our Lord 1793, in the county and district aforesaid, had undertaken safely and securely to keep in his custody one other pair of leather saddlebags, containing within the same the sum of two hundred and eighteen pieces of silver, coined money, commonly called Spanish milled dollars, of the value of one hundred and nine pounds of the current money of this State, being the bags and money of the said David, and to restore and redeliver the same to the said David whenever thereafter the said David should request him so to do, and for that purpose had received the said bags and money into his custody; the same William, his servants and agents afterwards, to wit, on the same day and year last aforesaid, in the county and district aforesaid, the aforesaid bags and money so negligently and carelessly kept for want of due care of the aforesaid William, his servants and agents, the aforesaid bags and money then and there were stolen and carried away by some person unknown, from and out of the custody and keeping of the aforesaid William; and by reason thereof the aforesaid David the said bags and money, and the whole value, profit and benefit thereof, hath totally lost and

been deprived of from thence hitherto; and the said William hath not restored or redelivered the said bags and money to the said David, although the said William afterwards, to wit, on the 14th day of January, in the year aforesaid, in the county and district aforesaid, by the said David was thereto required, but hitherto hath refused and still doth refuse so to do, or to make any satisfaction for the same, whereby the said David saith he is injured and endamaged to the value of.....pounds, and therefore he hath brought this suit, etc.

(42) And the general issue was pleaded.

Haywood, for the plaintiff, insisted that ordinary-keepers were liable for the loss of goods of their guests committed to their care, unless the loss happens by the default of the guest himself. Inns were instituted for the benefit of travelers, that they might know where to go when traveling amongst strangers, without the danger of being robbed or defrauded of their effects; and to say that the innkeeper should not be liable for the loss of his guest's goods would in effect destroy one of the principal ends of the institution of inns; and if it should be required to prove fraud or neglect upon the innkeeper before a guest could recover for the loss of his effects, this would destroy the utility of the institution in a great measure; for frequently a stranger would not have it in his power to prove the circumstances. There is no inconvenience on the other hand comparable to this. The innkeeper has nothing to do but to be careful —if he takes sufficient care, in general the goods will not be lost. The same answer may be given to the objection that the guest did not inform him of the contents of the bags. If he takes sufficient care, a thing of great value will no sooner be lost than a thing of small value; and he ought to use this care in respect to all his guests, and all the effects they have with them, be the value great or small; and therefore there is no necessity that he should be informed of the contents or value of the things confided to his care; and he cited 8 Rep., 33; Bac. Ab., 182 Buller, 73, of ed. 1778; Cro. Jac., 224.

Mr. Moore, for the defendant, insisted in general that he could not be made liable but by means of his neglect. He cited *Coggs v. Bernard* and many other authorities; and he argued that the laws of England are not in force here any further than the circumstances of the country make them necessary; that these kinds of frauds which the laws of England were so careful to guard against are not frequently practiced here, and that therefore there is no necessity for the adoption of this hard law.

WILLIAMS, J. (the only judge on this circuit): The law is as laid down in 8 Rep. ep., 33, *Coley's case,* and the innkeeper is liable for the goods lost, unless when the guest is robbed by a companion of his own, and in some few other cases mentioned in *Coley's case,* and in 3 Bac. Ab.,

183, as where the guest is informed that the house is full, but the traveler insists upon staying, and says he will shift. And in order to support the action it is sufficient for the plaintiff to prove that the defendant kept a common ordinary, that he was a guest, that the goods were brought to the inn, and were in the care of the defendant, and (43) were lost.

The plaintiff under this charge had a verdict for £109 and judgment.

NOTE BY REPORTER.—In this case it appeared the plaintiff had received this money of a Mr. O'Brien, of Tarboro, for the purpose of purchasing certificates, which he covenanted in writing to deliver to O'Brien, or to return him the money; and it was insisted upon by Mr. Moore that the money in this case was the property of O'Brien, and that Quinton only had it as his agent or servant; and that therefore the injury, if any, had been done to O'Brien and not to Quinton; and that O'Brien ought to have brought the action. But *e contra* it was insisted that, strictly speaking, there is no such thing as property in money, or, that if there was, the possession always gave the property to the possessor, and that an action which affirms property in the plaintiff could not be brought for it. L. Ev., 262; Co. Litt., 286, b; Salk., 284.

WILLIAMS, J. Whoever has the possession of money has the property of it; he may use it and dispose of it as he pleases, without and even against the consent and directions of him who entrusted him with it; and whoever receives the money from the trustee, though he knows it was entrusted to him for a different purpose, cannot be compelled to restore it, and the agent who abuses his trust in this respect is only liable to damage by means of his contract.

Cited: Clary v. Allison, post, 112; *Holstein v. Phillips,* 146 N. C., 369.

STATE v. JOYCE.

A sheriff's sale can be made, though only one bidder is present.

THIS was an indictment against the sheriff of Rockingham for a misdemeanor in making a false return to an execution. It appeared in evidence that the execution against one Nathaniel Williams, for levying a certain sum to satisfy Robinson Mumford, the plaintiff, was put into his hands to be executed in due time; that he levied on property more than sufficient to satisfy the debt and costs, and appointed a day of sale, at which time there was but one bidder; and he believing, as having been so advised, that a sale could not legally be made unless there were two bidders at least, returned upon the execution that he had not sold for want of bidders. For this he was indicted, and now, upon the trial, it

was ruled clearly by WILLIAMS, J., that one bidder at a sheriff's sale is sufficient; saying if it were not so, no execution could ever be satisfied where the defendant could procure a friend to attend and bid more than the property was worth at the first bid. He was convicted and fined.

See *S. v. Johnson, post,* 293.

Cited: McLeod v. McCall, 48 N. C., 89.

HALIFAX—APRIL TERM, 1794

DEN ON DEM. OF BAKER v. WEBB.

1. MACAY, J. The statute 5 George II., ch. 7, provides for the sale of land for debts, and the making them liable for all just debts in the hands of the heir, but does not alter the distinction between real and personal estate. Real descends to the heirs, personal goes to the executors; the lands in hands of the heirs cannot be affected by a judgment against the executors, no more than the personal estate in the hands of the executors can be affected by a judgment against the heirs. But per ASHE, J. The statute meant to make lands liable to the payment of debts; and as to the payment of debts, are to be proceeded against as personal chattels. They descend to the heir chargeable with all such debts as may be recovered against the executors. WILLIAMS, J., on a previous case expressed an opinion similar to MACAY'S.

2. If a deed be lost and its former existence proved, a copy, and if no copy, parol evidence may be given of its contents.

TRESPASS in ejectment, wherein the plaintiff deduced his title as follows: This land was granted 2 April, 1741, by the Earl Gran-
(44) ville to Benjamin McKinnie; by him 17 October, 1745, to William Kinchen; by him 19 October, 1746, to David Hopper; by him 12 September, 1747, to one Carter; on 3 September, 1760, it was conveyed by one Hays to Dewey, which recites a deed from Carter to Hays; by Dewey to Stuart, 14 February, 1765; by Stuart to Joseph Long, 20 July, 1768; and by Long to Blake Baker, the elder, 16 December, 1768; which Blake Baker, the elder, was the father of the lessor of the plaintiff, to whom the plaintiff is heir at law; and the said Blake Baker, the elder, was possessed and died possessed in 1769.

It was further proven on the part of the plaintiff that Carter was in possession for seven years and upwards, and also that after his possession

the said Hays was in possession for a great length of time before he sold to Dewey, and used the land by getting timber off it; that Dewey was possessed two or three years, and that Long was possessed for some time; and that during the time of Hay's possession Carter frequently declared that he had conveyed it to Hays.

The defendant on his part set up a title as follows: That one James McNeil obtained a judgment for debt and costs against the executors of Blake Baker, the elder, and took out execution thereon, tested in April, 1772, which execution commanded the sheriff that he should levy of the goods and chattels, lands and tenements in the hands of the executors, etc. And that by virtue thereof the sheriff sold the lands in question, and executed a deed for the same bearing date 22 February, 1773, to Joseph Montfort who by his will devised that his executors should sell; who sold accordingly to one Wilburn, who sold to J. Webb, who died leaving the defendant his heir at law. The judgment was obtained in April, 1772, and two pleas had been pleaded by the executors, to wit, *plene administravit* and *non assumpsit,* and the jury gave their verdict upon the other plea only, and there was a suggestion on record that there were lands, etc. The deed to Montfort, when produced, described the land thus: "Known by the name of Hays, formerly given by James Carter to James Hays."

Haywood for plaintiff. (45)
W. R. Davie for defendant. (60)

MACAY, J. The whole weight of this labored case seems reducible to this question, What is the true construction of 5 Geo. II., ch. 7? I am of opinion this act meant to provide for two things: the sale of lands for debts, and the making them liable to all just debts in the hands of the heir; and I am of opinion that since the act of Geo. II. the same distinctions between real and personal property is to be kept up as before, and the lands, upon the death of an ancestor, descend to the heir, and personal chattels go to the executor as before; and lands in the hands of an heir are no more to be affected by an action or judgment against the executor than the personal estate in the hands of an executor are to be affected by a judgment against the heir. Their interests are totally distinct and separate.

As to the plaintiff's title, if a deed be lost, and the existence of it be proven, a copy, or if no copy, parol evidence may be given of the contents. If these proofs be satisfactory, they are to be received. The jury have heard some evidence for both these purposes. It is for them to consider of the weight it deserves to have; if satisfactory to them, they will find the plaintiff's title complete.

ASHE, J. I am of opinion that 5 Geo. II., ch. 7, meant to make lands liable to the payment of debts, and so far as regards the payment of debts, to have them proceeded against as personal chattels; and that they descend to the heir chargeable with all such just debts as shall be recovered against the executor. Hundreds of tracts of land have been sold since that act upon the supposition that the law was such.

The plaintiff had a verdict and judgment.

NOTE BY REPORTER.—Upon a case circumstanced exactly as this, tried at Halifax three or four terms ago, between Baker and Ashe, WILLIAMS, J., delivered the same opinion, or to the like effect, as MACAY, J., now gave. And the plaintiff recovered upon the same grounds as the plaintiff in this (72) case now recovered. MACAY, J., being then upon the bench, but not giving an express opinion of himself—having now given it, whereby the opinion of a majority of the judges upon this point being obtained, it is supposed it may now be received and cited as law. Accordingly this case, as being of great importance, and affecting perhaps much real property in this country, has been reported here.

See Act of 1714, Rev., ch. 226; 1789, Rev., ch. 311; 1791, Rev., ch. 352; 1806, Rev., ch. 704. And see *Spaight v. Wade*, 6 N. C., 295, and *Temple v. Jones*, 7 N. C., 579, which are constructions upon the two first mentioned acts. The design of all these enactments was that after it had been judicially ascertained that the personal representatives had no assets, or not sufficient to satisfy the plaintiff's demand, the heir or devisee should have notice by *sci. fa.* to come in and contest the fact of lands descended, or might make up a collateral issue with the personal representatives and have the question of assets again inquired into. The heirs or devisees, if they sold the land before action brought or process sued out against them, became personally liable for the value of the lands; but if the lands continued in the hands of the heirs or devisees, or were fraudulently sold, the lands themselves only were liable to the execution. The lands, if *bona fide* sold before the *sci. fa.*, it seems would not be liable, and in such case the creditor must look to the personal responsibility of the heir or devisee.

See, also, *Badger v. Daniel*, 79 N. C., 372.

Cited: Tarkington v. Alexander, 19 N. C., 94 *Bevers v. Park*, 88 N. C., 459; *Speer v. James*, 94 N. C., 41; *Cowles v. Hardin*, 91 N. C., 233.

DEN ON THE DEMISE OF ROBERT BELL v. GREEN HILL.

Fraud is not barely to be suggested, but must be proved. A judgment by default upon a tobacco bond is not final. A judgment (final) binds lands from the time of its rendition, as to purchasers from the defendant, but not so as to defeat the title of one purchasing under the execution of a subsequent judgment. As between creditors, it is not the first judgment, but the first execution, that gives the preference.

BELL *v.* HILL.

EJECTMENT, upon the trial of which, at this term, the following facts appeared in evidence, viz.:

In February, 1780, and for a long time preceding, William Massey was seized in fee, in the county of Franklin, of the premises in question; and in that month the administrator of Thomas Bell, deceased, brought suit in the county court of Franklin for the recovery of a sum of money due from the said William Massey to the said Thomas Bell in his lifetime; and in the said term had a judgment by default, which was continued from term to term till June Term, 1783, at which term they obtained a final judgment; but before the issuing of any writ of execution, in the month of August, 1783, the defendant Massey obtained an injunction against the judgment and execution, which was dissolved on 18 April, 1789; and afterwards a *venditioni exponas* was issued 24 July, 1789, upon which the sheriff sold the land to the lessor of the plaintiff, and executed a deed to him dated 5 February, 1790.

On the other side it appeared that in June Term, 1783, in the same county court, one Devany brought suit against the same William Massey, upon a bond for 5,000 pounds weight of tobacco, and had judgment by default; and in September Term, 1783, he obtained a final judgment; whereupon execution issued, and on 22 June, 1784, the sheriff sold to Green Hill, he having express notice at the time of the purchase, of the judgment obtained by Bell's administrators, and being warned by the administrator not to purchase; and the sheriff executed a deed to him, dated 22 September, 1784. The defendant also made title another way: on 2 July, 1782, William Massey conveyed to his son, James Massey, and he in the month of June, 1784, to Hill; and in June, 1784, the deed from Massey to his son was registered; but Massey, the father, continued in possession until after the sale to Hill, and then moved away.

This James Massey was not a person of any substantial property (73) at that time; sometimes he had and sometimes he had not property; what he had was brought from foreign places, and it was frequently claimed and recovered by better owners. In September or October, 1784, he offered to buy land of one of the witnesses, and offered Hill's bond in payment, upon which there was an endorsement of £200 paid to William Massey; and twelve months before that time the witness said it was talked of that William Massey had sold to his son; and another witness said that some time in 1784 James Massey drove beef from Hill's and delivered them to the old man, and late in 1784, or in 1785, let him have a horse; and that in 1784 James had several negroes. The original deed from William Massey to James was not produced, but the copy only —but one Joel Parish, whose name was subscribed as a witness, said he

had frequently endeavored to recollect whether he ever did attest such a deed, and he could not remember he ever did, or ever knew of such a conveyance.

This was the evidence on both sides.

Haywood for the plaintiff.
Davie for defendant.

ASHE, J., had retired from the bench before the arguments were closed.

MACAY, J. This is a dispute of great consequence, and it is proper it should be well settled, and I very much regret the necessity I find myself under of deciding alone. However, ASHE, J., who hath just left the bench, conferred with me before he went away, and accords in the opinion I am about to deliver.

(He then stated the case, and proceeded thus:)

(95) As to the deed from old Massey to James, which is argued to be fraudulent, and therefore void. Fraud will certainly vitiate any transaction into which it enters. But it is a rule of law that fraud must be proven—it will not be sufficient to suggest it only. For my part, I cannot perceive any fraud in that transaction; but the jury have heard the evidence, and will draw their own conclusions. With respect to what is argued by the counsel for the defendant, that the judgment by default upon the tobacco bond, in June Term, 1783, binds equally with the final judgment of Bell's administrators. The taking a judgment for want of a defense on such a bond is not a final judgment —it is an interlocutory proceeding only. Before any execution can issue, a jury must be called in to assess the value, and then there must be another judgment entered to complete it. We are also agreed that a judgment binds the lands from the time it is pronounced, but in this wise only—it hinders the debtor from disposing of the land himself; but if a *fi. fa.* issues upon a subsequent judgment, and comes to the hand of the sheriff, and he sells the lands, the title of the vendee under such execution cannot ever afterwards be defeated—it is valid to every purpose. Were the law not so, it would be the most dangerous thing in the world to purchase lands at an execution sale. Dormant judgments might be revived a long time afterwards, and the innocent vendee evicted, without the possibility of ever regaining the purchase money. Who can he apply to for it? It is true, there was such a case decided at Morganton as that cited at the bar; but there the land was purchased by the plaintiff himself, as well as I can remember the case. So there was not the danger to purchasers, involved in that instance, that I have mentioned before. As

between creditor and creditor, it is not the first judgment, but the first execution that gives the preference.

So the defendant had a verdict and judgment.

Cited: S. v. Magness, post, 100; *Hoke v. Henderson,* 14 N. C., 18; *Ricks v. Blount,* 15 N. C., 133; *Smith v. Spencer,* 25 N. C., 267; *Dobson v. Prather,* 41 N. C., 35; *Isler v. Moore,* 67 N. C., 76; *Woodley v. Gilliam, ibid.,* 239; *Hadley v. Nash,* 69 N. C., 164; *Phillips v. Johnson,* 77 N. C., 228.

PETE'S EXECUTORS v. WEBB'S ADMINISTRATORS.

A bond to pay £100 Virginia money in North Carolina currency at a certain ratio justifies a verdict for the value of the North Carolina money agreed to be paid.

BOND given in 1775, conditioned for the payment of £100 Virginia money, to be paid in Proc. at 33⅓ per cent. The jury gave a verdict for as much of the present currency as was equivalent to Virginia money.

Per Curiam. This is no more than a bond for the payment of £133, 6 s., 8 d. of the currency of this country. One hundred pounds Virginia money to be paid in Proc. at 33⅓ per cent is a currency bond.

So they set aside the verdict and granted a new trial; but the jury at the next term gave the same verdict as the former jury gave—which was surely right—and Davie did not move again for a new trial.

GREER v. SHEPHERD.

A plea *puis darrein continuance* is a waiver of all former pleas, and an admission of the declaration.

TRESPASS, for assault and battery on the person of the plaintiff.

There was a plea *puis darrein* continuance—that he had recovered in an action against another defendant, who was a party to the same trespass, and had judgment against him; and neither plaintiff nor defendant had witnesses now ready to prove the trespass, or that it was the same trespass for which damages had before been recovered.

Haywood for plaintiff.
Davie contra.

(97)

ASHE and MACAY, JJ. A plea *pius darrien continuance* is a waiver of all former pleas, and an admission of the declaration; and the defendant not being ready to prove his plea, plaintiff had a verdict and judgment for one penny.

See *McDaniel v. Tate, post*, 453.

CARTER'S EXECUTORS v. RUTLAND.

Negroes sent with a daughter upon her marriage or with a son-in-law and daughter is *prima facie* evidence of a gift; and if the property remains any length of time with them, very strong proof will be required to show that only a loan, and not a gift, was intended.

THE following facts were stated by the parties as a *case agreed,* and submitted to a jury on the issue *non detinet,* under the direction of the court as to the law in this case of *Lazarus Carter, Executor of Isaac Carter v. Shadrach Rutland.*

Shadrach Rutland and Parthena Carter, daughter of Isaac Carter, Hertford County, were married 12 November, 1775. About the middle of 1776 a negro woman, Nann, with a young child, Saul, was sent by Mr. Carter to said Shadrach and Parthena. Nann's issue since is Bob, Hastie, Tibbie and Lydia. Some time in 1781 said Shadrach and Parthena were on a visit at Mr. Carter's, and they were directed to take a negro boy, Peter, home with them. Again, in 1782 or 1783, said Shadrach and Parthena were on a visit at Mr. Carter's, and they were directed to take a negro girl, Maggie, home with them. Maggy's issue is Homer, Penny, Violet and Willis.

Mrs. Parthena Rutland died in August, 1788, and Isaac Carter died 8 July, 1792.

It was also admitted on the trial that Isaac Carter had bequeathed these negroes, by his last will, to his grandchildren by Parthena, and the executor had made the usual demand, and that the defendant was in possession.

Per Curiam. When a man sends property with his daughter upon her marriage, or to his son-in-law and daughter any short time after the marriage, it is to be presumed *prima facie* that the property is (98) given absolutely in advancement of his daughter; and when the property is permitted to remain in the possession of the son-in-law for a considerable length of time, as in this case, it will be necessary

to prove very clearly that the property was only lent by the father, and that it was expressly and notoriously understood not to be a gift at the time. The peace of families and the security of creditors are greatly concerned in the law being thus settled. Every transaction in human life ought to be considered under its ordinary circumstances. These will sufficiently express the intention of the parties, and generally more unequivocally than the appointed solemnities of the law. This property was given in the usual manner—that is, sent with them on their going to housekeeping, as it is called, or sent to them as soon as the parent could make the necessary arrangements in his farm or family for that purpose.

Under this charge, there was a verdict and judgment for the defendant.

Cited: Parker v. Phillips, post, 452; *Torrence v. Graham,* 18 N. C., 288; *Hollowell v. Skinner,* 26 N. C., 172; *S. v. Bethune,* 30 N. C., 146; *Overby v. Harris,* 38 N. C., 257.

MORGAN—SEPTEMBER TERM, 1794

STEELE v. ANTHONY.

A grant from the State without the seal appendant, offered in evidence. WILLIAMS, J., thought that the deed was destroyed by the seal's being torn off. But ASHE, J., was clearly of opinion that where an interest once passed and vested in the grantee, the destruction of the deed could not affect the interest before passed by it.

EJECTMENT. Plaintiff, in making out his title, produced a grant from the State without the seal appendant, but it had been registered in the register's office. It was signed by the Governor and countersigned by the Secretary.

It was objected by Avery and Henderson that the seal being not appendant, the grant is nullified, and therefore it cannot be produced in evidence; in like manner, if the seal of a bond be torn off, the bond cannot be read in evidence.

Haywood, e contra:—When the seal of a bond is torn off, the presumption is that it was done in order to cancel the bond, and the existence of the debt depends upon that of the bond; when the bond becomes extinct in point of law, the debt is also extinct; but in cases where an

interest passes and vests in the grantee by the operation of the deed, though that deed be afterward destroyed, that will not revest the interest thus passed.

WILLIAMS, J., cited 2 Bl. Com., 295, and thought that in every case where the seal was torn off, the deed was destroyed, and inclined to be of opinion that the paper offered could not be read as the grant; but ASHE, J., was clearly of the contrary opinion, he said, where an interest once passed and vested in the grantee, the destruction of the deed afterwards could not affect the interest before passed by it; and that this was not like the case of a bond, where the debt must be presumed to be extinct where the instrument which evidenced it appeared to want one of its most essential constituents; for when the seal is torn from a bond, the conclusion of law is that the bond was meant thereby to be canceled. They agreed to reserve it as a point for further discussion, but the jury found for the defendant upon other grounds.

STATE v. MAGNISS.

Recognizances bind lands from the time at which they are entered into, but a *fi. fa.* only from its teste.

IN this case the defendant, who had been bail for his son, applied to the Court, upon an affidavit filed, to be relieved from the forfeiture of his recognizance, upon which judgment final had been entered under the Act of 1788, ch. 32, sec. 2, and to be permitted to enter into new recognizance to attend as a witness at the next term; but it was said he was about to move out of the State.

Whereupon the Attorney-General opposed this application. He said his former recognizance ought not to be remitted, for in that case the State would have no hold at all upon him; for though he now had lands, he might sell them and move away, and they were not liable to the recognizance, but only from the time the *fi. fa.* issued against them; and for this he cited *Bell v. Hill,* determined at Halifax Superior Court, *ante,* 72. He further said if the *fi. fa.* could have no retrospect in a case where it issued upon a judgment, it could have none where it issued upon a recognizance forfeited; and that a recognizance had no greater force to bind the land than a judgment had, for that each were mentioned in the same manner in the statute, 13 Edw. I., ch., 18, which introduced the *elegit.*

ASHE, J., made no observations. (100)

WILLIAMS, J. The decision at Halifax (*Bell v. Hill, ante,* 72), was a proper one. In England, where the lands are bound from the judgment, judgments are entered in the King's Bench or Common Pleas only. Thither all persons may resort with a certainty of finding whether or not such a judgment as would affect lands had been entered up; but in this country judgments are not capable of creating such notoriety. No man knows where to search for a judgment that he suspects may be probably taken. The Superior Courts, the county courts, and justices of the peace out of court may pass judgments to affect land, and no one knows where to search for them. It is very proper, therefore, in this country, the lands should be bound in case of judgments but from the time of the teste of the *fi. fa.* only; but recognizances remain as they were, because the land is made liable expressly by the words of the recognizance—"to be levied of my goods and chattels, lands and tenements, upon condition," etc. Now, when this condition is not complied with, it is the same thing as if he had expressly bound his land to pay that sum absolutely and unconditionally on the day of the recognizance made.

ASHE, J., assented.

See *Bell v. Hill,* and note thereto, *ante,* 72; *Burton v. Murphy,* 4 N. C., 684; *S. c.,* 6 N. C., 339; *Hoke v. Henderson,* 14 N. C., 12.

Cited: Burton v. Murphey, 6 N. C., 341.

STATE v. BROWN.

A horse stolen in one State or Territory and carried into another will not make it a felony in the latter State. A special verdict which states the *felonious* taking in one State, and the taking continued into another, cannot be supported as a felonious taking in the latter.

INDICTMENT for stealing a horse in the county of BURKE. The jury found specially that the felony was committed in the territory south of the Ohio, and that the trespass was continued into this State, where he was taken.

The Attorney-General cited Hale's Pl. Cr., 507, 508, and Haw. P. C., 90, and he insisted that as the asportation into another county is in law a new taking in this latter county, so a taking out of this State, and an

asportation into it, is a new taking here, and so the prisoner is guilty of felony here. He cited a case which he had from the information of Mr. Avery, who was now present and affirmed it, that while he was Attorney-General, a man was tried at Hillsboro who had stolen a horse in the county of Mecklenburg, in Virginia, and brought it into this State; and this appearing upon evidence a doubt was conceived whether he was guilty of felony against the law of this State; but H. H. P. C. being cited and relied upon, the Court upon deliberation were of opinion it was a felony punishable by the laws of this State, and the man was hanged.

(101) ASHE, J. If this man were tried and condemned here, or tried and acquitted here, would the sentence of this Court be pleadable in bar to an indictment preferred against him in the territory south of the Ohio? I think it would not; because the offense against the laws of this State and the offense against the laws of that country are distinct; and satisfaction made for the offense committed against this State is no satisfaction for the offense committed against the laws there. The consequences, then, of trying this man here and condemning him will be that if a man steals a horse in one part of the continent and goes with him to another, through several States, the culprit, according to the several laws of each State, being guilty of a taking in each, may be cropped in one, branded and whipped in another; imprisoned in a third, and hanged in a fourth; and all for one and the same offense. This is against natural justice, and therefore I cannot believe it to be law. When a man steals in this State, and carries the thing stolen into another county, he is guilty of the same offense, and punishable in the same degree and by the same law in the latter as in the former county, and is punishable but once; if convicted or acquitted in the latter county, he may plead *autre faits* convict or acquit of the same felony before, when indicted in the former; which shows that the law considers the felony that was committed in the first, otherwise it could not be pleaded as the same in the case before mentioned. Now, if the felony in this State was the same felony that was committed in the territory south of the Ohio, then it is a felony against the laws of the territory, and punishable there by pillory, branding and whipping, and not by death. It would be strange, then, to say he should be punished here with death for an offense against the laws of another State which punishes only with infamy.

This is my opinion for the reason of the case as it now occurs to me, and I am confirmed in it by looking into Hawkins Pleas of the Crown, where after stating the same doctrine as it is stated in H. H. P. C., relative to the asportation being a new taking, he says: "But if a piracy be committed on the sea, and the goods be brought to land, the pirate

cannot be indicted as a felon, because the original felony was not within the cognizance of the common law. And why? Because not committed within the extent of those limits that are subject to the law of England." So here, this offense has not been committed within the territory subject to the laws of this State, and therefore the prisoner is not liable to be punished by these laws. I think we cannot pass judgment upon him, however worthy he may be of death.

I cannot remember the case cited by Mr. Avery, and I think (102) he must be mistaken.

Also, for another reason we cannot pass judgment against the prisoner. This special verdict states at first that the felony was originally committed in the territory south of the Ohio; then that the taking was continued into this State; but it does not state the felonious taking to be continued into this State, and therefore we cannot say that the taking spoken of by the jury was a felonious taking, and without a felonious taking the prisoner cannot be guilty of the crime laid in the indictment.

WILLIAMS, J. I do not remember the case cited by Mr. AVERY. If there was such a case, it was so adjudged on account of some peculiar circumstances now forgotten; but at present I concur *in omnibus* with ASHE, J.

So there was judgment for the prisoner, and he was discharged.

Cited: S. v. Buchanan, 130 N. C., 662; *S. v. Hall,* 114 N. C., 912; *S. v. Cutshall,* 110 N. C., 541.

STATE v. ALLEN TWITTY.

If an outhouse be so near the dwelling-house that it is used with the dwelling-house, as appurtenant to it, burglary may be committed in it. In this case the outhouse was 17½ feet from the dwelling-house.

INDICTMENT for a burglary in the mansion-house of the prosecutor, one Haslip, and taking from thence a cask containing twenty gallons of brandy, etc.

Upon evidence it appeared that Twitty broke open, in the night-time, a little outhouse, about 17½ feet from the dwelling-house, and took out the brandy, etc., and it was insisted on the part of the prisoner that this was not burglary. The indictment lays it to be a mansion-house; but it has been determined that where the jury find the house to be separated

from the dwelling-house only 8 feet, and that the breaking and entering was in that house, it is not burglary; and cited an authority from Leach, who has a case to that effect.

E contra, it was urged that if the outhouse be so near the dwelling-house that it is used together with the dwelling-house, as appurtenant to it, that it is burglary to break it in the night-time with intent to commit a felony; and it is not necessary for this purpose that it should be enclosed with the dwelling-house in the same enclosure. If it stands within the curtilage it is sufficient—the meaning of which term in law is, a piece of ground, either enclosed or not, that is commonly used with the dwelling-house. Jacob verb. Curtilage; 6 Rep., 64. And to prove that if the house stands within the curtilage it is the subject of burglary, he cited Bl. Com., 225; 1 H. H. P. C., 558, 559; H. P. C., 104.

As to the case cited from Leach, he said it was so adjudged on
(103) account of the special finding. It must of necessity be stated in every indictment of burglary that it was committed in a mansion-house; and outhouses included within the curtilage, according to the definition of that word just given, may be considered by the jury, upon evidence given to them, to be parts and parcels of the mansion-house; and may conclude and say upon such evidence that the offense was committed within the mansion-house as laid in the indictment—like as in trover, when it appears in evidence the defendant was possessed of the goods declared for, and that there was a demand by the plaintiff and a refusal on the part of the defendant, the jury are warranted in concluding and finding there was a conversion; but in the one case, if they do not expressly find it was a dwelling-house, but an outhouse only, and in the other, if they do not expressly find a conversion, but possession, demand and refusal only, the Court cannot conclude in the one case that it was a dwelling-house, nor in the other, that there was a conversion. The Court are not empowered to draw any conclusion from facts specially proved or stated in a special verdict; that solely belongs to the province of the jury. Therefore, the case cited from Leach, where the jury find it to be an outhouse, separated from the dwelling-house, and do not expressly say, as they ought, that it was a mansion-house, the Court must take it, as the jury have stated it, to be an outhouse only, and not a mansion-house, as stated in the indictment; and of course they cannot say it was burglary, for that must be committed in a mansion-house. This is the reason why that case was so adjudged, and not because to steal out of such an house is not burglary; and so that case is not at all repugnant to what is laid down in the authors I have cited, but is perfectly consistent with what they have stated.

Of this opinion were the Court; and both ASHE and WILLIAMS, JJ., charged the jury accordingly; but yet they found him not guilty of the

burglary, but guilty of the larceny only; and he was burnt in the hand and discharged.

See *S. v. Wilson, post,* 242; *S. v. Langford,* 12 N. C., 253.

Cited: S. v. Whit, 130 N. C., 352.

STATE v. WEBB.

Depositions taken in the absence of a criminal shall not be read against him.

PLEASANT WEBB was indicted for horse-stealing, and upon the trial the Attorney-General offered to give in evidence the deposition of one Young, to whom he had sold the horse in South Carolina but a very short time after the horse was stolen; and cited in support of this attempt, 2 H. H. P. C., 284; H. P. C., 429; Bull., 252; La. Ev., 140, 142; 3 Term, 713.

(104)

ASHE and WILLIAMS, JJ. These authorities do not say that depositions taken in the absence of the prisoner shall be read, and our act of Assembly, 1715, ch. 16, clearly implies the depositions to be read must be taken in his presence. It is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross-examine; and though it be insisted that the act intended to make an exception, in this instance, to the rule of the common law, yet the act has not expressly said so, and we will not, by implication, derogate from the salutory rules established by the common law.

So the deposition was rejected.

SALISBURY—SEPTEMBER TERM, 1794

SAMUEL BAILEY'S ADMINISTRATORS v. ROBERT COCHRAN'S ADMINISTRATOR.

Former administrators removed, and another appointed, but not made a party to this suit. The latter administrator will not be allowed to plead anything to this suit; and the former administrators cannot plead the repeal of their letters after the first term since their repeal. An account settled and signed by one administrator is binding upon all, and will bear interest from the time it was signed.

MURPHY *v.* WORK.

IN this case it was moved on the part of the defendant that he might be at liberty to plead *puis darrein continuance;* that a judgment had been obtained at the last term of this Court against the administrators of Cochran for a sum which was more than sufficient to exhaust all the assets. It was objected on the part of the plaintiff that this suit was brought against two persons who at that time were the administrators, but who long since had been removed by the county court of Cumberland, and the present administrator appointed in their stead, but that this suit was never against the latter administrator; and that this matter which is now sought to be pleaded had never been pleaded by the former administrators; and that as the present administrator was not any party to this suit, he could not plead the plea moved for.

PER CURIAM. This latter administrator cannot plead anything to the suit; and as to the former administrators, they cannot now plead the repeal of their letters of administration. They should have done so at the first term after the repeal; but several terms of this Court have intervened since the repeal, and they now come too late.

The plaintiff produced an account stated and signed by one of the former administrators, and insisted that by act of 1786, ch. 4, sec. 3, he was entitled to interest on the balance of the account from the time of its being signed; and to this, upon argument, the Court assented, saying the act of one shall bind both. And the plaintiff had a verdict accordingly.

Cited: Puffer v. Lucas, 101 N. C., 285.

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(105)

JAMES MURPHY v. ALEXANDER WORK.

One can be convicted for perjury upon a deposition if he is proven to have made it and it is false, though it is not signed.

THE defendant on his part offered in evidence the deposition of a Mrs. Work, which appeared not to have been signed by her. Objected that a deposition thus circumstanced cannot be read, because if the party had sworn falsely, she could not be indicted for it; or, if indicted, she could not be convicted. The deposition not being signed by her could not be given in evidence against her. To support this position was cited Bull. *Nisi Prius,* 230.

WILLIAMS, J. (ASHE, J., assenting): In case of an indictment for perjury for a false oath in making a deposition, it is most proper that the party's name should be signed, in order that she may be more easily identified by proof of her handwriting. Yet if she can be otherwise proved to have sworn to the deposition, she may be convicted. Therefore this deposition should be received, though it be not signed by the deponent. *Vide* 1 P. Wil., 414; 2 Eq. C. Ab., 417, *contra,* and the deposition was read accordingly.

NOTE.—In *S. v. Ransome, ante,* 1, in which it was held that a person might be indicted upon an affidavit not signed. See the next case.

Cited: Rutherford v. Nelson, post, 106; *Boggs v. Mining Co.,* 162 N. C., 394.

RUTHERFORD v. NELSON.

It is usual to read depositions, where it appears that they have been read in the court below, unless it can be shown that there is an irregularity in them; and the want of deponent's signature is not sufficient to reject them.

THE defendant offered to read the deposition of one Fishburne, which had been before read in the county court upon the trial of this cause there; but Fishburne had not signed the deposition. It was opposed by the counsel for the plaintiff as being irregular. He said he had understood it had been usual to read depositions in the Superior Court, upon the mere circumstance of its appearing the same had been read in the court below; but he had also understood that this rule was not an universal one, and that such depositions had most generally been read in the Superior Court by consent of parties, and it certainly could not be universally proper, for it might be that the very cause of the appeal was the improper admission of depositions in the court below. Here there was an irregularity, the deponent not having signed his name, which he took to be necessary, inasmuch as without it he could not be well prosecuted for perjury, in case of falsity.

ASHE and WILLIAMS, JJ. It has been usual to read depositions where it appears they have been read in the court below; though perhaps this rule might not be a proper one in case the party opposing the reading could show an irregularity to the Court here. But he does not show it in the present instance; he only alleges the deposition was not signed by the deponent. But we have already decided (*Murphy v.*

(106) *Work, ante,* 105) that the want of the deponent's signature is not sufficient to prevent the reading his deposition, if it be certified by the justice or commissioner to have been sworn to; for we must give credit to this certificate so far as to believe that the party was sworn. So the deposition was read.

Cited: Boggs v. Mining Co., 162 N. C., 394.

REYNOLDS v. FLINN.

The act of 1777, Rev., ch. 114, voiding titles, etc., means void as to the state which proceeds to avoid by *scire facias.*

EJECTMENT. The plaintiff produced a State grant for the lands in controversy, and rested his case upon it. The defendant alleged and offered to prove that one Murphy had entered this land in the entry-taker's office; that it had been sold as Murphy's property by execution, and under that sale came as Murphy's property by execution, and under that sale came to the defendant; that afterwards Reynolds, the plaintiff, having a knowledge of these circumstances, procured the entry to be transferred, as it is called in his name, that is, to have the name of the original enterer erased and his own inserted in its place. He did this with intent to defeat the interest of the purchaser, and then secretly obtained his State grant.

WILLIAMS, J. I know of no law by which lands only entered, and not appropriated, and not appropriated by the execution of a grant, can be sold. The enterer has no title or property till his grant is completed.

Counsel for the defendant: Whatever the party himself may sell and dispose of, the sheriff may sell and dispose of for him by execution to satisfy his debts, and by act 1779, ch. 4, sec. 4, it is enacted: "That in case of the death of any person, who heretofore has made an entry of land, or who hereafter shall make an entry, pending the same, or before the making out the grant, his or their heirs or assigns shall have a fee simple in the premises, although the grant shall be made in the name of the decedent." By the word *assigns* here used it is plainly implied he may sell and dispose of the interest he has acquired by the entry, and that such sale and disposition shall vest a fee in the purchaser upon the event of the grant issuing after the death of the enterer in his name; and

if it be true that the sheriff may sell by the authority of an execution all such property or subjects of property as the debtor himself can sell, this clause authorizes the sale of lands which a debtor has entered; and then it follows that the law should protect such sale with as much ease and by the same rules that it protects sales of other subjects of property.

ASHE and WILLIAMS, JJ. Here the plaintiff has a State grant, and it would be of the most dangerous consequences to avoid it by parol testimony. It is true that the act of 1777, ch. 1, sec. 9, says that every right, title, claim, etc., obtained in fraud, elusion, or evasion of (107) the premises of that act shall be deemed void; but the meaning is, it shall be void as to the State, who may proceed to void it by *sci. fa.* and having a judgment founded on that on record expressly against it—not that it shall be voided upon evidence in an ejectment by an individual citizen. It is true, also, that the act further directs that a party preferring a subsequent claim shall give bond to prosecute the claim with effect, etc., as has been stated at the bar; but as this case is offered to be proven, that would be an act to be done by the defendant, when he found that Reynolds had procured the entry to be transferred in his name. The defendant should then have gone to the office and caused a *caveat* to be entered, and should have given the bond that the act directs.

It has been argued that the defendant was a purchaser, and that the plaintiff having this grant with an intention to defeat that purchase, it was void under the act against conveyances to defraud purchasers; but that act was intended to void the deeds of private individuals made for such purposes, not deeds granted by the State. The law will not suppose the State concerned with one individual to defraud another; and indeed it is much to be doubted whether an entry can be sold by execution. And if it cannot, then the defendant is not a purchaser within the meaning of that act. There are many things a man himself may sell, which cannot be sold by execution. If the defendant hath a judgment for a sum of money, the sheriff cannot sell it upon a *fi. fa.*, and besides the act cited does not authorize a sale by the enterer. It directs when the grant from the State comes out in the name of the decedent, the assign shall have a fee simple in it. It may mean an assignee in law as a devisee, etc. The act does not say that in all cases the enterer may sell, and that his sale shall be good.

WILLIAMS, J., to the jury: This is so clear a case that the jury need not go a foot from the bar.

Yet they did retire, and after some time found, according to his direction, for the plaintiff. *Quere de hoc.*

Cited: Strother v. Cathey, 5 N. C., 165; *Tyrrell v. Mooney, ib.,* 402; *Waugh v. Richardson,* 30 N. C., 471; *Lovingood v. Burges,* 44 N. C., 407; *Brown v. Brown,* 103 N. C., 216; *Doon v. Lumber Co.,* 128 N. C., 88.

BROWN, CAMPBELL & COMPANY v. DANIEL CLARY AND JAMES CRAIG, ADMINISTRATORS OF DAVID CRAIG.

Under the act of 1789, Rev., ch. 814, sec. 4, the action is to be brought against both the survivor and the administrator of the deceased joint obligor.

AN action had been brought against these defendants jointly, for a joint debt contracted by the defendant Clary and the intestate, David Craig, with the plaintiffs, pursuant to the act of 1789, ch. 57, sec. 5. "And whereas it is a rule of common law that in case of the death of a joint obligor the debt can never survive against his heirs, executors
(108) or administrators, which rule is frequently injurious and oppressive to the surviving obligor or obligors; to remedy which, be it enacted, that from and after the passing of this act, in case of the death of one or more joint obligor or obligors, the joint debt or contract shall and may survive against the heirs, executors and administrators of the deceased obligor or obligors, as well as against the survivor or survivors; and where all the obligors shall die, the debt or contract shall survive against the heirs, executors and administrators of all the said joint obligors; and in all cases of joint obligations or assumptions of copartners or others, entered into after the passing of this act, suits may be brought and prosecuted in the same manner as if such obligations or assumptions were joint and several; any law, usage or custom to the contrary notwithstanding." And now the jury being impaneled, and before any evidence given, it was objected by Henderson, for the defendants, that the act had not so far altered the rule of the common law as to allow the bringing a suit against the survivor and the representatives of the deceased together.

WILLIAMS, J. (ASHE, J., assenting): The inconvenience before this act was, that if a man had contracted a debt and procured another to become jointly bound with him as his surety, and then died, the debt survived against the surety only. So where there were several joint contractors, each of whom were equally benefited by the contract, if one died, the whole debt fell upon the other; and the act expresses that for the relief of the survivor it was made. This it proposes to do by making

them all equally contributable in the first instance. This produces equality and justice immediately, and prevents circuity and multiplicity of actions—for as the rule was at the common law, the survivor paid all in the first instance, and then was put to another suit to get contribution from the estates of the deceased; but now all this is effected by suing them both together. Besides, when the debt is first contracted it is joint, and now it does not become several upon one by the death of the other, but as a joint debt lies upon the representatives. Immediately upon the death of the deceased they instantly step into his place, sustaining the same burden that he did. Then how does the debt become several? Not by any part of this law; and surely the plaintiff cannot by suing severally upon a joint cause of action make it to become several by that means. Moreover, it was the relief of the survivor, not the benefit of the obligee, that this act sought for—but it is not (111) an equitable relief to put it in the power of the plaintiff to exonerate him entirely, and throw the whole burden upon the estate of deceased, or *vice versa*. No just reason can be assigned why it should lie upon the estate of the deceased wholly any more than upon the survivor, or the reverse. As to the difficulty suggested, that no judgment can be entered up in any regular form, the court is always bound to give their judgment according to law; and if there is no precedent to be found conformable to the new law, the court must form one that will be so. The action is well enough brought.

Cited: *Davis v. Wilkinson, post,* 336; *Smith v. Fagan,* 13 N. C., 302.

DANIEL CLARY v. ALLISON.

Whoever has the possession of money has the property of it. Money deposited by one person to be paid to another upon a contingency cannot be recovered by that other, but must be sued for by the person who makes the deposit.

A WRIT was taken out against Allison, returnable to the county court of ROWAN, and he was arrested upon it, and in order to procure Yarborough to become his bail he deposited in his hands a very considerable sum of money, and took a note in writing from Yarborough, in which he promised to pay the money to Governor Blount upon the event of Yarborough's releasement from his suretyship for Allison. This writing acknowledged the money to have been received of Allison. The plaintiff in the suit was nonsuited for want of a declaration in the county court,

and immediately commenced his suit again by way of original attachment, in which Yarborough was summoned as a garnishee, and upon his oath of garnishment stated the foregoing facts. This latter action was brought to trial in the county court, and appealed from this Court.

And now the cause coming on, it was objected for Allison, that by the tenure of the writing subscribed by Yarborough the money in his hands on the event that had taken place belonged to Governor Blount; and that Yarborough was liable to pay to him, not to Allison; and should it now be condemned as Allison's, Governor Blount, being no party to this suit, nor bound by any decision made upon it, might sue Yarborough and recover notwithstanding.

E contra, for the plaintiff, it was argued that whoever is in the possession of money is the proprietor, and especially if he claim to be the proprietor for his own purposes; that as to the writing making it to be Governor Blount's, there was nothing in it—that writing is a promise to Allison, upon a consideration proceeding from him (namely, his depositing the money), to pay to Governor Blount; and if the promise be broken, the action for the breach must be brought by Allison;
(112) that before the passing of the act of Q. Anne, stat. 3 and 4, ch. 9, and our own act of Assembly 1762, ch. 9, the plaintiff could not declare upon a promissory note; and these acts only enable the holder to declare upon such notes as are rendered negotiable by them, not upon notes not negotiable as a note at this day for the delivery of a specific article of tobacco, pork, etc.; and no notes are negotiable by these acts but such as are independent of any contingency; but here, as the time of making this note, it depended upon a contingency whether the money mentioned in it would ever become payable to Governor Blount, and if it is not a negotiable note at the time of its making, it can never after become so by any *ex post facto* circumstance.

PER CURIAM. Allison was possessed of this money and used it as his own, and therefore he must be taken to have been the proprietor. Whoever is in possession of money and undertakes to dispose of it is in law the proprietor.

WILLIAMS, J. This very point came in controversy at the last term of Hillsboro Court in *Quinton v. Courtney,* or *Quintoch v. Courtney, ante,* 40, and was directed as we are now deciding this question.

PER CURIAM. Perhaps it would be very difficult for Governor Blount to support an action upon the promise contained in this writing, for want of being able to show a consideration. So the plaintiff recovered.

STATE v. IRWIN.

Malice aforethought is express or to be implied from circumstances. Intent to maim or disfigure may likewise be implied from circumstances; and it is not necessary to prove antecedent grudges, threatenings, or an express design. Confessions before a justice of the peace may be admitted in evidence, although not reduced into writing.

THE defendant was indicted, for that he, on such a day and place, made an assault on one Joshua Coffee, and of his malice aforethought struck and put out his right eye with an intent to maim and disfigure, against the form of the act of Assembly, which is in these words, to wit: "If any person or persons shall of malice aforethought unlawfully cut out or disable the tongue or put out the eye of any person, with intent to maim or disfigure, the person or persons so offending, their counselors, abettors and aides, knowing of and privy to the offense, shall for the first offense," etc., and then directs the punishment, making the second offense felony without benefit of clergy. The second clause is in these words: "If any person or persons shall on purpose unlawfully cut or slit the nose, bite or cut off a nose or lip, bite or cut off an ear, or disable any limb or member of any other person, with intent to murder, or to maim, or disfigure such person, in every such case the person or persons so offending, being thereof lawfully convicted, shall be imprisoned for the space of six months, and fined at the discretion of the court before whom such offense shall be tried." 1791, ch. 8, secs. 1 and 2. (113)

PER CURIAM. Malice aforethought is express or implied, and it may be implied from the circumstance of the defendant's striking with such an instrument as is likely to produce great bodily harm to the person stricken, and from its being done without sufficient provocation. Also, the intention to maim or disfigure may be implied from the circumstances; and it is by no means necessary to prove antecedent grudges or threatenings, or an express design.

In this case, upon the trial, the Attorney-General called upon a witness to swear to a confession made before him by the defendant when he came before him to be examined; and Mr. Moore, of counsel for the defendant, insisted that such confession could not be given in evidence. He said a confession before a private individual may be given in evidence, but when it is made before a justice of the peace, as in the present case, it is his duty, whether it be for felony or a misdemeanor, to take the examination in writing; and that this is intended as well for the benefit of the prisoner as the State, to the end that his confession, being reduced to writing, when it is made by an officer entrusted by the public in whom

confidence is reposed, may not afterwards be liable to misrepresentation in the giving parol testimony of it; and he cited Leach, the last case, and the case of the *King v. Jacobs* in the same book.

E contra, it was insisted for the State that the practice both here and in England a long time previous to these cited cases hath been not to admit parol testimony where the examinations of the prisoner were reduced into writing; for then, according to the rule of evidence in all cases, that would not be the best testimony the party had it in his power to produce; and it was an absurdity to say, as the cases cited did, that a confession made in the presence of an individual not engaged by duty to be attentive might be given in evidence, and yet the same confession made before a justice, whose business it was to examine carefully, shall not.

PER CURIAM. The practice in this country always hath been to receive such evidence, and we see no good reason to break through it. There is certainly an impropriety in saying that evidence may be received of a confession made before a private man, and that the same confession made before a justice shall not, because he hath omitted to perform his duty. This would put it in the power of a justice to make the confession evidence or not, at his election, and is a power the (114) law never meant to give him. The act is only directory, and if the justice should not do his duty in the obeying it, that shall not be of so much prejudice to the State that the evidence shall be lost by it. So the evidence was admitted. Section 3, Co. Inst., 62, where malice prepense in cutting out the tongue, or putting out an eye, is thus defined—a voluntarily and of set purpose, though it be done upon a sudden occasion; for if it be voluntary, the law implieth malice.

See *S. v. Evans, post,* 281.

Cited: S. v. Parish, 44 N. C., 241; *S. v. Suggs,* 89 N. C., 530.

HOUSER v. REYNOLDS.

From the day of the date, and from the date, signifying the same thing; and, according to the intent, are either inclusive or exclusive.

EJECTMENT. At the last term of this Court this ejectment came on to be tried, and the jury were impaneled and charged; but before any evidence given, Mr. Williams, for the defendant, took an exception to the

form of the declaration, which stated the demise to have been made on the 15th day of September, in the year of our Lord one thousand seven hundred and ninety-one, to have and to hold from the said fifteenth day of September, for and during the term of five years; and that afterwards, to wit, on the same fifteenth day of September, in the year aforesaid, the casual ejector entered and ousted the plaintiff, who had entered on that day by virtue of the said lease. The exception was, that the plaintiff had entered and was ousted before the commencement of his lease. He argued that the words, "from the date or henceforth," are inclusive of the day; but "from the day of the date" are exclusive, and cited Co. Litt., 46; Bull., 105, 106, and many other old cases.

For the plaintiff were cited *Pugh v. Duke of Leeds,* reported by Cowper, and Runnington on Eject., 85.

WILLIAMS, J., was then of opinion, after a very lengthy argument on both sides, that the words "from the day of the date," both according to the true acceptation and more especially according to the legal meaning, are exclusive of the day, and, consequently, that the ouster was before the plaintiffs' title commenced, and nonsuited plaintiff. But next day he granted a new trial, that the plaintiff might obtain a rule to amend so as to bring on the argument again at the ensuing term, when there would be more judges present, before whom the point might undergo a thorough examination and become settled. And now, at this term, the counsel for the plaintiff informed the Court he was ready on the part of the plaintiff to proceed to the trial of this cause, but as an objection had been taken to the declaration, which, if valid, and not to be gotten over either by amendment or by some other means, would render it useless for the plaintiff to proceed any further, he desired to have the opinion of the Court upon it; whereupon (115) they directed it to be argued.

Counsel for the plaintiff insisted that the demise was well laid in the declaration, and commenced on 15 September, 1791; the words "from the fifteenth day of September," or "from the day of the date," were inclusive or exclusive according to the subject-matter, and would be interpreted either one or the other as would best answer the intent of the parties—*ut res magis valeat quam pereat;* and this point was so settled in *Pugh v. Duke of Leeds,* reported by Cowper, and recognized by Runnington, 85; and though formerly, as many of the old cases will prove, these words in leases were held to be exclusive of the day, yet the rule has been established of late as being incompatible with reason and good sense.

E contra, it was argued that *Pugh v. Duke of Leeds* was an exception to the general rule of law formed by the Court in that instance to get

over the piece of manifest injustice that would have been operated by adhering strictly to the old rule.

Curia advisari, and after some days delivered their opinions:

(116) WILLIAMS, J. I was present at the last term, and I was then very strongly of opinion that "from the day of the date" was exclusive; but I have since altered that opinion. In law there is no fraction of a day. Date signifies the day on which an instrument is delivered; and to say "from the date" is the same thing as to say "from the day of the date," and "from the date" is inclusive. "From henceforth" is inclusive—but it can only mean from this day when the instrument is delivered. Therefore, "from henceforth," "from the date," and "from the day of the date" must all mean the same thing; and the first of them is admitted on all hands, to be inclusive.

ASHE, J. *From,* is either inclusive or exclusive, as intended by the party at the time of making it. From such a town to such a town, in respect of distance, must mean inclusive; otherwise, in the computation of distance, the space that these towns occupy will not be computed at all. It is so used in holy writ, "From everlasting to everlasting thou art God." So, also, in poetry,

> "Great Jove laughs from his imperial throne—
> To hear mortals boast of prowess not their own."

Moreover, the case cited from Cowper was intended to form a general rule, and to settle the law for the future, and is peculiarly recognized in Runnington as settling the law in cases in ejectment, and establishing the ancient distinction between the terms "from the date" and "from the day of the date."

PER CURIAM. The declaration is sufficient.

NOTE BY REPORTER.—In the argument of this case it was argued that the words coming after the "*Scilicet,*" where the ouster is described, should be rejected, and the word "afterwards" only retained. In which case it would read thus: "to have and to hold from the said 15th day of September, for and during the term of five years, and afterwards the casual ejector entered," omitting the words, *to wit,* "on the same fifteenth day of September, in the year aforesaid"; and for this were cited *Bull. Nisi Prius,* 106. [Cro. Jac., 96,] and some cases from *Espinasse;* and also, that omissions in a declaration in ejectment are amendable—and authorities were cited to this point. But the Court being of opinion for the first point made in the argument, they gave no opinion on these.

HAMILTON v. DENT.

Words in an action of slander bear that significance which they have in common parlance. Therefore, to say one has sworn false in court implies malice, and, also in this country, must mean such a court as has power to administer an oath; and it is therefore actionable.

ACTION for words in which the declaration stated that the defendant maliciously spoke of the plaintiff these words: "You swore false in two particulars in one oath in court"; then it went on, and (117) that afterwards, to wit, the same day and year, he spoke these other words: "He swore false in two particulars in one oath in court," meaning the county court of Guilford, which is a court of record. Upon the general issue pleaded, the jury found generally for the plaintiff, and assessed his damage to £60; and thereupon Moore, for the defendant, moved in arrest of judgment, and assigned these as his principal reasons, to wit, that the words in the first count are not actionable, and that those in the second are not laid to be spoken maliciously or with any ill motive. There were other reasons assigned, but he seemed to rely upon these only, and these reasons come on now to be argued.

E contra, it was argued that the rule as to actions for slander is considerably changed at this day from what it was formerly. In ancient times there were two rules which principally governed these (118) actions, namely, that words were to be taken in *meliori sensu;* and; secondly, that they must be such as if true the plaintiff was liable to be punished criminally. As to the first of these rules it is now exploded; and as to the second, if the words are such as according to common acceptation are expressive of a charge that would render a man liable to punishment, the action will now lie; and even where the words are defamatory, though not containing a criminal charge, an action hath been held to lie. It was anciently the policy of the law to discourage actions for slander—*ad obviendum malitae hominum,* as the old books expressed it; but in modern times the action has been encouraged to prevent breaches of the peace. But even according to the ancient authorities, this action would lie for such words as are stated in the declaration, much more will it lie by the modern authorities.

Curia advisari vult. And now, on the last day of the term, they gave judgment for the plaintiff.

ASHE, J. According to the old authorities, words are to be taken *in meliori sensu,* to discourage actions for slander; but now the rule is changed, and they are to be taken to have that signification which they bear in common parlance; and taking them in that sense, in the present case, they clearly import a charge of perjury.

WILLIAMS, J. The old authorities say that the words spoken must be such as impute a crime punishable, yet there are many of these old cases where actions of slander have been maintained without the assistance of this rule—as to say of a young lady, "You went to such a place to drop your stink"; and, besides, the old authorities cited on the part of the defendant go to this, that if the words were foresworn in such a court, mentioning it, and that appears to be such a court as could administer an oath, it sufficiently implied a charge of perjury to support the action. But if they only charged him with being foresworn in court, they would not support the action. The reason of this difference is that in England there are many courts which have no power to administer an oath, and if an oath should be administered, and the party swear falsely, it was not perjury according to the authorities cited from 4 Bl. Com., 136; 1 Haw. P. C., 172, and the court would not intend the speaker of
(121) the words meant such a court as could lawfully administer an oath, when he had not expressly named such an one; because another rule was, that words were to be taken *in meliori sensu.* But these reasons will not apply here. There are no courts in this country (of course, none in the county of Guilford), but such as by law may legally administer an oath. The orphan court has been singled out as one that cannot administer an oath; but I think the orphan court may legally administer in regard to such matters as are within their jurisdiction. It will follow, therefore, that to say a man swore false in court in this country is the same thing as to say he swore falsely in a court having power lawfully to administer an oath to him, and by the old authorities themselves such words would support an action amounting to a charge of perjury.

PER CURIAM. Let the plaintiff have judgment; and it was entered accordingly.

See *Browne v. Dula,* 7 N. C., 574.

JAMES CONNER v. GWIN'S EXECUTORS.

A negro, whose life was forfeited to the public for murder, was sold under execution without that fact being then known. A bill in equity by the purchaser praying to stand in the place of the judgment creditors for the amount of the purchase money was sustained by the Court.

THE bill stated that two executions being writs of *fi. fa,* issued from the county courts of Mecklenburg and Iredell, at the instance of different plaintiffs, and were levied by the sheriff on the property of the testator

in his lifetime, and particularly on a negro fellow named Jim; and that the property was advertised for sale; that before the day of sale this negro privately murdered the testator, and that on the day of sale the perpetrator of the murder had not been discovered. That this negro was sold on that day, and purchased by the plaintiff for a sum of money amounting to the judgments, which he paid in discharge of them. That afterwards it was discovered this negro had committed the murder, whereupon he was tried, condemned, and executed; and the bill prayed that as the life of the negro was in fact forfeited to the public at and before the day of sale, and that as an action at law could not be supported by the plaintiff against the executors, that this Court would decree him to stand in the place of the judgment creditors, and to be considered in the light of purchaser of the benefit of their judgments, so as to have the estate of the testator, as to the amount thereof, subject to the same manner it was at the time when the money was advanced by him. The defendants demurred to this bill for want of equity, but agreed that if the opinion of the Court should be against them on this point, they would not further contend against the plaintiff, as the facts stated in the bill were true, but would submit to such decree as the Court (122) thought proper to make.

And now this cause came on to be tried, and the demurrer being argued:

ASHE and WILLIAMS, JJ. We are clearly of opinion that the facts stated are proper for the jurisdiction of this Court, and, if true, that the plaintiff is entitled to relief agreeably to the prayer of this bill. Whereupon a decree was entered accordingly.

HILLSBORO—OCTOBER TERM, 1794

FLOWERS v. GLASGOW.

On demand, previous to bringing detinue, defendant acknowledged that the negroes were in his possession. Proof that he had given one of the negroes to his son-in-law, who was in possession of him at the time of the demand, shall not prevent the defendant's liability to the action.

DETINUE. This cause now came on to be tried upon the general issue, and the proof of the demand made by the plaintiff previous to the institution of his action was that plaintiff demanded the negroes

(James and Dempsey) of the defendant, who acknowledged they were both in his possession, and said he should not deliver them; and that this demand was in January or February, 1787. The defendant then proved that two years before that period he had given James to his son-in-law, Mr. Williams, and had at the same time given him possession, which he had continued ever since; and that the negro James, in January and February, 1787, was in Williams' possession. It was argued by General Davie that Glasgow, as a parent, was willing and intended to undertake the defense of the action himself, and his acknowledgment must be taken as evidence to that amount.

ASHE and WILLIAMS, JJ. The evidence must be so understood; and they directed the jury that this evidence was sufficient proof of the possession having been in the defendant at that time; but the cause, for another reason, was adjourned.

NOTE.—WILLIAMS, J., said in this case, upon another part of the argument, that he should yield to the decision in *Tims v. Potter*, 1 N. C., 12, until it should be contradicted by a more full decision to the contrary. It was decided by two judges, ASHE and SPENCER, against his opinion.

ALLEN'S EXECUTORS v. MONTFORT STOKES.

A plea to the jurisdiction of the court under the act of 1793, Rev. ch. 392, is to be decided, as to the amount for which the suit is brought, only by the writ and declaration.

DEBT. The bond was for £100, but reduced by payments, as the defendant alleged, to about £30. He pleaded to the jurisdiction of the court according to the act of 1793, ch. 19, which directs that from and after the passing of this act no suit shall be originally commenced in any of the Superior Courts in this State for any debt or demand of
(123) less value than £100, where the plaintiff and defendant lived in the same district; or for less than £50, where the parties lived in different districts; and if any suit shall be commenced contrary to the true intent and meaning hereof, or if any person shall demand a greater sum than is due, on purpose to evade this act, in either case the plaintiff shall be nonsuited and pay costs; and the defendant set forth in his plea that the real and true demand of the plaintiff was of less value than £50; to which plea there was a replication and issue.

ASHE and WILLIAMS, JJ. This is an issue to be determined by the Court, and that the writ and declaration was proof of the amount of the plaintiff's demand, and as the sum demanded in the writ and declaration was above the sum of £50, they ordered a *respondeas ouster*. *Quere de hoc.*

See *McNaughton v. Hunter*, *post*, 454; *Bell v. Bell*, 5 N. C., 95; *McGhee v. Draughon*, 4 N. C., 240.

CHRISTMAS AND OTHERS v. CAMPBELL AND OTHERS.

An affidavit of an agent, not a party in the suit, cannot be annexed to an answer to dissolve an injunction. But an order may be made to have the fact, which the affidavit was intended to show, tried by a jury at the next term.

CATLETT CAMPBELL and his partners, merchants in Petersburg, recovered a judgment on debt in the Superior Court here last term, against Christmas and his partners; and since the last term the defendants filed their bill in equity and obtained an injunction. They stated in the bill that when they gave the bond Campbell promised not to sue them upon it, and that they were induced to confess the judgment by Mr. Tatom, the agent for Campbell & Co., who promised them that if they would each pay their proportion of $500, on or before February then next, execution should be stayed for the residue till they could sue and recover the amount from their debtors. Campbell by his answer denied that he had promised not to sue upon the bond, as they had stated, and as to the promise of his agent, denied that he believed it to be true, being informed to the contrary by his agent, who he believed had given his true information; and he further stated in his answer that as to the said promise stated to be made by his said agent, that the agent, not being made a party to the bill, had no opportunity to answer, but that he had made his affidavit contradicting that part of the bill which related to his promise, and prayed that the same might be taken and received as part of his answer. This affidavit was accordingly appended to the answer, and fully denied the promise alleged in the bill to be made by him to the defendants at law.

Moore, for the defendants, insisted that this affidavit was *ex parte*, and could not be received as part of the answer.

E contra, the counsel for the defendant. (124)

ASHE and WILLIAMS, JJ. The defendant here, it is true, has denied in positive terms that he agreed not to sue this bond; but as to the other part of the bill, stating an agreement by the agent that if the defendants at law should each pay his proportion of $500 before February then next, that execution should be then stayed until they could collect the residue of the debt from their debtors, this he has not positively denied: he says only, he does not believe any such agreement was made; and, indeed, not being present when this judgment was obtained, he could not positively deny it. Therefore it remains unnegatived, and the injunction must be continued. The affidavit annexed, of the agent, Mr. Tatom, cannot be read, he not being a defendant to this bill; and, indeed, he could not be made a defendant, not being interested in the judgment. Had he been made a party, he might have disclaimed any interest or concern therein, and the bill as to him would have been dismissed with costs; and his affidavit cannot be received because it was taken *ex parte,* and for want of cross-examination may appear in a different dress now from what it would appear were he cross-examined by the complainants,
who might suggest matters that he would recollect, and which for
(126) want of such suggestion he might not remember. This we
have decided over and over again; but we will make an order that the unnegatived fact shall be tried by a jury at the next term. Let the injunction be continued, and make an order for the trial of this fact at the next term; which was done accordingly.

NOTE.—Ex parte affidavits cannot be received to support an injunction. *Leroy v. Dickerson,* 4 N. C., 110.

SEARS v. PARKER.

Grants from the State cannot be avoided for any cases in any other manner than by proceedings in a court of equity.

(128) EJECTMENT. Mr. Moore for defendant: The deed granted by the State to the purchaser of this confiscated property expressly included the land now contended for by Sears; and supposing it to have been vacant land, not included in either of McCulloch's tracts, yet having been granted by the State to the purchaser of the confiscated lands, prior to Sears' entry and grant, the State could not afterwards grant it to him. Sears is not entitled to recover.

Counsel for Sears, in reply: The deed to the purchaser of the confiscated lands expressly states that this land was sold as the land and estate of Henry Eustace McCulloch confiscated by the Legislature, which makes it evident that no more was intended to be conveyed than the land which had been the property of Henry Eustace McCulloch; and if by mistake or design the boundaries had been extended beyond what his grant covered, that mistake was to be rectified by the express words of the State grant, saying the State conveyed it as his land; for whether it was his land or not was to be ascertained only by his grant, not by the description of the State grant to the purchaser. The invalidity of the grant may be shown in the ejectment, and a public officer granting land as the agent of the community, believing the title of the community to have come by one means (by means of confiscation, for instance), when in truth it came by another, which if he had been apprized of, he would not and ought not to have executed the grant, does not thereby convey any property to the grantee. (135)

ASHE and WILLIAMS, JJ. We have often decided, and we are now of opinion, that the State having granted vacant lands, the first patentee will be entitled to hold them, notwithstanding any attendant circumstances that render it avoidable, until it be actually avoided in the court of equity; and that it cannot be avoided by any parol evidence given to a jury on a trial in ejectment, but the jury may find a special verdict, if they please, subject as to this point to the opinion of the Court. But the jury did not agree, and one of them was withdrawn.

Afterwards, at a subsequent term, the Court holding the same doctrine, there was a verdict and judgment for the defendant.

See *Reynolds v. Flinn, ante,* 106.

Cited: Waugh v. Richardson, 30 N. C., 471; *Dosh v. Lumber Co.,* 128 N. C., 88.

HALIFAX—OCTOBER TERM, 1794

WILSON CARTER v. JOHN BRANCH.

A declaration in ejectment served on a tenant in possession cannot be amended so as to comprise more lands than those already described. The defendant in an ejectment will not be allowed to defend only as to so much as the plaintiff can prove him in possession of.

CARTER *v.* BRANCH.

EJECTMENT. The plaintiff, by his attorney, moved to amend the declaration so as to comprehend more lands than were described in the declaration served on the tenant in possession. The tenant in possession moved at the same time to be admitted to defend only as to so much of the premises as the plaintiff could prove him to be in possession of.

MACAY, J. The amendment moved for cannot be allowed, for that would be to make a new declaration.

The other motion was then urged by counsel for defendant, and MACAY, J., asked if there were any precedent to justify an admission to defend in that manner, when counsel for defendant cited the case stated in Bull., 97, and 2 Bac. Ab., 162; Barn. Supp., 24, 25; 2 Barn., 148. Where in case of several tenants, the rule may be drawn generally, that I. H., who claims title to the premises in question in his possession, shall be admitted defendant for such messages; and then plaintiff must prove what lands are in his possession—or specially, that I. H., who claims title to such lands, expressing them particularly, should be admitted defendant, and then the plaintiff need not make such proof. And he insisted that in the present case there was as much reason for admitting the defendant in the manner first stated as in the case where there are several tenants, since the tenant in the present case could not defend otherwise, without making an admission of the fact he principally intended to controvert.

(137) MACAY, J. There is no precedent for such a motion as this, and therefore I cannot consent to it. The defendant must enter his defense as he thinks proper; but I think the proposal made by plaintiff's counsel a fair one, and fit to be acceded to, namely, that when the lands shall be run out by the surveyor, if the survey should include the lands claimed by defendant, that then he shall be at liberty to enter himself defendant for as much of the lands claimed by him as should be included in the survey, particularizing them—and I would recommend the adoption of it.

This appeared to defendant's counsel to be still an admission that these lands were a part of the premises described in the plaintiff's declaration, as he must still enter himself defendant for a part of the said premises in the declaration mentioned, to wit, that part to be so described; whereas his objection was not that the lands described in the declaration were not plaintiff's, for he admitted them to be so, but that

the boundaries in the declaration did not comprise the lands which defendant claimed. But the opinion of the Court being against him, he was obliged to accept of the proposal recommended to him.

See *Troxler v. Gibson, post*, 465, and *Cowper v. Edwards, ante*, 19.

BRICKELL v. BASS.

The neglect of bringing up an appeal under the act of 1777, Rev. ch. 115, sec. 77, in proper time, is not relievable by *certiorari*, although occasioned by the neglect of the clerk; and the appellee may move for the affirmance of the judgment with double costs, either at the first or any other term after the appeal.

APPEAL in an EJECTMENT cause from the county court of NASH.

The jury below had found for the defendant, and the appeal was returnable to this Court in October Term, 1793. It was not then transmitted to the clerk of this Court, but in April, 1794. Counsel for defendant, having a copy of the record in his hand, moved to have it entered of record in this Court, and the judgment affirmed with double costs, agreeably to the act of 1777, ch. 2, sec. 84. Counsel for plaintiff then moved for time to procure an affidavit for removing the cause by *certiorari*, alleging the neglect of the clerk of the county court, who had been applied to in time and failed to give a transcript of the record. And now, at this term, the motion for affirming the judgment was renewed and the affidavit for the *certiorari* produced. It stated that this cause was tried in May, 1793; and that in August, 1793, Brickell's attorney had declined practice in that court, but had applied by Mr. Hall, the attorney left to finish his business, to the clerk for a transcript of the record, to be brought up and lodged with the clerk of this court; Mr. Hall intending, could he have procured it, to have brought it up himself, but was informed by the clerk that he had not then time to make it out, but that he would hand it in time to the office of the Superior Court clerk. (138)

Upon this affidavit plaintiff's counsel contended that the act of Assembly only contemplated the affirmance of judgment and double costs in cases where the appellant craved the appeal for the purpose of gaining time, and delaying the other party; but many cases had occurred where the appellant, having been hindered by accident, of the default of the clerk, from bringing up his appeal in time, had been helped by *certiorari;* and that he understood the rule in such cases to be this:

where it was not owing to the default or neglect of the appellant, but to some other cause not under his control, that the appeal was not brought up in time, he should be relieved by *certiorari;* for it frequently happens that the appellant has good cause for his appeal, and may intend to prosecute it, but owing to the default of the clerk of the county court, or to some other cause not imputable to the appellant, he may be prevented from having it removed in time; and then surely it would be great injustice, and not within the true meaning of the act, that the judgment appealed from should be affirmed.

MACAY, J. The act is express that unless the transcript be filed with the clerk of the Superior Court fifteen days before the commencement of the term, the judgment shall be affirmed, with double costs; and I cannot narrow down the operation of the act by guessing at what was the probable meaning of the Legislature. If the clerk has done amiss, he is liable to pay a fine to the party grieved, and to answer him in damages, as also to be prosecuted for a misdemeanor in office; and that must be the remedy which the plaintiff must pursue. Of course, the judgment must be affirmed, with double cost, and the motion for the *certiorari* overruled.

Counsel for plaintiff then said he would submit whether it was not now too late to move for an affirmance of the judgment. The appeal was returnable to October Term, 1793, and the first day of that term was the day in court given to both parties to appear—the appellee to answer to the appeal if brought up, or to move for affirmance of judgment if not brought up; and the time having passed without anything done, or any motion made on either side, or any further day given, they were, after the expiration of that term, both out of court, and could not be again brought in but by some new process.

MACAY, J. It might have been proper, perhaps, in forming the first decisions upon this clause of the act, for the courts to have held it necessary to move for the affirmance of judgment at the first term of the Superior Court after the appeal prayed; but the uniform practice hath been to move for the affirmance at any term after (some adjudications in this circuit at New Bern cited to that effect); and, therefore, notwithstanding this latter objection, it is ordered that the judgment be affirmed, with double costs. Affirmed accordingly.

NOTE.—As to what circumstances will be deemed sufficient to entitle a party to a *certiorari*, see *Chambers v. Smith, post*, 366; *Robertson v. Stowe, post*, 402; *McMillan v. Smith*, 4 N. C., 173; *Dyer v. Rich*, 4 N. C., 413; *Steele v. Harris, ibid.*, 440; *Hood v. Orr*, 4 N. C., 584; *Bovis v. Marshall*, 9 N. C., 59; *Mera v. Scales, ibid.*, 364. The propriety of the other part of the decision was denied by HAYWOOD, J., in an anonymous case, *post*, 171.

HAMILTON v. MARY WILLIAMS.

MACAY, J., inclined to think that the handwriting of a subscribing witness, who had voluntarily become interested in the bond, could not be proved. *Sed adjournatur.*

DEBT upon bond, and *non est factum* pleaded. The attesting witness was one Cordall Norfleet, and there was an endorsement on the bond transferring it and its contents to him. The bond itself bore date prior to the time when bonds were first rendered negotiable in this State. It was argued for the plaintiff, and insisted upon, that the handwriting of Norfleet, the attesting witness, might be proven; and this was compared to the case in Stra., 34, where the subscribing witness hav- (140) ing become the administrator, his handwriting was admitted to be proven. It was also compared to the cases where the witness becomes blind, or is convicted of perjury or forgery, or is made a legatee, or becomes heir. And the evidence in the present case offered by the plaintiff was admitted, Judge MACAY being on the bench, and a verdict obtained; whereupon, General Davie moved that the verdict might be set aside, the evidence upon which it was grounded being improper; and he argued that in the case of the executor, administrator, or legatee, the law gave them that character, or placed them in that situation, which disabled them to give testimony; at least, they did not acquire such characters or offices by their own independent voluntary act, and in such cases there was no room for presuming any combination between the obligee and the witness. But these cases are not like the present. If the evidence admitted in this case should be allowable, a wide door would be opened for fraud, and it would immediately be put in practice. The forger of a bond would have nothing else to do but to endorse to the subscribing witness, and that witness to sue and effect the recovery upon proof of his own handwriting. Should it be a case of usury or of gaming existing in the knowledge of the witness only, as frequently happens, an endorsement like the present, and the admission of such testimony, would effectually exclude the truth of the transaction and make the bond valid, though in reality it was void by the rules of law. Should this decision be established as law it will immediately become the common practice to assign all such bonds to the witness, for the purpose of procuring a false validity to them. This case, therefore, is not to be assimilated to the cases cited. In those, no mischief results from the admission of proof of the witness's handwriting. It is not to be presumed that the witness will undergo a conviction of forgery or perjury, or that a testator, intestate, or ancestor will procure the person that is to be his executor, administrator, or heir to witness a forged instrument, or one

invalid in other respects, to the end that after the death of himself a recovery may be affected by proof of their handwriting. There are but few men have attained to such a degree of baseness as to contrive frauds to be executed after their deaths. The uncertainty itself of the time of death, which is generally viewed as at a distance, is a sufficient guard against any such attempt. But in this case, and in all cases like it, the mischief of such evidence is greatly to be apprehended.

(141) MACAY, J., seemed to be of this opinion, and he ordered the judgment to be stayed, until this question could be argued before more judges; and it was adjourned.

Cited: Overman v. Coble, 35 N. C., 4.

MORGAN—MARCH TERM, 1795

STATE v. GREENWOOD.

After a verdict, in an indictment, it is too late to object that one of the jurors was not a freeholder in this State. If it appears upon another trial of the same cause, in which the perjury is assigned to have been committed, that the person convicted did not swear falsely in the first trial of the cause, a new trial will be granted him upon that ground.

THE defendant was indicted of perjury, and convicted; and his counsel moved for a new trial upon the ground that one of the jurors was not a freeholder in this State. The juror had been examined, before he was sworn on the jury, whether he was a freeholder or not, and answered in the affirmative. The fact is that he was a freeholder in South Carolina, but not in this State. This appeared by the affidavit of the juror himself, now produced in support of the motion.

MACAY, J. I think this is a case that deserves consideration. I have understood this objection has formerly prevailed in a civil case, at Hillsborough, in an ejectment cause in which General Butler was defendant.

HAYWOOD, J. I will give no judicial opinion, having preferred this indictment whilst Attorney-General. Were I to give one, I should not hesitate to decide against the objection. He might have taken his excep-

tion to the juror before he was sworn; that is the time the law appoints for him to take it; and in this, as in all other cases, when the objection is not made at the appointed time, and the parties proceed to other stages, which in point of order are posterior, they can never afterwards be allowed to recur to the advantage they have passed; as if a defendant pleads in disability of the plaintiff, he admits the jurisdiction of the court; if he pleads to the court, he admits the ability of the plaintiff; if he pleads to the writ, he admits the form of the court to be good; if he pleads in bar, he waives all pleas in abatement; if he is to plead to a *sci. fa.*, he cannot defend himself by any matter of defense he might have used in the first action. So it is with respect to challenges. If the party will not take his challenge before he is sworn, he can never afterwards challenge for a cause existing before he was sworn. *Vide* Trials *per pais*, 142, 145; 3 Burr., 1858. Were a defendant allowed to take his challenge to the jurors after the trial, he never would do it before, but would always rather depend upon moving it to the court after trial; for if he should be acquitted, he would say nothing about the disqualification of the juror; and, if convicted, he could avoid judgment by offering his objection. This, in fact, would be placing him in a situation totally exempt from danger and from punishment, so long as he could get a juror sworn against whom he could offer any (142) legal objection, and would give him the additional advantage of several chances for his acquittal. There is a case in Leach which comes nearly enough to the present to show the principle I have spoken of. There the officer that returned the jury was the prosecutor of the indictment, and consequently the whole array was liable to be quashed had the defendant made the objection at the proper time. He, however, put himself upon his trial without taking the exception, and was convicted. He then offered to take the exception, but the Court held it then too late to take it, and overruled the exception.

The cause was adjourned for further consideration. See 5 Bac. Ab., 245; 7 Mo., 54; Holt, 235.

NOTE BY REPORTER.—This motion came on at a subsequent term before Judge ASHE and Judge MACAY, and they disallowed the exception, but delayed giving judgment for another cause; and at September Term, 1796, the cause being tried, in which the perjury was alleged to have been committed, before Judge WILLIAMS and Judge HAYWOOD, and they being of opinion, from the oaths of several witnesses, sworn on that trial, concurring in the same fact that Greenwood had formerly sworn to in the trial of the same cause in the County Court, that probably it was not falsely sworn by him, they thought this might be a proper cause for a new trial, and granted a new trial accordingly on that ground.

NOTE.—The objection with respect to the juror, would have been a good one if taken at the proper time. *Sheepshanks v. Jones*, 9 N. C., 211. But after the verdict it is too late. *S. v. McEntire*, 4 N. C., 267; *S. v. Ward*, 9 N. C., 443.

Cited: *S. v. Lambert*, 93 N. C., 624.

MEHAFFY v. SPEARS.

The jury could not agree upon the evidence, and a juror was withdrawn. But it seemed to be agreed by all the bar, and MACAY, J., that if the jury had found for the defendant on his plea of "tender and refusal at the day and place" where he was bound by a sealed writing to deliver a certain parcel of cattle, that the plaintiff would have been forever barred of any recovery on the covenant.

THIS was an action of covenant upon a sealed writing, for the delivery of a certain number of cattle, of a certain description, on a day stipulated and stated in the agreement. Defendant pleaded a tender and refusal at the day and place, and upon this the plaintiff joined issue. And now on the trial it appeared in evidence that the defendant on the day and at the place appointed tendered a greater number of cattle than the writing demanded—some of them answering the description, others not; so that the chief matter of dispute upon the evidence was whether there were as many cattle of the dsecription as the contract required. It appeared further upon the evidence that after the tender made, and refusal to accept the cattle on the part of plaintiff, the defendant killed part of the cattle, and sold others. The jury could not agree, and a juror was withdrawn.

NOTE BY REPORTER.—Notwithstanding the circumstance of the defendant having killed part of the cattle, and disposed of others of them, it seemed to be agreed by the attorneys on both sides, and indeed to be admitted by all the bar, and by Judge MACAY, that if this issue should be found against the plaintiff, he would thereby be utterly barred of his recovery upon the cove-
(143) nant. This seems to be amongst the *apices stricti juris* that are not very conformable to the common ideas of justice. Shall the defendant be allowed to retain the value received for the cattle, by killing and disposing of them, and be discharged at the same time, by his tender, from a debt of the same value due to the plaintiff? Shall he be discharged of his debt when it is apparent the refusal on the part of the plaintiff has not been attended with any loss to himself?

SALISBURY—MARCH TERM, 1795

HOUSER v. REYNOLDS.

An infant who makes a deed can confirm it verbally after becoming of age.

EJECTMENT. Plaintiff and defendant both claimed under one Wright, who while an infant had conveyed to Houser, and, after full age, to Reynolds; but after coming of age, and before he conveyed to Reynolds, he said to Houser: "I will never take advantage of my having been an infant at the time of executing the deed, and it is my wish that you should keep the land." Mr. Whyte cited some cases from Bac. Ab., Verb, Infant, where such or the like words had been held to be a confirmation of the deed. (144)

MACAY, J., directed the jury to find for the plaintiff; and they did so. There were many other points made by the counsel in the argument of this case, but the whole cause seemed at length to turn upon this only, and therefore the others are omitted.

Cited: Leak v. Gilchrist, 13 N. C., 73.

Overruled: Hoyle v. Stowe, 19 N. C., 327; *Ward v. Anderson,* 111 N. C., 117.

ANONYMOUS.

Under the act of 1762, Rev. ch. 69, sec. 20, which directs the bonds taken on binding out orphans to be made with the chairman of the court and his successors, the bond is good although *the successor* be not named; and a suit may be sustained in the name of the successor. After the plea of conditions performed, no advantage can be taken of any inconsistency in the indentures of apprenticeship, as where, in a part of the instrument, the name of the apprentice is put for that of the chairman. A verdict finding, among other things, an issue not submitted to the jury is void as to such finding.

COVENANT in the name of the chairman or presiding justice of the county court against the defendant, to whom the real plaintiff had been bound as an orphan child; and he declared upon the indentures, taken under the act of 1762, ch. 5, sec. 20, and stated as a breach that the

defendant had not taught him the trade he agreed to teach him; that he had not taught him to read and write, etc. Defendant pleaded that he had performed his covenants, etc.

Upon the trial plaintiff's counsel produced the indentures, and read them to the jury, whereby it appeared that the covenants were introduced in the former part of the instrument as between the chairman of the court, but not with his successors, of the one part, and the defendant of the other; and in a subsequent part the name of the apprentice was put for the name of the chairman, which rendered the whole writing insensible.

It was objected on the part of the defendant that this bond is not made pursuant to 1762, ch. 5, sec. 20, which directs it to be with the chairman and his successors, and therefore it was not such a writing as could be prosecuted in the name of the successors of the presiding justice named in the indentures; and that this action being in the name of the successor, the present chairman, could not be supported; and, moreover, that the covenants being insensible, by the mistake in the subsequent part of it, was therefore wholly vitiated, and that no action whatever could be supported on it. It begins as a covenant intended to be made with the presiding justice, and then recites an agreement with the apprentice. These objections were reserved for further consideration after the verdict should be taken, which was agreed to be made subject to the opinion of the Court upon them. Accordingly the jury gave a verdict that the covenants were not performed, and assessed damages; and afterwards, on a subsequent day in this same term, the objections were argued, and the Court gave their opinion.

PER CURIAM. The first objection here is that the covenants are not made with the successors of the presiding justice as well as with
(145) himself, and for that reason it is argued the successor cannot maintain this action, as he might have done had these words been inserted. The second is that the covenant produced is insensible, through the mistake of inscribing the name of the apprentice in the subsequent part of the indenture instead of the name of the presiding justice, as it should have been.

As to the first, though it be the general rule that a personal chattel cannot go in succession to a sole corporation, yet it was the clear intent of this act that indentures of apprenticeship should be sued in the name of the presiding justice and his successors; and if an action cannot be maintained in the name of the successor, when the presiding justice is dead, as in the present case, it will be difficult to say in whose name it shall be brought so as to answer the purposes of justice. It might be

objected, with propriety, that the executors of the former presiding justice could not maintain it because they are not named any more than the successors, and at the making of the covenant there was no intention in the contracting parties that an action ever should be maintained by executors. The law itself not intending the action to be brought by executors, hath not declared them trustees for the apprentice; and should they be allowed to maintain the suit and effect a recovery, they would also be entitled to receive the money, and the court could not say they are only trustees. In all cases at law the person who maintains the suit is entitled to the benefit of it, unless in those special cases where he is by statute declared to be a trustee and a nominal plaintiff only. Suppose, in the present case, the executors may be considered in the light of trustees, they may then assign a breach of covenant as having not been performed; but how can they aver it to be *ad damnum ipsorum,* who in truth have sustained no damages, as not being the legal father or guardian of the rights of the apprentice? If neither the executors nor yet the successor can maintain this suit, much less can the apprentice himself maintain it, for the covenant is not made with him, nor can be by law; and should the objection prevail against the right of the successor, the covenant would be wholly invalid, and the injured apprentice left without remedy. It would be improper, therefore, for the Court to give a ready ear to this objection. The indentures are either made under the authority of the act 1762, or they are void; for if not made under that act, then what power had the presiding justice to make any covenant relative to the orphan, or to bind him at all? Or how can (146) the defendant justify his taking the orphan at all into his service?

It will be improper to pronounce the covenant to be void, for that will defeat the plain intent of the parties and the ends of justice; and the Court will support it if possible. It is a rule that whatsoever is sufficiently implied, need not be expressed; and the act hath directed the covenant to be with the presiding justice and his successors, principally with a view of pointing out the party who was to bring the action in case of a breach of the covenant and the death of the presiding justice. Had the word successors been omitted in the act, doubts might have arisen for want of an express declaration respecting the proper person to bring suit after the death of the presiding justice; which doubt is prevented by the addition of the words successors in the act. It here has only the effect of pointing out decisively the person that is to sue upon such an event; but yet the covenant without the words successors has precisely the same legal properties and consequences attached to it as it would have with it; for whenever the maker of a personal contract acts as an agent for the benefit of others, by appointment of law, in an official

character and in the name of his office, which is to be perpetually continued, such contract belongs to him only in his public character and, whenever he becomes divested of that, will belong to the same character, though sustained by another individual. It is true, there are some cases in the books where the law will not allow of the succession of a personal chattel at all; as anciently in the case of abbots, bishops, and others, from policy and mistrust of these characters, lest under the pretence of advancing the interests of religion they might draw from the people more wealth than was consistent either with the circumstances of individuals, or that moderate degree of power and influence flowing from wealth in which it was prudent to keep the ecclesiastics and other sole corporations. But in almost every case where the official character is conferred with a view to its being exercised for the benefit of others, a personal chattel, or the right to sue upon a personal contract, devolves to the successor upon the death or removal of the former officer. Thus, in England, the king, by operation of law, has a public capacity and perpetual existence, and may contract in that character for the benefit of the public; and in case of the death of the individual who sustains the office the personal chattels and rights to personal things which he had in that character shall go to his successor. Wood's Inst., (147) 113, 21; Co. Litt., 90a; 11 Rep., 92, and in his case the word successors is implied, though not expressed in the contract; as in the instance of a recognizance taken in court, the cognizer only acknowledges himself indebted to the king, not saying "and his successors"; yet the successor is entitled to sue for the money due upon it. The law will not permit the executors of the predecessor to recover it—persons in whom the public hath placed no confidence, and are not of public appointment. Here the omission of the word successors does not render the transaction void. Upon the death of the officer, his successors are comprehended in the name of his office. In the case of the president of a college, where a statute directs a suit for the breach of the statute to be brought by the president for the time being, if the president sue and recover, the successor and not the executor shall sue out the *sci. fa.*, for the character or office of president still continues. Cro. Jac., 159; 4 Bac. Ab., 411. Here the statute said nothing of successors, but they were implied in the name of the office. If an orphan bond be made to the chamberlain of London in the name of his office, and he died, his successors, not the executor, shall institute the suit for the benefit of the orphan. 4 Rep., 65; 4 Inst., 249. So in the present case the chairman or presiding justice acted only in his official character for the benefit of another, the orphan; and though the individual who sustained that office be dead, yet the office itself still has a legal existence, and

capacity to be exercised by another. It is the same office now as it was then, and confers upon the individual who exercises it all the same powers his predecessor had, and that of commencing this suit amongst others; and the very name of the office implies all the successors that ever shall be to it—like the case of church wardens, who are instituted by law for the benefit of parishioners, to transact various kinds of business for them, and, so far as regards that, to have a corporate capacity of commencing suits. If they sue whilst church wardens, and their year expires before the determination of the suit, it shall be continued by their successors, and will not abate; which proves that it is the name of the office, and not the adjunct name of the individual, that the law regards. Stra., 852; Cro. El., 145, 179; 1 Lev., 177. Great indeed would be the evil if the law were not so, and the name of the individual and not that of the office were to be principally attended to. The officer is continually changing by death, resignation, removal, and other (148) occurrences. Some offices are but of annual duration, and the officer must necessarily be removed before a suit could be carried through all its different stages. Were his going out of office to operate an abatement of the suit instituted for the sole benefit of another, justice might be greatly hindered, and in some instances be rendered wholly impossible to be obtained. The Governor of this State is an instance. Almost all bonds for money due or to become due to the public are taken in his name as Governor. There can be no doubt that either he or his successors must bring suit; the law will not trust his executors. Were suits instituted by him to be abated by his going out of office, how many of the public demands would be lost? His election is annual as to him, his office is but of a year's duration, and it generally takes up a longer time than that, at least in many instances, before a suit can be determined. It would be monstrous to say that suits should abate in such cases; yet if his successor is not implied and included in the name of the office the suit must abate, there being no real plaintiff to support it. It is, therefore, a position subject to no doubt that when a governor, presiding justice, or other officer entrusted by law to take bonds for the benefit of others does take them accordingly, though without making them payable to his successors, that the successor may, notwithstanding, commence actions upon them, and in case of his death after the institution of an action, and before its determination, that that action may be continued by his successor without any abatement. (In England, however, the name prefixed to the office in the king's case is so far regarded that the death of the individual abates the writ. 7 Rep., 31a.) And this right of the successor to sue, though not named, holds in all cases except where the law directs otherwise; as in the case of guardian bonds, which by

the 7th section of 1762 are to be sued by the executors, and other cases where the law directs an assignment to the party grieved. In some of which, perhaps, a suit may be maintained in the name of the assignee. N. Car. La., 29, sec. 5. But such bonds are not suable by executors generally; for then they might receive the moneys of others, without security given to pay them into the proper hands. They might also, upon improper motives, either refuse to sue or dismiss the suits when brought, or give releases or enter retraxits, at their pleasure, and the utmost confusion, uncertainty, and fraud be introduced; for if (149) executors should once be acknowledged to be the proper persons to sue, they must be also allowed to be the proper persons to do all these acts. And there is no foundation in reason to say that the omission of the word successor shall defeat the instrument entirely. The objection, therefore, founded upon that omission is not valid.

As to the other objection, that the name of the apprentice is put in a subsequent part of the instrument, instead of that of the chairman: if upon the profert thereof made in the plaintiff's declaration the defendant had craved *oyer,* and demurred for the variance between the covenant set forth and that which appeared to be in the indentures, the objection might then have been fatal; but where the covenant stated in the declaration is once admitted to be as there stated, by a plea of covenants performed, he cannot afterwards be permitted to say there is no such covenant; and the production of the warrant afterwards upon the trial by the plaintiff is irregular, although it is often done when a declaration is mislaid, or not readily to be come at, it being presumable that the declaration has been drawn in conformity to it; and the court ought to take no notice of an inconsistency in the writing itself, discovered upon such an irregular reading. They cannot do it without a departure from the record and the issue submitted to the jury, which is, whether the defendant has performed that covenant that is set forth in the declaration. 3 Term, 302, 303; Doug., 302; H. Black. Rep., 91; 1 Stra., 298; 2 Stra., 1149; Kidd on Bills, 154, 155; 6 Rep., 45; 2 L. Ray., 852. And although the jury have found the covenant to be in the words of the indenture produced on the trial, which is variant from that stated in the declaration, it is not to be regarded; for they cannot give a verdict upon any point except that contained in the issue with which they are charged; and then the finding by them what the covenant really was, as well as that the covenants were not performed, is void as to that part of the verdict stating the covenant, and not to be proceeded upon or attended to as a part of the verdict at all. 2 Roll's Ab., 691; 2 Mo., 5; L. Ray., 390, 864, 1521; 2 Rep., 4; 2 Stra., 873; 5 Ba. Ab., 310. The Court must proceed upon the legal parts of the verdict only, that is to

say, that the covenant stated in the declaration has not been performed, and the assessment of damages for the nonperformance. Of course, the second objection must also be overruled, and the plaintiff must have judgment.

Judgment accordingly.

Cited: Threadgill v. Jennings, 14 N. C., 385; *Dowell v. Davis,* 15 N. C., 66.

(150)

LEWIS v. WILLIAMS.

Quere, Whether, when action is brought for two distinct causes of action, a verdict *in solido* can be sustained.

DETINUE. For two resolutions of the General Assembly directing certain sums to be paid to Lewis and Crafton, for services performed as officers in the State legion. That which belonged to Crafton had been sold by him to Lewis and delivered to him. They came afterwards into the hands of Lanier, who died possessed of them, leaving the defendant one of his executors, who by that means also came into possession. *Non detinet* was pleaded, and a verdict found for the plaintiff, and an entire value and damages assessed. The defendant moved in arrest of judgment, assigning various reasons, and these, amongst others, to wit: That in the writ the resolutions are described in part by the day of their date, and in the declaration also; but the day stated in the declaration was not the same as that stated in the writ; and so there is a variance between the writ and declaration in a material part. Also the jury have assessed an entire value and damages for both resolutions, whereas they should have assessed a value and damages for each separately, or at least a value for each separately.

One of the judges, now on the bench, having instituted the action whilst at the bar, and declining to give any opinion, the cause for that reason was adjourned.

The parties afterwards compromised the dispute, and the reasons were not argued.

HILLSBORO—APRIL TERM, 1795

STATE v. BROMFIELD LONG.

HAYWOOD and WILLIAMS, JJ., were of opinion that the taking which is to constitute a felony must be a trespass. ASHE and MACAY, JJ., thought a borrowing with a fraudulent intent might be the ground of a felonious act.

At this term the defendant was indicted in the common form for stealing a mare of one Samuel Parks, in the county of RANDOLPH.

It appears upon evidence on the trial that the defendant was a stranger to Parks, but came to his house some time about the 6th of December last, offering himself to be employed as an overseer, and after remaining on Park's plantation three or four days he borrowed the mare in question of Parks, to ride to the house of one Candles, who lived about four miles from Parks' in the same county; and he called at Candles' accordingly, riding the mare, but from Candles' went directly off, and in two days and a half arrived at a house in the county of Lincoln, at the distance of eighty miles from Candles'.

Upon this state of the evidence it was insisted by Jones, Solicitor General, that the defendant was guilty of felony. He argued that though there were some *dicta* in the old books, and even some adjudged
(155) cases, which make a taking that would amount at least to a trespass to be an essential ingredient in the constitution of felony, yet that the more modern authorities have decided in many instances, and uniformly, that a borrowing or hiring with a fraudulent intent not to return the property to the owner, but to convert it to his own use, and a subsequent going off with the property and selling it or not returning it to the owner, will amount to felony; and that in such cases the court will charge the jury to inquire whether the borrowing or hiring was with such fraudulent intention; and if they found it to be so, then to find the prisoner guilty. In support of this position he cited 1 H. P. C., 90, s. 5, 91, s. 10; Kelyng, 24, 81, 35; Leach, 95, 231, 266, 355, 213.

Mr. Potter, for the prisoner, *e contra,* insisted that a felony could not be grounded on a delivery by the owner to the borrower, but it must be a taking without the consent of the owner. He cited 4 Bl. Com., 230; 1 H. H. P. C., 504, 506, 507. And with respect to this point there was some difference of opinion in the Court, and in their charges.

MACAY, J., seemed to incline that it was felony. HAYWOOD, J., that it was not.

The jury found a special verdict as follows: "The jurors now here sworn, upon their oath say, that on the 6th day of December, in the year of our Lord 1794, in the county of Randolph, in this district, Samuel Parks, senior, was in possession of the mare in the indictment mentioned, as of his proper goods and chattels; and that on that day the aforesaid Bromfield Long, in the said indictment mentioned, did borrow the aforesaid mare of the said Samuel Parks, to ride to the house of John Candles, living in the aforesaid county of Randolph, about four miles from the house of the said Parks, and that he, the said Bromfield Long, was to have returned the mare to the said Samuel Parks, after riding her thither; and the jurors aforesaid further find that the said Bromfield Long did get the said mare into his possession by the means aforesaid, and did ride her to the house of the said Candles, and that he did not return her to the said Samuel Parks; but forthwith rode the said mare into the county of Lincoln, to the distance of eighty miles from the house of the said John Candles, and there sold her to one Andrew Hoyle, as his own property. The jurors further find that the said Broomfield Long did not take the said mare or get her into his possession otherwise than is hereinbefore stated. And the jurors aforesaid further say that they do find that the said Long, at the time when he got possession of the aforesaid mare as before stated from the said Parks, did the (156) same with a fraudulent intention not to return the said mare to the said Parks, but to sell and dispose of her as aforesaid; but whether, upon the facts aforesaid found, the said Bromfield Long be guilty of the felony stated in the indictment, the jurors aforesaid now here sworn are altogether ignorant, and pray the advice of the court here thereupon; and if the court shall be of opinion, upon the facts above stated, that the said Bromfield Long is guilty of the said felony, then the said jurors do find him guilty in the manner and form as stated in the indictment; but if upon the aforesaid facts above stated the court here shall be of opinion that he is not guilty, then the jury say that he is not guilty."

This special verdict afterwards in this term was argued by Mr. Jones for the State and Mr. Potter for the prisoner. Mr. Jones cited the same cases as before.

The Court thought, as there was a division in the opinion of (157) the judges now present, it was proper that this special verdict should undergo the consideration of all the judges. They therefore ordered the prisoner to be recommitted, and that the clerk of this Court transmit a copy of the special verdict to each of the judges of this State, and that they be requested to return their opinions to this Court at the next term.

At the next term, October, 1795, the opinion of all the judges was had on this special verdict. ASHE and MACAY, JJ., were of opinion it was felony; WILLIAMS and HAYWOOD, JJ., that it was not; and the prisoner was recommended to mercy, and obtained his pardon.

See *Dodd v. Hamilton*, 4 N. C., 471.

ROBERTSON v. STUART.

A slave wrongfully taken out of the possession of A, and sold to B, and while in the possession of B sold by A to C, may be recovered by C in a suit brought in his own name.

ACTION brought for the recovery of a negro boy. It appeared upon evidence that old William Stone was the owner of the boy, and that his son John Stone, being about to move to South Carolina, had gotten the boy into his possession; that he sold him as his property to the defendant; that the defendant had retained the possession of him as his own ever since; that after the sale, and whilst Stuart had him in possession, the old man demanded him, and then sold him by a bill of sale executed to Robertson; that then Robertson demanded the boy of the defendant, and soon after brought this suit in his own name. The exception taken at the trial, and afterwards in arrest of judgment, was that this negro when sold by the old man to the plaintiff was a chose in action, and not transferable, and that therefore Robertson could not maintain this action in his own name.

Mr. Whyte for defendant.
General Davie for plaintiff.

(162) *Curia vult advisari.* And at October Term, 1795, this cause was again argued, as I have understood from the counsel, and there was a judgment for the plaintiff, per ASHE and MACAY, JJ.

See *Morgan v. Bradley*, 10 N. C., 559, and *Stedman v. Riddick*, 11 N. C., 29, which latter case seems *contra*.

RULE IN EQUITY.

The Court adopted this rule: Where an injunction, bill and answer have been read, and the injunction dissolved, and no replication nor commissions within two terms after, the bill shall be dismissed for want of prosecution; and accordingly, many injunction bills were dismissed at this term for want of prosecution upon the above rule.

Cited: Collier v. Bank, 21 N. C., 331.

——————v. ARRINGTON ET AL.

The purchaser of a chose in action for a valuable consideration will be protected in equity.

THE bill stated, in substance, that the negro in question was given by old Arrington, now deceased, to his daughter, one of the defendants, now married to another of the defendants; that she and (165) her husband, for a valuable consideration paid to them by the complainants, had by deed poll assigned and transferred their interest in said negro to the complainant; that old Arrington, the father of the defendants, had died, leaving the defendant Arrington his executor; that he had gotten possession of the negro and detained him; that the complainant, in the name of the *feme* and her husband, had brought detinue against the defendant Arrington to recover the negro; and that the *feme* and her husband, being indigent, and in insolvent circumstances, threatened to enter a retraxit in the suit at law, or to execute some writing to the defendant Arrington that would operate at law as a discharge of the action. The defendants demurred to this bill; and, upon argument, the Court said; this is a *chose in action,* purchased for a valuable consideration paid by the complainant, and a court of equity will protect it. If the defendant could procure a retraxit from the plaintiffs at law, or a release of the action from them, the complainants, who carry on the suit in their own name, would be totally defeated. If the court of equity, who ought to protect this assignment, being for valuable consideration, would not interpose as prayed by the bill, the complainant, as the bill states, would be defeated by a fraudulent contrivance between the vendors, who have received value, and the defendant, who

knows they have. This would be a fraud in the very face of the rules of a court of equity on the subject of assignments. The Court, therefore, were of opinion the bill was proper, and ought to be answered, and overruled the demurrer, and ordered the defendants to answer accordingly.

EXECUTORS OF —— —— v. SAMUEL OLDHAM.

Where an executor declares as executor, there he makes profert of his letters testamentary, and they are to be objected to in pleading upon *oyer* of them, or by demurrer, if any defect appears in the declaration; and after the first term they need not be produced again. But where an executor declares upon his own possession, the fact of executorship forms part of his title, and must be proved upon the trial by the production of the letters testamentary themselves, unless they have been lost, when, perhaps, other proof of executorship will be admitted.

DETINUE for negroes in the plaintiff's own possession. The plaintiff proved the wench from whom these negroes were descended to have been the property of the testator; that she continued to be his property, and was in his possession at the time of his death; that after his death she came into the possession of the plaintiff, as his executrix; that she was brought from Virginia secretly by a man who had married her daughter, and disposed of by him to the defendant; that they were demanded of the defendant previous to the commencement of this action, who confessed he had three boys in his possession which were the children of that wench.

This being all the evidence produced by the plaintiff, Mr. Moore, on the part of the defendant, moved that the plaintiff might be nonsuited for want of letters testamentary to prove the plaintiff's executor-
(166) ship and qualification.

PER CURIAM, after much argument: If an executor declare as executor, then in the declaration, at the end thereof, he makes a profert of his letters testamentary to the court, then in contemplation of law they are in court during all that term, according to *Wymack's case,* in Coke's Reports; and during that term, the defendant may demand oyer of them, and, on their being produced, may either deny them by plea, or by plea show that they are invalid, as not being granted by the proper jurisdiction, or for other defects; or, if the declaration does not set forth a proper jurisdiction for granting them, and they appear to be granted by the improper jurisdiction, he may demur; but if oyer is not then

craved, and advantage taken for want of the production, or for any defect in them, but the party defendant pleads in chief, or any plea posterior in point of order to these, that question the plaintiff's right to sue, then the letters are admitted, and the plaintiff at the end of the term may take them out of court, and need not produce them any more.

But where the executor declares upon his own possession, and not as executor, then he does not make a profert of the letters testamentary in his declaration, and the defendant cannot crave oyer and take advantage of them, or for the not producing them before he pleads, as in the other cases; and, therefore, in this latter case, the plaintiff must show his right to recover on the trial, and this he cannot do but by showing the property to be in him as executor; proof of which must be made by showing the letters, and then the defendant may contest them, not having before admitted them by pleading. Butler, 48, 246, 108; 2 Nels. Ab., 626; Hib., 38, 218; Salk., 37, 38.

Mr. Williams, for the plaintiff, then offered a copy of the testator's will, attested by the clerk of the proper county, and his clerkship regularly certified by the presiding justice, under the title of Chief Justice of that Court; and at the end of this copy it was also certified that the plaintiff had given bond according to law, and taken the oath, and had a certificate for obtaining the probate in due form, but she had not any letters testamentary to produce; and he insisted he had sufficiently proven the executorship of the plaintiff, the copy of the will showing she was appointed executrix, and the clerk's certificate showing she had taken upon herself the execution thereof; and that it was not the practice either in Virginia or in this State actually to take out letters testamentary; and even in England, where they are taken out, the executorship may be proven by a copy of the will and probate. Buller, 247, or the probate in the register's book. (167) Buller, 245, 246.

PER CURIAM. It is a mistake to say that letters testamentary are not taken out in this State and Virginia. They are often taken out when suits are to be commenced out of the State or county where the testator resided. The plaintiff's executorship is to be proven by testimony produced by himself, and the letters themselves must be produced, the issuing of them being the final act that makes him a complete legal executor. Until they issue, his executorship is inchoate and imperfect, and in embryo only, liable, notwithstanding the intermediate acts, to be questioned and all further progress stopped. If the executor could prove the letters to be lost, then, perhaps, he might be admitted to a proof

of the executorship by a probate or copy, or if the executorship were to be proven by a third person then, perhaps, such proof might be allowable, or, under some circumstances, even proof less satisfactory. And this reconciles the cases cited from Buller, 245, 246, and is proven to be the true doctrine by the passage in the same book, 108, where he cites 1 Liv., 25; Cro. Eliz., 13, and the case of *Lewis and Brag,* Mich., 16; Geo. II. Therefore, the proof offered in the present case is not sufficient, and she must produce the letters, unless she can prove them lost or destroyed by accident.

Mr. Williams then saying he could not make such proof, the Court recommended the withdrawing a juror; and a juror was withdrawn by consent.

See *Berry v. Pulliam, ante,* 16.

Cited: Leake v. Gilchrist, 13 N. C., 84.

PATTERSON ET AL., LEGATEES OF PATTERSON, DECEASED, v. MARK PATTERSON AND SELLARS, DEFENDANTS.

A person made a party defendant in a bill, who is not compellable to answer, and against whom no relief is sought, may have the bill dismissed as to him.

THE bill stated a will made by the deceased, containing dispositions of the testator's property, which went to the defendant Mark Patterson, or at least a considerable part thereof, in case of the deceased's intestacy. It stated that Mark Patterson and Sellars (who it did not appear had any interest in the destruction of the will) had fraudulently, and with intent to secret the same, gotten possession of the said will and secreted it. Sellars demurred because the charge in the bill, if true, subjected him to a criminal prosecution, and that he was therefore not bound to answer, and there was no relief prayed in the bill as to him.

(168) It was argued at the bar, though it might be true that he was not compellable to answer, that was no proof, but that he might be continued in court, for if the complainant could prove the charge, he might have a decree against Sellars, notwithstanding he was not obliged to answer; and for this was cited Mitford, 64, 65; 2 Ves., 246.

E contra, it was argued that it was admitted he could not be compelled to answer, and that as the bill prayed no relief against him, there could be no reason for keeping him any longer in court.

PER CURIAM. It seems a little contradictory that this man might be compelled in a court of law to answer this charge upon oath, as he might be by 1777, ch. 2, sec. 62, and that a court of equity should not have as large a power for the discovery of such a fraud; but with some reluctance the Court allowed the demurrer, and dismissed the bill as to Sellars, for no relief being prayed in the bill against him, and he not being compellable to make a discovery, it was useless to keep him longer in court.

COOKE v. LITTLE AND ANOTHER, SURETIES ON AN APPEAL BOND FOR WHITNEY.

Suit in the county court, and judgment for plaintiff; appeal by defendant to the Superior Court, with A and B sureties to the appeal bond; before judgment in the Superior Court the bail below surrendered the defendant, and he was committed; after judgment in the Superior Court, the defendant being gone, *sci. fa.* issued to the sureties in the appeal bond, and it was held that the surrender by the bail did not discharge them.

PLAINTIFF had sued Whitney in the county court, where he had given bail. Upon the trial of the cause there, the plaintiff obtained a verdict, and Whitney appealed and gave an appeal bond as the law directs, with the present defendants his sureties. The cause was removed to the Superior Court, and entered upon the docket of that court, and pending the action here, and before judgment, the bail below surrendered Whitney in this Court, and he was committed to jail. Afterwards the plaintiff obtained a verdict and judgment here, also, and Whitney being gone, the plaintiff took out a *sci. fa.* against the defendants to subject them to the payment of the money. The defendants pleaded the surrender of Whitney by the bail, and his commitment to jail thereupon. The plaintiff demurred.

Moore for defendant
Davie for plaintiffs. (169)

PER CURIAM. The act of 1777, ch. 2, sec. 76, directs bail to be given at the commencement of a suit in the county court, and also that such bail may surrender the principal in discharge of themselves at any time

before final judgment obtained against them. Sec. 20. It allows either party an appeal to this Court (sec. 82) but requires the appellant to give bond, with sufficient sureties, for the prosecution of such appeal with effect, and for performing the judgment, sentence, and decree which this Court shall make or pass thereon, in case such appellant shall have the cause decided against him; but the act makes no provision for any surrender to be made by these latter sureties, which is a proof that the Legislature did not intend that they should be dischargeable by means of a surrender. Had this been their meaning, they certainly would have declared it, as they had the subject of surrender under their consideration, and made provision for it in certain cases in this very act. The act probably goes upon this reason, that the plaintiff having by a suit at law, and verdict in his favor, established the probable justice of his demand, the defendant ought then to be held to more strict terms than at the institution of the suit, before there was any presumptive evidence on record against him. The Legislature probably thought it reasonable, after such evidence, that the defendant should not have it in his power to defeat the plaintiff by conveying his property to other creditors, or by wasting it during the pendency of the appeal, which event, combined with the circumstance of an intermediate surrender by the bail, would leave the plaintiff entirely remediless, were it not for the security he has by means of the appeal bond. At the same time that they allowed the privilege of appealing to the defendant, they were solicitous to provide against every possible inconvenience that might result from it to the other party, and this they have intended to effect by requiring an appeal bond with condition for prosecuting with effect or paying the condemnation in case of a judgment against the appellant. This secures the plaintiff at all events, and against all practices to his prejudice. The sureties for the appeal, therefore, cannot surrender nor can they be discharged by the surrender of the bail.

Much argument hath been used respecting the meaning of the act of 1785, ch. 2, and it hath been contended that the appeals there
(170) spoken of are from judgments and verdicts rendered in actions subjected by that act to the county court jurisdictions, and not appeals from all action in general. The title of the act, and its preamble, it is true, only looks to the enlargement of the county court's jurisdiction; but the provisos in the first clause and the second clause relate to appeals in general, and are to be taken to be *in pari materia* with the act of 1777, ch. 2. They are both parts of one whole, and these parts of the act of 1785 have a reference to appeal bonds taken pursuant to the act of 1777. This is plainly evinced by the preamble or introductory

part of the second clause: "And whereas from the manner in which appeals from the county courts of pleas and quarter sessions have been heretofore obtained in numerous instances, frequent injustice has happened to many just suitors from the delay incident to said appeals." This is the most unequivocal reference to abuses committed in the prosecution of appeals previous to that time that language can signify, that is to say, to the prosecution of appeals taken pursuant to the act of 1777; and for the remedying these abuses it directs appeal bonds for the future to be sent up as a part of the record; but it does not direct any new species or form of bonds. It is additional to the act of 1777, which did not provide for the sending up such bonds, and the consequence of their omission frequently was that the bonds were lost or mislaid, and the remedy upon them frustrated, to the prejudice and loss of the appellees. The act of 1777 did not ascertain the mode of proceeding upon appeal bonds by the appellee, when it should be necessary to proceed upon them, whether by a new action of debt by *sci. fa.* by a motion in court for judgment or how otherwise; and of course doubts were entertained upon that point. The act of 1777 imposed no penalty by way of restriction upon vexatious and unjust appeals, prayed sometimes for the mere purpose of delay, at others for the purpose of gratifying a litigious disposition. All these omissions are supplied by the act of 1785. Appeal bonds by that act are to be a part of the record transmitted to the Superior Court. The appellee may enter judgment upon them *instanter,* by motion to the court; and if the judgment below be affirmed, the appellant shall pay interest at the rate of 12½ per cent for his delay. And if the act of 1785 relates to appeals generally, the arguments built upon the contrary position must all fall to (171) the ground.

It was argued for the defendants that the commitment of their principal after his surrender by the bail was a commitment in execution, and that there can be no *fi. fa.* against the sureties after this. None of these statements are just. He was not, nor could be, committed in execution, because at the time of the surrender there was no judgment against him. But suppose him to have been committed in execution, it will not follow that that operates as a discharge of his sureties, any more than in the case where there are three obligors to a bond, and one is taken and imprisoned in execution for the debt; that will not discharge the others. 5 Rep., 86; 1 Roll. Ab., 903, pl. 21. Nothing short of payment, or a release, will discharge the coöbligors in such case. Had he been in execution, and been discharged by the plaintiff, that might have discharged his sureties; but a man can never be in execution till after judg-

ment, and a prayer for that purpose entered on record, and the prayer allowed by a *committitur* entered on record, when a principal is surrendered by his bail—for if he could be in execution merely by a surrender without prayer to the plaintiff, he might then take advantage of the insolvent debtor's act, and also might preclude the plaintiff of the benefit of a *fi. fa.* when perhaps at the time of the surrender the plaintiff might know that in a little time to come he would have property enough, as by the death of relations, marriage, or other means—and should he be once in execution by his body, the plaintiff could never afterwards during his life have a *fi. fa.*, and therefore the law will not say he shall be in execution, for the plaintiff, even upon a surrender after judgment, unless the plaintiff chooses that he shall be so, which choice must be manifested by a prayer on record. And if he be imprisoned upon a surrender, for instance, to the sheriff out of court, the court will release him from his imprisonment after judgment unless the plaintiff, in a reasonable time, apply to charge him in execution. But upon this last point, though the Court seemed to be very clear, Mr. Moore still thought the law was otherwise, and pressed for further time to argue it, which was allowed him by the Court, and the argument did not again come on during this term.

ANONYMOUS.

An appellee may move for an affirmance of the judgment with double costs, either at the first or any other term after the appeal. Per MACAY, J. But HAYWOOD, J., denied the propriety of it, and a rule upon the appellant to show cause at the next term was ordered.

MR. NORWOOD moved to have leave to enter up the affirmance of a judgment of the county court, upon an appeal taken from thence (172) to this Court. The appeal was returnable to last term, but no motion was then made for the affirmance. The appellant had failed to bring up the appeal fifteen days before the term.

MACAY, J. To the best of my remembrance, it has always been the practice to enter up judgments, as now moved for, at any time.

HAYWOOD, J. Whatever may have been the practice, I cannot say, not having attended to it in this particular. Sometimes a practice may prevail for a length of time, upon the strength of a precedent passing

sub silentio, which, when it comes to be examined, may be found very erroneous. Where an appeal is taken, both the appellant and appellee have the first day of the next term of the Superior Court given to them for their appearance in court, and by that means they are both in court that day—the appellee to move for the affirmance of judgment and the appellant to defend himself against the motion by showing any good cause he may have against it, as payment, release, or the like, since the appeal taken. The act of 1777, ch. 2, sec. 84, directs that the appeal shall be brought up fifteen days before the sitting of the term, for this reason, principally, that the appellee may have sufficient time, after knowing the appeal is intended to be prosecuted by its being filed in the office for that purpose, to prepare himself for the trial, or, if not filed, then to procure from the clerk of the county court a transcript of the record, and thereupon move for the affirmance. But if the first term of the Superior Court passes without any such motion for the affirmance, and without putting the case on the records of this Court, and continuing it to the next term, the parties are both out of court; and one of them cannot move against the other without bringing him into court again by some new process. 7 Rep., 30a. It would be productive of great mischief could the appellee at any distance of time, in the absence of the appellant, be at liberty to take a judgment against him upon a mere motion to the court. By such means a judgment might be entered against a man upon an old dormant county court verdict, after he had moved out of the country, and perhaps satisfied the demand; or when the plaintiff had discovered his evidence were lost, and all the property he had here be swept away, before he could have the least intimation of it. I am very clear, if the practice spoken of has prevailed, that it is repugnant to an universal principle of law and justice, that no man shall be condemned *ex parte* or unheard, as well as to the true meaning of the act. Therefore, I cannot yield my consent to the motion; but I am willing you should take a middle way—you may give notice to the (173) appellant of the intended motion for affirmance to be made at the next term, and at the next term prove the service of this notice by affidavit filed in court, and then renew your motion, and the Court will then consider it. You may have a rule entered for this purpose.

Rule entered accordingly.

See *Brickell v. Bass, ante,* 137.

CAIN v. PULLAM.

Practice upon arbitrations discussed.

ACTION on the case for slanderous words. This cause was referred by rule of courts to arbitrators, who awarded in favor of the plaintiff, and returned their award into court. These exceptions were taken thereto in writing, filed by General Davie, the principal of which were that the arbitrators proceeded without declaration, notwithstanding the defendant insisted it should be produced. These being filed, a day was given by rule of court for hearing the exceptions. They were answered in writing, also, filed by Mr. Moore for the plaintiff, and on the appointed day were brought before the Court. The exceptions of the defendant were supported by affidavit; they were contradicted by the affidavits of one of the arbitrators and of one Smith, who had been present. These persons swore that the defendant made that objection, upon which the arbitrators stopped in order that it might be produced; then the defendant consented they might proceed without the declaration stating the words spoken as laid in the declaration, which the other party agreed were the words stated therein. Upon this the Court overruled the exceptions.

This case is reported to show what is the practice in such cases in our courts.

Cited:—Tyson v. Robinson, 25 N. C., 337.

HUNT v. JUCKS & LONDON, SURVIVING PARTNERS OF THE COMPANY OF JUCKS & CO.

General reputation is not sufficient to charge a particular person as partner. There must be some confession of his, or some overt act to prove it. When a person indebted to another knows what sum he is to pay, and when he is to pay it, he must pay interest.

DUNBEBBIN had purchased the tobacco of the plaintiff, and had not paid for it. Dunbebbin was dead, and his estate supposed difficult to be come at, whereupon the suit was instituted against these defendants. The proof of the partnership depended upon the deposition of Mr. Hooper, who deposed that about the time of the purchase there was such a company as that of Jucks & Co.; that he was a partner himself; and

also Dunbebbin & London, and another whose name he mentioned; and that to the best of his remembrance, some of the partners of this company purchased a quantity of tobacco of the plaintiff for the company. A letter was produced written by London or Dunbebbin to (174) the plaintiff, stating the account, which was in the name of Jucks & Co. It informed the plaintiff that Jucks had the money to pay the balance of the account; and counsel for plaintiff insisted this tender had been made upon this evidence.

The court left it to the jury to say whether such a company had existed, and whether the defendants had been partners. The court informed them that the other depositions in the cause, stating a general reputation of the partnership, were not sufficient to charge Jucks as a partner; there must be some confession of his, or some overt act proving the same; but if they could rely upon the accuracy of Mr. Hooper's remembrance, as he had spoken of it, or if they believed Jucks carried the letter and the money mentioned in it, and knew how the account enclosed was stated, that would amount to an admission of his being a partner; and in that case they should find for the plaintiff; otherwise, for the defendant. They found for the plaintiff, and, also, pursuant to the charge of one of the court, given a few days before, who stated the rule to be that wherever the debtor knows precisely what he is to pay, and when he is to pay it, that the jury might give interest by way of damages, if they thought proper, they did in this case allow damages to the amount of the interest on the principal sum, by way of addition to the principal damages, and it was not complained of on the other side; and the plaintiff had judgment.

See *S. v. Blount, ante,* 4.

Cited: Devereux v. Burgwyn, 33 N. C., 495; *McRae v. Malloy,* 87 N. C., 199.

SMITH v. ST. LAWRENCE.

The negotiability of a bill or note may be restrained by indorsement or by special words in the body of the note. Endorser may sustain an action in his own name, either striking out the endorsement or without it, possession of the note being *prima facie* evidence of payment to endorsee.

ACTION instituted upon a note under seal, dated since 1786, promising to pay the money to plaintiff, and to him only. It was endorsed by the

plaintiff to an assignee, but the action was still commenced in the name of the original payee.

Mr. Moore, for the defendant, objected that the plaintiff ought not to recover, because it appeared by this endorsement that the property or interest in this note was not in the plaintiff, but in another person, the endorsee.

General Davie, *e contra.* The endorsement of a note by special words may restrain its future negotiability. 2 Doug., 638. And by
(175) parity of reason, the negotiability of a note may be restrained by special words in the body of the note itself. If so, then here is the word only, meant no doubt to restrain its transfer, and then it is not negotiable under the act of 1786, ch. 4, which only says that "All bills, bonds, or notes for money, as well those with seal as those without seal; those which are not expressed to be payable to order, or for value received, as those which are expressed to be payable to order, or for value received, shall, after the passing of this act, be held and deemed to be negotiable; and all interest and property therein shall be transferable by endorsement in the same manner and under the same rules, regulations, and restrictions as notes, called promissory or negotiable notes, have heretofore been." This clause comprehends the case of notes in which there is nothing expressed towards rendering them negotiable; but it does not extend to cases like the present, where negotiability is expressly guarded against; and of course the endorsement in the present case cannot operate as a legal transfer of the note.

One of the judges mentioned *Dook v. Caswell, ante,* 18, where the note was endorsed by Benton, but the suit commenced in the name of Dook, and the court allowed the endorsement to be struck out, upon an objection similar to the present being made. Upon the mentioning this case, the record was searched and found to be so.

PER CURIAM. The negotiability of a bill or note may be restrained by endorsement, or by special words in the body of the note itself; and if it could not, yet the original payee having the bill or note in his possession is evidence of the note having been returned to him by the endorsee after the endorsement; and if a payee endorses by a general or special endorsement, and the assignee cannot obtain payment of the drawer or maker of the bill or note, he may call upon the endorser, and he is compellable to pay the money and take back the bill or note; and if in such case the endorser or payee could not sue the maker in his own name because of the endorsement, he could not recover at all. He may strike out the endorsement, or recover without striking it out, his posses-

sion of the bill or note being evidence of such a repayment until the contrary be shown.

Verdict and judgment for plaintiff.

See *Drew v. Jacocks*, 6. N. C., 138; *Dook v. Caswell, ante*, 18.

Cited: *Strong v. Spear, post,* 214; *Bank v. Bank,* 118 N. C., 788.

(176)

STATE v. ROBERTS.

Indictments containing three counts, the first of which the court had no cognizance of. To submit on the first count (the others not to be considered) would oust the court of jurisdiction. Submission cannot be made upon one count without all, unless *nol. pros.* is entered as to the other counts. Upon assaults with intent to kill, the court may punish by fine only.

DEFENDANT was indicted for an assault and battery, stated in three counts: in the first, for a common assault and battery; in the second, for an assault with intent to kill and murder; in the third, for an assault and wounding with intent to kill and murder.

General Davie, for the defendant, upon an agreement between him and the Solicitor General, offered to submit upon the first count, and the other counts should not be considered at all.

PER CURIAM. If he submits upon that only, the court cannot take any notice of the offense, being ousted of original jurisdiction by the act of 1790, ch. 3, sec. 8, which directs "that all indictments for assaults, batteries, and petit larcenies shall in future originate in the county courts of pleas and quarter sessions only." These words are equivalent to express negative words, which it is said are necessary to oust this Court of juridiction, and the defendant cannot by his admission give to the court cognizance of an offense which by law they have no cognizance of, any more than a prisoner indicted for a capital felony could by his admission give authority to a county court to pass sentence upon him. Neither can there be a submission for part of the indictment only; he must submit as to all the counts in the indictment if he submits at all, unless the Solicitor General will enter a *nole prosequi* as to some. The Court are not obliged to imprison upon a conviction for an assault with intent to kill. They may inflict imprisonment, the pillory, and a fine, but they

may inflict some or one of them only. 4 Bl. Com., 217, means only that the Court have a discretionary power of inflicting the punishments there mentioned, not that they are obliged to inflict all of them.

Defendant submitted, and the witnesses for the State were examined, and the Court fined him only.

FAYETTEVILLE—APRIL TERM, 1795

SEEKRIGHT, ON THE DEMISE OF WRIGHT AND WIFE, v. PATRICK BOGAN.

It is the first patent or grant, and not the first entry in the land office, that gives the best title. In the case of lapped patents where both are in possession of their respective tracts, but neither actually settled on the lapped part, the oldest grantee will be considered as having the legal possession of that part. Plaintiff may prove the loss of his deed by his own oath, but not that the plat offered in support of his title was part of the deed lost.

EJECTMENT for 54 acres of land.

Plaintiffs claimed under one Thomas, who conveyed to Aaron Baker, who died seized, leaving the *feme* his only child. The grant to Thomas bore date in December, 1770. The mesne conveyance to Baker, (177) his dying seized, and the heirship of the plaintiff, were proven.

The defendant claimed title under one McNatt, who conveyed to him. McNatt's patent bore date 18 April, 1771, and his conveyance to Bogan was proven.

The land granted to Thomas, and by him to Baker, was a large tract of 500 acres. The tract granted to McNatt, and by him to Bogan, was a tract of 200 acres, and it intersected the tract of 500 acres, so as to include the 54 acres which were the subject of this dispute. Bogan took possession of his tract of 200 acres, as one witness proved, in 1775, as another said, in 1773, and continued that possession down to the present day. Baker was proven to be in possession of his tract of 500 acres in 1778, soon after the Briar Creek defeat; and his possession has also been continued to the present time, except as to these 54 acres, which were cleared by Lanier, the first husband of the *feme,* and cultivated for two years; he then died, and the *feme* intermarrying with Wright, he cultivated it one year, in the fall of which year Bogan entered and took possession, whereupon this action was instituted. McNatt's entry in the land office was made in 1766, that of Thomas at a subsequent period.

This being the evidence, Mr. Moore, for the plaintiffs, was about to speak to the jury; but MACAY, J., called to Mr. Williams to begin. He insisted that their entry was prior; that McNatt had first purchased, and was in justice entitled to it. Secondly, that Bogan had possession ever since 1773, and that more than seven years having elapsed, during all which time Bogan was in possession, that the plaintiff had thereby lost her right of possession.

PER CURIAM. The question here is who has the best title to possess this 54 acres—as to which the rule is, that the first patent or grant gives the best title, not the first entry in the land office, unless the first patentee or grantee loses that title by suffering an adverse possession of seven years without entry, claim or action made by him within that time. Here the defendant hath been in possession ever since 1773, but the operation of the act of limitations hath been suspended by two several acts of the Legislature, from 1773 to 1 June, 1784, that is to say, by the act of 1777, ch. 2, sec. 54, and the act of 1783, ch. 4, sec. 9; and this action was commenced after 1 June, 1784, and before seven years had elapsed from that period; so that there is no bar formed under that statute by the possession which the defendant had. Besides, the rule of law (178) is that where two persons are in possession, claiming by different titles, the law will adjudge the legal possession in him who hath the right. In the present case both plaintiff and defendant were in possession of the 54 acres in dispute, from 1778, when Baker is proved to have been in the occupation of his 500-acre tract; and therefore from that period, he claiming under the patent first dated, the law will adjudge the possession of this tract of 54 acres to have been in him; and then from 1773, when Bogan first took possession of his 200-acre tract, to 1778, there were but five intervening years—Bogan's possession of the 54-acres was then defeated by Baker's entry into his 500-acre tract—for either of these reasons possession will not avail the defendant in the present case, and then the title must rest upon the priority of the patents. Wherefore plaintiffs ought to recover.

Verdict and judgment for the plaintiffs accordingly.

Cited: *Tyrrell v. Mooney,* 5 N. C., 402.

DEN ON THE DEMISE OF PARK v. COCHRAN AND OTHERS.

A party who has been guilty of neglect may, upon seeking a continuance, be compelled to pay the costs of the term as the condition of the continuance; and these costs are not to be refunded even though he should succeed in the cause. In this country no actual entry is necessary until an adverse possession commences. A possession to bar an entry must be a continued one. Suspension of the running of the Statute of Limitations.

EJECTMENT. The continuance of this cause was moved for upon an affidavit stating that the plaintiff had at the last term procured an order of survey of the premises in dispute; that he had given notice that he would begin the survey four days before the beginning of this term; that it had been begun accordingly, and that the survey was not yet
(179) completed, though it would be completed by the end of this day, the day on which the motion is made. It appeared, on the other hand, that this order had been first procured about three years ago, and had been renewed from term to term ever since, and that the survey had never yet been completed.

PER CURIAM. The plaintiff has been guilty of great neglect. He might have procured a survey before this time. This is distinguishable from the case of *St. Lawrence,* last term, at Hillsborough, to which it has been compared. St. Lawrence had made no preparations at all for the trial, for want of notice, as he said, of a new trial having been granted the term before; whereas he might have known it had he made the proper inquiry, as he ought to have done, the motion for a new trial being his own motion. Here the plaintiff began his survey in time, as he supposed, to complete it by the time of the sitting of this Court at the present term; but hath been prevented by some unforeseen difficulties, and will be ready with his plats after this day. His cause, therefore, should be continued; but as he has not used all the diligence that he might have used to prepare for the trial, therefore, according to the act of 1779, ch. 4, sec. 5, he must pay all the costs accrued at this term, which are not to be refunded to him even although he should eventually prevail. Rather than submit to these conditions, the plaintiff thought proper to proceed to trial.

Upon the trial it appeared that Dyer and Carroll had been the proprietors of the land out of which this lot was taken; that they conveyed to the plaintiff's father, by deed dated 9 May, 1763. Its execution by Carroll only had been proven, and it had been registered upon that proof; and the plaintiff was proved to be the heir at law of the bargainee. On the other side it appeared that on 22 November, 1764, Dyer and Carroll and others, assignees of the estate of the first-mentioned Car-

roll, conveyed part of this large tract of land to Edmund Fanning, and on the same day Dyer and wife conveyed another part thereof to the said Edmund Fanning; and it seemed to be admitted that the lot conveyed to Park, or described in his deed, lay somewhere within the lot conveyed to Fanning. On 3 May, 1775, Fanning conveyed to Cochran, father of the defendants, who is now deceased. Fanning, between the commencement of 1764 and 1766, built a house upon the lot now claimed, and was some time in erecting buildings, which when built had fallen down; after which time he had no actual possession; he had no actual possession to the time of his conveyance to Cochran. Cochran took possession in 1775, and that possession has been continued (180) to the present time. Parks had never any actual possession.

This being the evidence, Mr. Williams for the defendant, moved that the plaintiff might be called. He cited many authorities from the English books to prove that unless a man has entered within the time limited by law, he can never enter afterwards, but loses his right of entry. That here was an adverse possession in Fanning between 1764 and 1766, and the possession once being adverse, need not be continued. That Cochran's possession commenced in 1775, and was an actual adverse possession.

PER CURIAM. Though the law is as stated by Mr. Williams in England, it is different in this country. In this country there is no necessity for an entry until an actual adverse possession commences, and that actual adverse possession must be continued for seven years, without entry or claim on the other side, before it can toll the plaintiff's right of entry. The contrary doctrine in this country would be attended with consequences very fatal to titles for land. According to Mr. William's position, if a man had title to a tract of land which he had not been upon for seven years, defendant next day after the seven years expired might enter without any color of title and hold it forever against the first lawful proprietor. Fanning's possession was not continued longer than the house was building. The next adverse possession (of Mr. Cochran) commenced in 1775; from that time to the first of June, 1784, the operation of the act of limitations is suspended; and in 1784, before the act began to run, the plaintiff's father died, leaving the plaintiff an infant, and he continued an infant till just before the commencement of this action, so that the plaintiff ought not to be nonsuited. But afterwards, at another stage of his trial, a juror was withdrawn for another reason.

NOTE.—As to the continuance see *Tyce v. Ledford, ante*, 26.

Cited: Harper v. Hancock, 28 N. C., 124.

THE SURVIVING PARTNERS OF AULEY McNAUGHTON & CO. v. JOHN NAYLOR.

A plea since last continuance will be refused unless the Court is satisfied of its truth.

DEBT, and payment pleaded; and the jury being called, Mr. Spillar would have pleaded a plea *puis darrein continuance.*

PER CURIAM. The Court must be satisfied of the probable truth of the plea before they will permit it to be made. Buller 309; 2 Mo., 307; Yelv., 181; Cro. Eliz., 49. And Mr. Spillar not being able to satisfy the Court on these heads, he was not permitted to enter his plea. See 2 Wils., 137, 138, where it is decided that the Court cannot reject a plea *puis darrein continuance,* if verified by affidavit; also, 1 Str., 492; 3 (181) Term, 554.

PEALE v. FOLSOME.

A plea of the insolvent debtor's act is not a plea *puis darrein continuance,* unless so entered.

AT the pleading term the defendant pleaded *non est factum,* and conditions performed, and afterwards, at another term, the insolvent debtor's act. Mr. Hay insisted that was intended as a plea *puis darrein continuance,* and that it was a waiver of the preceding pleas. It was insisted, on the other side, that it was not a plea *puis darrein continuance,* not having been so pleaded, nor entered on the record as such.

PER CURIAM. Were it a plea *puis darrein continuance,* the plea of *non est factum* would be thereby waived, and you would have no need to prove the execution of the bond; but unless the other side will concede it to be a plea *puis darrein continuance,* the Court cannot take it to be so. It does not purport in itself, nor by the entry of it on the record, to be a plea of some new matter arisen since the last continuance. It might have been, and probably was, a plea added to the others by motion to the court, or by consent of the opposite party, as an original plea. A juror was withdrawn by consent.

See *Greer v. Sheppard, ante,* 96.

McMURPHEY v. CAMPBELL.

Process returned by the deputy sheriff should be in the name of the high sheriff, and not in the name of the deputy for the high sheriff; but a return in the latter mode was supported.

CAMPBELL had been summoned on the part of McMurphey to attend this Court as a witness in his behalf, and when the trial came on, failing to appear, was called upon his *subpœna,* and his default recorded; whereupon a *sci. fa.* issued against him, and now his defense was that he never was summoned by any proper officer. The *subpœna,* when produced, appeared to have been served by the deputy sheriff, and returned by him in his own name for the high sheriff, and not in the name of the high sheriff, as it should have been. Whereupon Mr. Spillar objected that the deputy sheriff was not a sworn officer, which was conceded in the present case, and that therefore, as the return was made by him, and not in the name of the principal, it was not a good service.

PER CURIAM. The return here is for the principal by the deputy, which is nearly the same thing as if the return had been "executed" and the name of the principal subscribed, and the words "by A. B., Deputy Sheriff," added, which is the usual course. This return is indeed a little irregular, but it cannot now be amended, the principal being dead and the deputy removed out of the State. Such re- (182) turns, however, though irregular, have prevailed very generally through the country for a long time, and the disallowing them would be productive of terrible inconvenience. *Communis error facit jus* is a maxim we do not approve of, but it must sometimes be submitted to for the sake of avoiding confusion. The course of practice frequently makes the law, and must be given way to where a sudden disallowance of it would be followed by a great public evil. In strictness, however, there is no doubt but that all returns should be made in the name of the high sheriff. Salk., 96; Bac. Abr., 437; 1777, ch. 8, sec. 5.

So the objection was overruled, and the plaintiff had judgment.

See *S. v. Johnston, post,* 293; *Holding v. Holding,* 4 N. C., 324.

Cited: Dobson v. Murphy, 18 N. C., 590; *Washington v. Vinson,* 49 N. C., 381; *Brickhouse v. Sutton,* 99 N. C., 109.

DUNCAN McRAE v. ADMINISTRATOR OF J. MOORE.

When "no assets" are pleaded, the plaintiff shall have judgment for the amount of the assets which he can show in the hands of the administrator, and judgment *quando* for the balance of his debt.

SET-OFF and no assets pleaded. The debt was £154, 2s., and plaintiff produced the inventory, showing assets of £124, 18s. 6d., and the jury gave their verdict accordingly; whereupon the plaintiff had judgment for the latter sum, to be levied of the goods of the deceased, in the hands of the administrators; and for the residue he had judgment to be levied of the assets which should thereafter come to the hands of the administrators to be administered.

PER CURIAM. The Office of Executors, 191, says plaintiff shall have judgment for as much as defendant hath assets to pay, and an award that *quando* assets *acciderint in futuro,* that then he shall have judgment for the residue, upon which award a *sci. fa.* lies to have judgment and execution. Co. Ent., 151, b.

JAMIESON, ASSIGNEE, v. FARR.

A bond payable partly in money and partly in specific articles is not negotiable under the act of 1786, Rev., ch. 248.

DEBT upon bond for £50, dischargeable part in money and part in specific articles. After verdict it was moved in arrest of judgment that this bond is not assignable so as to enable the assignee to bring debt in his own name; and it was argued that no bonds are negotiable unless for money absolutely, not where they are for money and something else beside, or for money, but to be discharged in something else. In support of this doctrine were cited Kidd on Bills, 32, where it is laid
(183) down that the instrument must be for money in specie, not to be paid in good East India bonds, or anything else but money; also, 3 Wils., 213; Bull., 273; 2 Str., 1271.

PER CURIAM. The act of 1786, ch. 4, makes only bonds for money negotiable. Bonds for specific articles could never answer the purposes of trade, not being the representatives of any certain value, as money is. The assignee of such bonds could never know how much money to ex-

pect in lieu thereof, neither could he know whether the debtor would discharge the bond in the stipulated article or in money. But bonds for money are of a certain precise value; the payment must be in money; the assignee knows exactly how much he is to receive, and, when upon a man of good credit, may be readily substituted for the same sum in money, or almost with the same advantage as if it were money, without any danger of being afterwards involved in disputes about the value—which in the case of bonds for specific articles is continually fluctuating, and depends upon a great variety of circumstances. For these reasons the law has never made bonds for specific articles negotiable, but only bills, notes, and bonds for money. The cases in 3 Wils., 213, and in Kidd, 32, are precisely similar to the present, and the reasons for these decisions are strictly applicable to the case now before us. On the score of reason, the present case cannot be distinguished from them. Therefore, the judgment must be arrested. Arrested accordingly.

See *Tindall v. Johnston, post*, 372; *Campbell v. Mumford, post*, 398; *Thompson v. Gaylard*, 3 N. C., 150; *Wofford v. Greenlee*, 1 N. C., 299. The law is the same of bonds payable on a contingency. *Goodloe v. Taylor*, 10 N. C., 458.

ANONYMOUS.

Payments made in the depreciated currency prior to 1783 shall discharge the same numerical sum as their nominal value.

DEBT upon a bond, dated 21 March, 1776, payable in September, 1776, for £2,200, and payment pleaded. There was also another bond for £713, upon which a suit had been instituted in the county court, and payment pleaded to that; and the same payments were there proven as were now proven to this bond. But it was alleged that these payments were large enough to discharge both bonds, and the defendant's counsel offered that the amount of the principal and interest of the small bond might be deducted from the payments now about to be proven, and the balance of the payments only to be applied to the discharge of the present bond. To this the Court assented; and he proved £110, 16s. 8d. paid 19 January, 1777; £900 17 November, 1779; £1,237, 10s. on 22 January, 1780; and £10,000 26 May, 1780. All of these sums (184) but the first were in depreciated money, and if reduced into money of the present currency, by application of the scale at the several times of payment, would amount to about the sum of £349 4s. 10d. But if

taken as payments according to the nominal value when paid, both bonds were discharged.

Counsel for plaintiff contended that the payments ought to be scaled, and that this had been the practice of the courts heretofore in divers instances; that to allow them as payments according to the nominal amount would be injustice to the plaintiff, as his bonds would then be discharged by one-tenth of their value; and he urged that the payments made being much beyond the sums contained in the bonds, afforded evidence that the defendant believed himself bound to pay as much of the depreciated money as was equivalent in real value to the sums mentioned in the bonds. He argued, further, that the Legislature intended payments made in the time of the war to be reduced by the scale to their real value; for 1783, ch. 4, sec. 11, repeals the tender laws so far as they related to the payment of debt, and by section 7 have ousted all pleas of tender with an "always ready," alleged to be made in the time of the war, unless such pleas be accompanied with affidavits stating that the sum tendered was equal, at the time of the tender, to the debt or damage demanded, according to the then depreciation; and as no tender of the nominal debt made in times of depreciation is good, as by this act it clearly is not, by the same reason no payment made in depreciated money ought to pass to the credit of a bond for more than its real value.

PER CURIAM: It hath been the constant practice ever since the passing of this act that payments made in the time of depreciation should discharge as much of the debt as such payments nominally amounted to. A contrary decision at this time would revive many of the old disputes that have been settled by that rule, and produce much litigation. When payments were made in depreciated money in time of war, they were generally understood to be equal to the same nominal sum in the bond. Both sums were equally depreciated, both the money in the bond and money paid. Had the creditor sued for his debt, he could have recovered no more than as much depreciated money as numerically
(185) equaled his debt. When he received depreciated money for his debt pound for pound, or shilling for shilling, he received precisely what the law allowed him, and what it would have compelled the debtor to pay. Under the laws then existing, the debtor was discharged *pro tanto,* according to the numerical sum; and the act of 1783 did not intend to lay any new charge upon the debtor to which he was not subject before, or from which he had been discharged under the operation of the tender laws and payments made before that time; nor is it clear the Legislature could have thus subjected him, had they been so inclined. The act of 1783 meant only to repeal the tender laws so that

they should not operate for the future, not to destroy the effect and operation of the laws upon transactions that had already taken place under them. It must be admitted that a payment made in time of war of the whole numerical sum due upon a bond is a legal discharge of that bond, although the real value of the payment was much inferior to the real value of the money mentioned in the bond at the time of the contract: for no instance ever occurred since the war where such payment has been reduced by the scale. And if the law be so in case of full payments, so it is also in case of partial ones. The case now before us is that of a full payment. Indeed, it is not founded in justice, that the creditor shall receive the full value of his money and be exempted entirely from all loss by depreciation, when the debtor, who perhaps procured the money, or securities for money, at an early period, when the currency was but little if at all depreciated, intending therewith to pay off his debt, shall be allowed only the real value when he received from his debtor and paid it to his creditor, and very likely did this at the request of his creditor. Depreciation was a consequence of the war carried on as well for the benefit of the creditor as the debtor, and he ought at least to bear a part of this burden. As to the argument drawn from section 7 of the act of 1783, that act stopped the circulation of the depreciated paper currency, and had it not made some provision for the cases of tenders made in the time of depreciation, the plaintiff, wherever a legal tender had been made, would by the operation of this act have been barred forever. The defendant might have pleaded the tender with an always ready, and have paid the money that had been tendered into court, leaving the plaintiff no other alternative but to take that or join issue; in which latter case, if the plea proved to be true, he was barred. This would have been a case of hardship, especially where the money had been refused because of its great in- (186) adequacy in point of value to the contract. His hardship was prevented by the clause in question. It says nothing of payments actually made; it only provides against a total loss of the debt where the plaintiff has not received the money, and only extends to cases after a certain day when the money had become greatly depreciated, not to cases before. It only places the debtor, who had made an unconscionable tender, in the same situation with one who had made no tender at all. But this is a very different thing from a payment actually made and accepted, and understood at the time to be a discharge. But if the reason of the thing be not in opposition to the doctrine contended for on the part of the plaintiff, the constant practice of our courts hath been; and we ought not to render the law uncertain by a contrary decision.

The plaintiff suffered a nonsuit.

LUCY LEE v. WILLIAM ASHLEY.

Quere as to the effect of plea of *liberum tenementum.*

TRESPASS *quare clausum fregit;* not guilty, and *liberum tenementum* pleaded.

It appeared in evidence that the land on which the trespass is alleged to have been committed was a tract of 230 acres, which was part of a tract of 1,500 acres, of which Zachariah Lee, the husband of the plaintiff, died seized, who at the time of his death left a son and heir at law, now of the age of 31 years. This son had sold all the land except the 230 acres, some considerable time ago; then he sold the residue to John Field, who sold to the present defendant. Plaintiff had kept possession from the death of her husband until the conveyance to Field of the residue, which lately took place. She verbally assented to this latter conveyance, Field and the son on their parts agreeing that she should possess 100 acres during her life.

Upon these facts counsel for defendant insisted that the plea of *liberum tenementum* was supported. He argued that though it be sometimes laid down in the books that possession is of itself sufficient to support an action of trespass *quare clausum fregit,* and that the action of trepass is an action for the violation of possession, the true distinction is that possession only is sufficient to support the action against a mere trespasser, who hath no cause of justification or excuse, or, in other words, against a wrongdoer. 2 Str., 1238; Bull., 93. But where the defendant hath the freehold, and pleads it, there a bare pos-
(187) session is not sufficient; for then the entry of the defendant is lawful, and not a trespass. In such case the plaintiff cannot otherwise support the action than by showing an interest in the soil or the profits, either derived under the defendant or precedent to his title, as will take away the defendant's right to enter for the present. Some of these instances are stated in Bull., 85, in the case of *Welch and Hall* there cited; and others in 3 Bl. Com., 210; Bull., 93, 94. Here, indeed, the plaintiff hath continued the possession from the time of her husband's death, but upon his death the fee and freehold descended to the son, who it is proven lived upon the land with his mother, and consequently had the legal possession; and he hath conveyed both the fee and freehold to the defendant. His entry was therefore regular, unless it can be shown, notwithstanding the defendant's having the freehold, that she hath a right to maintain her possession against him. She hath not replied her having any such interest by way of avoiding the plea of *liberum tenementum;* indeed, the fact is, she hath no such interest to

reply. It hath been argued for her that upon the death of her husband she had a right to continue the possession, notwithstanding the heir's title, until her dower should be assigned; and for this her counsel cited 2 Bl. Com., 135. Allowing the fullest extent to this doctrine, she could continue but forty days in possession, and after the expiration of that time, if her dower had not been assigned in the interim, she was liable to be turned out of possession by the heir, and could have no other action but that of dower to recover the possession of any part; though before the expiration of the forty days the old law provided her with a writ *de quarantina habenda,* to be decided *instanter* by the sheriff. Co. Litt., 34, b; 2 Inst., 16; but no such writ lying after the forty days is proof that she was no longer entitled to possession, though her dower were not assigned. Had the law intended that her possession should continue until the actual assignment of dower, it would have provided a remedy in case of dispossession previous thereto.

As to the doubt suggested by one of the Court, relative to the estate in dower being considered as a part of the estate of the deceased still continuing, so that the law does not cast the freehold thereof, but only the reversion upon the heir, for which were cited the authorities of Co. Litt., 241, a 15, a 31, a and b 327, 44, 45 (see, also, Gilbert's Ten., 23; Hawk. Abr., 23): the best answer to that is 2 Bl. Com. 135, 136, where it is said, the assignment of dower must be made by the heir or his guardian, to entitle the lord of the fee to demand his services of the heir, who by his entry to assign dower becomes tenant of the land to the lord, and the widow immediate tenant to him. Whence it follows that the heir has the right of entry and freehold, which the law casts upon him from the moment of the ancestor's death, and not (188) a reversion only.

PER CURIAM. We entertain some doubt upon the facts stated in evidence relative to this plea of *liberum tenementum.* Let the jury give their verdict as they shall think proper; and if either party be dissatisfied, he may move for a new trial, and then the law will be more deliberately considered.

The jury found for the defendant, and the cause was no more stirred.

NOTE 1, BY REPORTER.—When the plea of *liberum tenementum* is pleaded, which is called the common bar in the action of trespass, if the defendant has not given a name to, or described exactly, the *locus in quo,* in his declaration, it becomes necessary for him to make a novel assignment, to which the defendant again pleads; but if the plaintiff describes the *locus in quo* in his declaration, with precision, then the plea of *liberum tenementum* puts it upon the

defendant to prove that the *locus in quo* thus described is his freehold; and the plaintiff need only deny the plea, without a novel assignment. And in the first case, if the plaintiff does not make a new assignment, ascertaining the place, the defendant may prove any close that is the freehold, and that will support his plea. But the freehold, I apprehend, must be proved to be within the place laid for the venue. *Vide* 2 Bl. Rep., 1089; Salk., 453; 6 Mo., 119. But if the action of trespass be *de bonis asportatis*, and the defendant pleaded that the *locus in quo* is his freehold, and that the goods were then damage feasant, then he must describe the place with certainty. The locality is a material part of his plea;—and without it the plea is not good. So if to trespass the defendant pleaded *son assault*, proof of an assault by the plaintiff on the same day, or before the action brought, supports the plea. So that if in fact there were two batteries, one produced by the plaintiff's own assault, the other not, the plaintiff must new assign and distinguish the battery not brought on by his own assault; but if there are two counts stating the two batteries, and two justifications or pleas of *son assault*, one of them will be untrue, and upon that the plaintiff may recover without a new assignment. Buller, 92.

NOTE 2, BY REPORTER.—It appears evident from the authorities cited on that head above that the wife is deemed to continue the estate and possession of the husband after his death; the reason of which probably may be that if she claimed under the heir and not paramount, her dower, as being a part of his estate, might be subject to his prior charges and incumbrances, which is avoided by her claiming above him. Also, if she claimed under the heir and from him, and was not in, in continuance of her husband's estate, then if the husband was tenant in tail, and he died without issue, in that case there would be no heir nor any estate tail, and she would lose her dower. Yet by law she is dowable, and of necessity the estate tail of the husband must have continuance as to one-third until her death. *Vide* 8 Rep., 34; 6 Rep., 41; 2 Bac. Ab., 127. Again, were the dower a part of the heir's estate, then by the descent he might be remitted to his ancient and better title, and the estate descended thereby cease altogether, and the widow be defeated of dower. (189) This the law does not allow. Her dower, therefore, is not derived out of the heir's estate, nor supported by it, but out of the estate of the husband, continued by fiction of law after his death, which fiction is invented for the purpose of avoiding the inconveniences above stated, and others that might result were it not for this fiction.

THE SURVIVING PARTNERS OF AULEY McNAUGHTON & CO. v. JOHN MOORE.

Per HAYWOOD, J.: Death of one partner dissolves the partnership, and a clerk or agent, who had been appointed by the company, cannot, after such dissolution, do any act to affect the interest of the company, as to receive payments, etc. But the jury found otherwise.

DEBT and payment pleaded. After the death of McNaughton, McAuslin received £40, and endorsed it on the bond; and the question was, if this was a good payment. It appeared in evidence that McNaughton

and McAuslin both lived in the same town before the death of the former; that McNaughton appointed the other one of his clerks; that he opened a store, and put up a sign, purporting that the store was McAuslin's, but the books were kept in the name of the company; that this bond was for a debt contracted in that store, and was made payable to McNaughton & Co. McNaughton wrote to his correspondents in Europe, informing them that he had appointed McAuslin one of his clerks, or agents, or assistants; of which they approved by their letters in answer; and about twelve months before the death of McNaughton they addressed letters to McAuslin, as an agent of the company. It was argued that this payment was not a legal one, and 2 Esp., and 1 Salk., 27, were cited.

MACAY, J., being some way interested in the question, gave no opinion.

HAYWOOD, J., doubted, and requested that if the jury should give a verdict pursuant to the opinion he was now about to deliver, and the bar should be at all dissatisfied with it, that they would by motion for a new trial, or by some other means, put the question upon record, in order to a further investigation—his opinion being very unsettled, as the question came suddenly upon him without any previous intimation of it, and before he had time to form it upon deliberation and looking into authorities. Then turning to the jury, he said, with respect to the point under consideration, it seemed to him that where there were several partners in trade, and one of them died, that operated a dissolution of the partnership. As they could no longer trade jointly together, and the interest of the deceased vested in executors, the goods and debts immediately became vested in the survivors; and a right to a share of what remained after all debts due from the company were paid and satisfied belonged to the executors of the deceased. That McAuslin was to be considered as a person having authority to act by virtue of the appointment of the company; and as it was a rule that a power (190) to act could be exercised no longer than the life of him that gave it, the company that gave the appointment being dissolved, and no longer existing, all authorities derived from that company were at an end. Consequently, that the authority of McAuslin had ceased from the time of McNaughton's death, and he had no power to make sale of goods, or to receive and give discharges for debts afterwards, unless by virtue of a new appointment from the survivors. In which case he would act in the name of the survivors, and not as he had formerly done, in the name of the company. If an authority be committed to several persons jointly, and one dies, the authority cannot be executed; and by

like reason, if several persons jointly give an authority, and one dies, the authority must be revoked, and more especially where the death of one causes an alteration of the property concerning which the authority was given—as where by death of one, his share goes to executors or heirs, and the like, who might be unwilling to be bound by the conduct of the agent formerly appointed; and therefore he thought the payment was not a good one.

(192) The jury, however, found for the defendant.

The death of the partner here was notorious. It is a thing in itself capable of notoriety, and if a man will pay to the clerk after the death of the merchant, he acts in his own wrong. It is no more than the common case of debtors paying into the wrong hand, in which case he is always compellable to pay over again to the right one. Whatever authority was derived from the deceased, so far as concerned his interest, was countermanded by his death. The clerk appointed by him cannot receive his share of the debts, so as to make himself chargeable for that share to the executors. Their demand will be against the survivors, and it is unreasonable that the agent cannot affect the estate of the person who appointed him, but at the same time shall affect that of the partners in another part of the world at too great a distance to give any check to his conduct, and, after all, when perhaps he has greatly injured them by mismanagement, that he may be permitted to shelter himself by saying he acted as their servant, and is not liable to make them any satisfaction. The survivors, and they only, become answerable to the executors of the deceased; and if they sell the goods at an undervalue, or otherwise waste the partnership in a losing speculation or otherwise, no loss can accrue from thence to the executors or to the estate of the deceased.

If this decision, however, be allowed to ascertain what the law is, as the decision of a jury seems to have done in a similar case (2 Str., 1182), then the law now is that where there are several partners, some here and some in England, and the partner here appoints an agent to assist him in selling goods and receiving debts, and then dies, the agent may continue, until notice to the contrary be given to the debtors, to receive debts and give legal discharges; and the death of the partner here is not a countermand of his authority.

WINSLOW v. WALKER.

A boat is drifted away from a landing, and taken up by a stranger, who sells to defendant: *Held*, that the stranger's right to salvage is a demand upon the plaintiff to be enforced by detention, and that the right is not transferable to a purchaser of the property.

(193) TROVER for a boat; and a general verdict for the plaintiff, subject to the opinion of the Court upon this special case, viz.: The boat sued for was the property of the plaintiff, and was drifted

away from the landing at Campbellton, and floated down the river 114 miles, to a part of the river about a mile wide, and was there taken up by a stranger, and again got adrift and went to the New-Inlet, where the river empties into the sea, 10 miles wide; there it was again taken up by a stranger, who knew not the owner, nor from whence the boat had come. The boat was greatly wrecked and damaged, and in that condition was sold to the defendant, who repaired it; upon which the plaintiff demanded, and the defendant refused to deliver. If, on the above facts, the law is for the plaintiff, the judgment to be given for him in the verdict; if for the defendant, then a nonsuit to be entered.

And now, upon argument, it was insisted for the defendant that the taker-up of the boat who sold to him had a lien on it for his salvage, to which he was entitled. 1 L. Ray., 393, *Hartford v. Jones,* and 2 Bl. Rep., 1117, were cited.

The Court took time to advise, and the next day gave judgment for the plaintiff, being of opinion that the right he had to detain the boat until paid for salvage was in the nature of a demand upon the plaintiff, or a chose in action, to be enforced by keeping possession of the boat till the plaintiff should satisfy him, which could not be transferred with the boat to another; and being founded on the possession, when he parted with that, he lost his lien, and could then only recover his salvage in his own name against the plaintiff. 1 Atk., 234, 235; 1 Burr., 494; 5 Bac. Ab., 270; Doug., 105; 4 Burr., 2214.

Judgment for plaintiff.

JOHN INGRAM, ASSIGNEE, ETC., v. JOHN HALL.

A bond for payment of money, without a subscribing witness, can only be declared upon as a sealed instrument; and proof of the obligor's handwriting will be admitted as proof of the seal; but proof of the seal is not evidence of delivery, which is to be inferred from other circumstances.

DEBT, and *non est factum* pleaded. The jury being sworn, this special case was made, viz.:

The jury being sworn in this case, a paper-writing was produced in the words and figures following, that is to say:

"Ten days after this 22 June, 1793, I promise to pay to William Cutlar, or order, for value received, one hundred and seventy-five pounds, ten shillings currency. Witness my hand and seal, day and date first above written.

£175.10. JOHN HALL. (SEAL.)"

(194) On the back of said paper-writing were the following endorsements, viz.:

"Pay the within to Geo. Hooper, or order. WM. CUTLAR."
"Pay the within to J. Ingram, Esq., or order. G. HOOPER."

It appeared, on inspection of the paper, that there was not a subscribing witness to it, but that there was a seal; and the plaintiff's counsel offered a witness to prove the handwriting of the defendant, to support the action. To this the defendant's counsel objected, as insufficient in law to support the action.

The court, therefore, directed the witness to be sworn, and a verdict to be taken, and reserved the question of law, on the above objection, for further consideration.

It was further objected in the case that an action of debt cannot be maintained on the writing produced; whereon, also, the court took time to advise; and it is agreed, in case the court shall be of opinion that, on either of these objections, the plaintiff ought not to recover, then a nonsuit shall be entered.

But if the court should be of opinion that both these objections are invalid in point of law, then judgment to be entered for the plaintiff.

The witness not only proved the name subscribed, but also the word seal, written in the circumference of the seal and scratched with a pen, to be in the handwriting of the defendant.

At October Term, 1795, the Court gave their opinion as follows:

HAYWOOD, J. Before we proceed to the immediate investigation of the first question, Whether, in the case of a sealed instrument, unattested by any subscribing witness, the handwriting of the party may be admitted in evidence, it may be proper to take a view of the origin of deeds, in our law, and of the various changes and alterations the law has undergone with respect to that species of instruments, in order to be accommodated to the different circumstances which different periods of time have produced. This may have a stronger tendency to place the present question in a true light than perhaps any method of treating the subject that could be devised.

Let us consider, therefore, (1) the origin of reducing contracts to writing; (2) the origin of sealing, with the uses that have been made of it at different periods; (3) the origin of delivery.

(195) We will then consider the only circumstance essential to the constitution of a deed at this day, and, lastly, from all these premises, we will draw conclusions applicable to the point now in controversy.

(1) All writers agree that the northern nations of Europe, who spread themselves over the southern and western parts of it, were an illiterate people, who despised all arts but those of war. The Saxons who founded the Heptarchy in England, and afterwards the English monarchy, were part of those people; they had, in general, no knowledge of letters; their laws and customs, their legal ceremonies, were preserved and transmitted to others and to posterity by tradition only. To keep up a military spirit, and to have a band of warriors always ready at command, it was the universal practice of the conquering leaders of these nations to divide the conquered country into allotments, which were parceled out to their followers: first, at the will of the lord or leader; next, for the better encouragement of agriculture, for life; and, last of all, forever or in fee. About the time when it began to be usual to make these grants for life, the Christian religion, under the auspices of the Papal see, was propagated in England by St. Augustine and others, and was soon adopted and received as the national religion. Its priests were men of some learning; they here, as in all other places where they have been received, began to grasp at temporal advantages; they inculcated upon the minds of the people that it was an act of the most meritorious piety to provide for the maintenance of the ministers of God. This doctrine had its effect, and donations of allotments of land began to be made to the Church, also for life; but this life was supposed to be perpetual, as the Church never died. The donations of these allotments, for want of a better method of perpetuating the transaction among the laity, who knew nothing of letters, had always been made by livery of seizin, done in the most solemn form, to impress it on the mind, before a number of the co-vassels or tenants of the lord, who, in case of a dispute, were assembled in the lord's court, and determined chiefly by the remembrance which these impressions had made between the parties. The presumption was that if some who were present, from length of time, had forgotten some of the circumstances or conditions annexed to the donation, others of them might remember them, and so, by the united remembrance of all together, might, in the end, ascertain the true (196) state of facts. This, by the way, I suspect was the origin of juries, and of the unanimity required in their decision. Each juror contributed the circumstances lodged in his mind to the general stock of information which formed the verdict, and by conference with his fellows, brought to their recollection the circumstances which he remembered and the others, or some of them, had forgotten, until at length the whole transaction was renovated in the minds of all. This mode of conveyance answered the purpose sufficiently when donations were for the life of an individual only; for it would seldom happen that he would

survive all the other *pares* of the lord's court who were present at the investiture. But when donations were made for life to a churchman, for the benefit of his Church, and it was a received maxim that the Church never died, this method no longer answered the purpose as to them; for the donation might have continuance, and the conditions upon which it was made might come in question, after every one of the *pares* present at the investiture were no more, and then the allotment might be liable to be resumed by the lord—all lands included in his territory or manor, not granted to one of his vassals, belonging to him; and, after the death of all the *pares,* no evidence remained of the investiture, much less the conditions annexed thereto. It became necessary, therefore, when the Church was concerned, to have some other mode of perpetuating the transaction than mere livery of seizin; and the clergy, being the learned part of the community, devised the mode of reducing the terms of the donation to writing. Sullivan, 82. And when the lord, on account of sickness, the distance of the land from his place of residence, his being employed in some other business, or some other cause, could not go upon the land to make livery, then the writing containing the terms of the donation was solemnly delivered, before the peers of the Court also, in lieu of the land; to the end that, being delivered before them in so solemn a form, they might be witnesses of the investiture of the land mentioned therein, and might be able upon trial to ascertain the identity of the paper delivered should the dispute happen in their time. This was not, indeed, a complete investiture of itself; it was termed the improper investiture, and bound the lord to make a more formal livery of seizin of the land contained in the deed at a future day, and was a sufficient security to the donee in the interim. Experience evinced the safety and certainty there was in reducing these landed contracts into
(197) writing in the case of churchmen, and the laity, wishing to be as secure as possible in their possessions, adopted by degrees the same method; which afterwards, when these allotments were extended to the heirs of the possessor, became equally necessary for the laity as the clergy, and from that time deeds of feoffment, to accompany the livery of seizin, became generally used, though the livery of seizin was good without them; and these contracts in writing, being found so advantageous in perpetuating the terms and conditions of a landed donation, were, by degrees, converted to the purpose of perpetuating other contracts that concerned only personal estate, which formerly, amongst the unlettered Saxons, were completed by shaking of hands only. 2 Bl. Com., 448.

(2) The preserving the remembrance of a landed contract having thus become general in the times of the Saxon government in England, and

the general illiterature of the laity of all ranks prevailing universally, it was customary for them to put some mark, usually the sign of the cross, to identify, as well as they could, the writing they had agreed to; and this was done *coram paribus,* who, upon the trial, might remember it, or be able to distinguish it from some circumstance attending the making the deed or the mark itself. But upon the Norman conquest, it became the policy of the conqueror and his sons to abolish the Saxon customs, and for this purpose to draw as many causes as possible to be determined in the *curia regis,* where the judges were Normans (Sullivan, 339, 343, 369, 374), where the *pares* of the neighborhood were frequently not called upon to decide between the litigants, as they uniformly were in the courts of Saxon institution, the county court, hundred court, etc. About this period the bishop was separated from the sheriff in his county court; and it was established as a rule that the county court had not cognizance of any demand of more than forty shillings value; the consequence of which must have been that all causes were carried in *curia regis;* and it must frequently have happened, also, that the marks affixed to the deeds, for want of the *pares,* were incapable of any distinction, and, of course, any proof of the identity of the instrument. This produced an inconvenience. The greatest men among the laity could not write their names, so as to give a proof of identity that way, and being under the necessity of providing some more certain criterion of identity than that of the sign of the cross, they introduced for (198) the first time into England the practice of impressing their writings with a seal. Sulliv., 374; *Terms de ley, verbo Fait;* Gilb. Law of Evid., 17, 18, 20, 78. The seal exhibited the emblem which its owner had affixed to his person, when covered in the field with his coat of mail, and which being portrayed upon some conspicuous part of his dress, served to designate his person. These symbols came to be very much in use at the time of the crusades to the Holy Land, in the time of Richard I. and after, and were continued by the knights and other persons, who then used them by way of distinction in their families after their return home. The seal, therefore, of any distinguished person could immediately be known by inspection only. This method of sealing, however, was not introduced all at once, but by degrees. It was at first only used by such as were entitled to those distinguishing symbols—by the nobility and gentry only. For Lucie, Chief Justice of Henry II., reprimanded a common man who had made use of a seal, saying that belonged to the nobility only. *Terms de ley, ubi supra,* and several other books. But it is to be remarked that about this period, and for some time before, the common people had but little use for seals, as they could have but few contracts. The conquest had introduced the maxim of non-alienation

without the consent of the lord. A great number of them were villains, who could not acquire property at all but for their masters; and as to the feudal tenants, they were continually harassed by attending their lords in war. Commerce had not yet begun to flourish and increase the personal property of the nation. The old law authors of those times have scarcely a chapter upon personal property. 2 Bl. Com., 385. And even when the doctrine of nonalienation began to wear away imperceptibly, the common people, being not entitled to any family distinction, had no seals, and were obliged to contract as formerly was used before the introduction of sealing. The uncertainty of such a method begat, in combination with other circumstances peculiar to those times, the practice of conveying by fine; where the whole transaction, with the precise terms of the conveyance, were recorded in one of the King's courts, and obviated completely any future controversy respecting the execution of a deed. At length, however, the eyes of the nation began to be opened to their true interest; trade flourished; agriculture was encouraged; personal property increased; lands, or part of them at least, began to be freely alienated; they were made liable to answer the debts of the
(199) merchant and, as to part of them, the debts of any other proprietor. Contracts, both for real and personal property, became frequent among all ranks of men. The necessity of authenticating their written contracts became urgent. They of course used the best mode then known. They broke through the privileges of the nobility and gentry, and made seals with such impressions as each man's fancy suggested to be the properest mark for distinguishing his contracts. By the time of Edward III. seals were in general and common use. *Terms de ley, ubi supra.* Cunningham, title "Deeds," who cites Perkins, 229, and *sequentia.* And it became a rule of law that a deed could not be constituted without a seal; and the method of signing with the sign of the cross, or some other mark, had gone into total disuse. Thus it seems clear that the seal was originally introduced in the place of signing, as an evidence of the identity of the writing which contained the party's agreement, and afforded a full proof thereof by the inspection of its impression only; and signing by the party was held unnecessary and useless. In reality it could contribute but little to the proof of the writing, as long as the illiterateness of the people continued, which was until some time after the introduction of printing into England, in the time of Edward IV., insomuch that as late as the time of Henry VII, the being able to read was held to be a legal proof of a man being a clergyman, or clerk in orders. 4 Bl. Com., 360.

This universal use of seals, however, produced its inconvenience, when every man who made a contract was obliged to use a seal to authenticate

it. Many of those seals were not known to the jurors, and they could not determine in many instances on the authenticity of the instrument upon the inspection of the seal only. They were under a necessity, therefore, to call upon those who were supposed to know the seal which the party used, to say whether that was the impression of his seal or not; and upon this evidence they decided, and sometimes upon the comparison of the seal with the impressions upon other instruments which were proved to be sealed by the party. But still, in contemplation of law, these seals were held to contain an intrinsic evidence in themselves of the contract to which they were affixed; and, therefore, as well as for the purpose of being compared, the rule of law was that they should be carried out by the jury. Gilb. Law of Ev., 20. But with respect to those seals which still retained sufficient distinction in themselves, as the great seal, the seals of the courts of justice, the seals of corporations, and some others, no proof as to them was required or perhaps was allowed. They still continued to answer the genuine purposes of seals at their first introduction, and were full evidence of themselves. The people began, at length, to forget the original use of this institution, and to seal with any impression they could get; and the law, rather than invalidate the whole transaction, left it to the jury to decide whether that was the seal of the party or not. (200)

In this country the people have departed still further from the true use of seals, by not making any impression at all, scratching something like a seal upon the margin of the paper, and making that pass for a seal. To the first of these abuses the law has conformed, and will now deem the sealing to be sufficient if found by the jury to be the seal of the party. For fear of destroying some contracts improperly made at first, it has relaxed from strict propriety, and the practice of sealing with any impression has become general; and is now, from necessity, allowed to be good in every instance. Cunn. *verbo* "Deeds," cites Perkins, 129, 34; Cro. Car., 149; Gilb. Ev., 20. But still the contemplation of law is in conformity to the ancient use of seals. They are deemed the signs of authenticity, are supposed to have an intrinsic evidence in themselves, and for that reason are carried out by the jury. Gilb. Law of Ev., 17, 20, cites Sid., 145; Hard., 118; Plowd. Com., 411; and Sir Edward Coke, speaking of deeds, page 6 h, says: "Also the deed may receive credit *per collationem sigillorum, scripturae,*" etc., and Baron Gilbert, in his note upon 2 Bac. Ab., 494, says: "The seal appearing, it must be presumed to be put there by the parties to the deed," and cites Leo, 25, Owen, 23, and Bend., 1.

In the reigns of Henry VII. and Henry VIII. learning, and the art of writing, had become much less general than in former times, and by

this time also seals had become much less a mark of distinction, and proof of the individual contract made by the parties, than in former reigns; but the rule that the deed must be authenticated by the party's seal had passed into settled law. In order, therefore, to give a sure proof of the seal which proved the writing that contained the agreement of the party, subscribing his name at the foot of the instrument, immediately after its conclusion and prefixed to the seal, in the same place and in the party's own handwriting, began to be used. Noy., 163. (201) And although it was held in conformity to the rule then established, and which has ever since continued, that such a signature was not necessary to the essence of the deed, yet where the jury could not decide with respect to the deed, upon inspection of the seal merely, nor be satisfied by a witness who knew the impression, nor by a comparison of the seal in dispute with other seals made use of by the same party, they were allowed to form their judgment upon the handwriting of the party prefixed to the seal; and that was the *scripturæ* intended by Sir Edward Coke, in the passage above cited, where, speaking of the doctrine of deeds and of presumption, he says: "Also, the deed may receive credit, *per collationem sigillorum, scripturæ,* etc., *et super fidem cartarum: mortuis testibus erit ad patriam, de necessitate, currendum.*" Co. Litt., 6 b. It may be here supposed he meant the handwriting of the witnesses; but this is not his meaning, for he says expressly, in the very next page, that the clause of *hiis testibus* is not essential to the deed; and in page 6a he says: "Very necessary it is" (by which he means advisable or prudent) "that witnesses should be underwritten or endorsed for the better strengthening of deeds" (not that it is absolutely necessary to make them valid) "and their names, if they can write, written with their own hands" (not that they must necessarily be subscribed with their own hands). Even at this day there were many witnesses who could not write their own names, and their names were to be endorsed; and when these witnesses, namely, witnesses who had not subscribed their names in their own handwriting, could not be found or were dead, then the deed was to receive credit *per collationem sigillorum et scripturæ,* coupled together. This proves the position that the signature of the party was used as a proof of the seal. If it was not evidence of the seal, then it was in vain to prove the handwriting at all; for that of itself was totally unessential to the deed, and made no part of its essence, as the same author had said in the page last preceding, and as is held to be law at this day. Salk., 462, pl. 2. And, that the proof of the signature of the party, when admitted, is used as a proof of the seal, is avowed in terms almost unequivocal, by Baron Gilbert, Evidence, 99, 103, where he

says: "For though the deed be produced under hand and seal, and the hand of the party that executes the deed be proved, yet this is not full proof of the deed, for the delivery is necessary to the essence." Does not this manifestly imply that the proof of the handwriting proves everything, which is of the essence of the deed, but de- (202) livery only, and, of course, that it proves the seal?

With respect to an attested sealed instrument, it is the common practice in the English courts, where the witnesses are not to be found, to prove both the handwriting of the witnesses and of the party. Bl. Rep., 532; *Forbes v. Wale,* such proof admitted before *Lord Mansfield* to be given. 2 Brown Ch., 536, 538. The same proof admitted before the Lord Chancellor, and stated by the counsel opposed to the fact it meant to establish to be evidence in the common form. The same proof must also have been admitted in *Gould v. Jones,* reported in Bl. Rep., 384, as may be seen by having recourse to the case itself; and the same kind of proof was clearly admitted in *Coghlan v. Williamson,* 1 Doug., 93. But why in all those cases is the proof of the party's signature held necessary, if proof of the witnesses' handwriting proves both sealing and delivery, and not the delivery only? From the reason of the thing itself, and more especially from the great weight of these combined authorities, it seems to be a conclusion fairly warranted that at this day, whatever it might have been formerly, the seal is in some instances proved by the signature of the party. This holds in all those instances where the signature of the party is admitted to be proved, and that the seal always since its first introduction has been used as an evidence of the writing, in which the party has deposited his agreement.

3. With respect to the delivery, I have no more to add to what has been already said relative to its coming into use instead of the livery of seizin, and being like that, made in solemn form *coram paribus,* to the end it might make the deeper impression in their minds, than that this solemn delivery of the deed *coram paribus* being found to be well calculated to make the desired impression in the case of landed contracts, and, also, from the same solemnity, to excite in the party a reflection upon the subject he was engaged in, it was continued in other contracts, and, like the seal, was considered an essential ingredient to the constitution of the deed. Here it may not be improper to remark upon the excellence of this institution when once established, though introduced gradually and for other purposes, in preventing all manner of surprise upon the party. It was first to be written; this necessarily employed some time; he had the interval for reflection; it was to be read over to him if he requested it, then the wax was to be prepared and melted; (203)

next a seal to be procured; then an impression to be made; thus gradually approaching to the final act, still giving time for reflection, and exciting by each new act still greater apprehensions; and last of all, lest the former precautions might not be sufficient to put him upon reflection, he was called to go before the *pares* of the neighborhood and make a solemn delivery of the instrument. After all these ceremonies were complied with, it was scarcely possible to believe that the party was circumvented by fraud or surprised into what he had done. After the *pares* were disused, and the authority of the county and hundred courts diminished, I apprehend a delivery before the *pares* went out of use, but that a delivery of the contract was still used as a sign of the party's assent to the contract contained in the deed, and has ever since been deemed necessary to give it its final validity.

Such seems to be the origin and progress of the several circumstances of writing, sealing, and delivery of deeds, which came into use, not all at once, but at different periods of time, and were used for perpetuating, authenticating, and proving the complete and final assent of the party to his contract. Any other concomitant circumstances, besides those, though they have been sometimes used, and said to be incident to deeds, as signing by the party, subscription by witnesses, and many other, as may be seen in Co. Litt., 7 a, yet they have never at any period of time been held material to the essence of the deed, unless, perhaps, in some instances where such circumstances have been required by statute; and that these are the only necessary circumstances is proved by all law writers, both ancient and modern. Co. Litt., 7 a, says: "I have termed the said parts of the deed formal or orderly parts, for that they be not of the essence of a deed of feoffment; for if such a deed be without premises, *habendum, tenendum, reddendum,* the clause of *warranty,* the clause of *in cujus rei testimonium,* the date and the clause of *hiis testibus,* yet the deed is good; for if a man by deed gives lands to another and his heirs, without more saying, this is good, if he put his seal, deliver it, and make livery accordingly." Wood in his Institutes adds: "where livery of seizin is necessary," importing, as Lord Coke clearly did, also, that if it were not a deed of feoffment, but a deed of some other kind, then putting the seal and delivering the writing would make it a good deed. The same definition is given, and the same circum-
(204) stances only mentioned as necessary, in 2 Rep., 4, 5; 10 Rep., 92; 3 Bac. Ab., 393; 2 Bac. Ab., 493, who cites 2 Roll's Ab., 21; 1 Nels. Ab., 623; *Terms de ley, verbo Fait;* Co. Litt., 171 b; Gilb. Law Ev., 78; Sheppard's Touchstone of Common Assurances, and many others.

After the production of this concurrent testimony of so many authors, it seems scarcely necessary to say that the subscription of witnesses in their own handwriting to a deed was never held necessary to its constitution. The reasons already assigned for the first introduction of seals and their continuance for a long time afterwards, namely, the illiterature of the laity, proves also that the subscription of witnesses was not used during that long period, which commenced soon after the conquest and continued to the time of Henry VII. and Henry VIII. Even the *Magna Carta* of King John, given at Runnymede in 1215, mentions the archbishops, bishops, barons, etc., not particularly naming them, and in the end is attested in this manner, *testibus suprà dictis et multis aliis;* and lest anything should be added or subtracted from the form of the writing, he thereto put his seal. Bl. Law Tracts, 35, 36. In 1216 the first charter of Henry III. is attested thus, *testibus omnibus prenominatis, et multis aliis.* I infer from this that in a matter of so much moment they certainly used the best method of attestation then known or used, and as they did not subscribe their names, it is an evidence that the subscription of witnesses in their own handwriting was then not practiced. The attestation of private deeds was in the same manner—the names of the witnesses were underwritten or endorsed, and this was used only as a memorandum to show who of the *pares* were present, to the end they might be called upon and associated to the jury, upon the trial of the issue, when the deed was denied. *Vide* Co. Litt., 6 a and b. And sometimes it was said, *teste comitatu, hundredo,* etc. 2 Bl. Com., 307. I apprehend the practice of subscribing by the witnesses came into use at the same time with the subscribing by the party—at a time when the law respecting deeds was already firmly established, and when both these circumstances were held unessential, though perhaps both of them at the time might be useful—the signature of the party to prove his seal and that of the witnesses, when they could not be found to prove the delivery of the deed; for when it was proven by his own signature to be the seal of the party, there arose a very strong presumption from the proof of the handwriting of the witness that they had been present at the delivery. But this kind of proof was only resorted to when positive testimony could not be procured, and was not in (205) the party's power to produce.

To proceed a little further, the statutes of 2 Edw. II, and 9 Edw. III., speaking of the trial upon the issue *non est factum,* say: "The witnesses shall be summoned where there are witnesses named in the deed, but if they do not appear at the day appointed, the trial shall proceed notwithstanding their absence." Hence the conclusion follows that in those

days there were some deeds without witnesses named in the deed, and as to them there was no delay of trial. Secondly, that there were other deeds wherein witnesses were named, and that as to them the trial could not be in their absence, for they were to be summoned and make part of the jury. Thirdly, this statute directs that they shall be summoned as usual, but in case of their nonappearance the trial shall, nevertheless, go on by the jury that are present. Fourthly, that there was some other method then used of proving a deed than by the witnesses named in the deed, or else this statute operated injustice by ordering the trial to proceed upon the first default of the witnesses (who perhaps might be convened at another day), and by so doing rendered the deed invalid and void; and this it is unfair to presume. That it could be proved by other means is held by Lord Coke 121 b, where he assigns reasons why the law requires the profert of a deed in pleading to the court, viz., that it may be proved by the witnesses, or other proof, if denied. This opinion is strongly confirmed by some modern decisions, where the rule of law is held to be that a witness shall not be permitted to deny his own attestation. The true meaning of which rule is, that if he does deny it upon the trial, the deed may be proved by others who were not attesting witnesses, and whose names were either subscribed nor endorsed. Doug., 216; 4 Bur., 2225. This proves beyond all possibility of doubt that the attestation of witnesses is not necessary; for if the delivery may be proved by persons who did not attest, in case of an attested deed, can there be any solid reason assigned why they may not prove the delivery in case of an unattested deed, where there are no witnesses to deny their attestation, and by that means bring a suspicion on the instrument? Upon this point I think it may be affirmed, in perfect consonance with the rules of law, that at this day the attestation of witnesses, either by endorsing or underwriting their names in the handwriting of the drawer of the deed or by a subscription of their names in their own handwriting, is in nowise essential to the validity of the deed; and (206) from all those premises we may also infer some other conclusions.

If writing, sealing, and delivery be the only essential parts of a deed, and the law deems it valid without the further ceremony of a subscription by witnesses, then there must be some other competent means of proving the deed otherwise than by subscribing witnesses. It would be absurd to attribute validity to an instrument that had these essential parts, and yet say it should not be read to benefit the party producing it, unless proved by subscribing or endorsed witnesses.

But what other means are competent?

To form a decided opinion upon this head, we must remember that there is but one general rule in relation to evidence, and that is that the law requires the best evidence. But this rule is always relaxed upon two grounds, either from absolute necessity or a necessity presumed from the common occurrences amongst mankind. The rule is not so stubborn but that it will bend to the necessities of mankind and to circumstances not under their control. The rule is adopted only to obviate the fraud of mankind. One shall not deceive the jury by offering a less convincing testimony to establish his point, when it appears there is a proof more elucidative of the point in controversy in his own possession or power, which perhaps he does not offer because it would be decisive against him. It was never meant to exclude the party from justice merely because he had not, through ignorance, provided himself originally with the best evidence it was possible for him to provide; for then two witnesses would be better than one, a hundred better than two, and so on progressively. A writing would be better than a parol contract, a deed better than either, and a record better than all. Neither was it intended to deprive any one of justice when, without any default in himself, he had lost the better evidence which he had provided originally. It first deprives him of the power of imposing upon us, and then lays itself open to be relaxed as circumstances shall in justice require. These circumstances, as I began before to mention, are of two kinds: those founded on absolute necessity and those founded on a necessity occasioned by those occurrences which are common amongst mankind. We will touch upon the first class only.

In the case of deeds, if there be subscribing witnesses to them (see 1 Aikins 49, the argument of Lord Hardwicke, in the celebrated case, *Omichund v. Baker,* and mark the implication), they must (207) be proven by these witnesses, because it is presumed that these witnesses can give a more distinct and satisfactory relation than any others, having been called upon originally for that purpose; but if the witnesses be dead, or not to be found, and that be proved to the court, then the handwriting of the subscribing witness may be proved, that raising a violent presumption in favor of the deed. If the deed be lost, and that appear to the court, then the copy shall be read, as affording a presumption. But if there be no copy, then an abstract may be admitted, that affording a probable presumption; and if no abstract, parol evidence of the contract may be offered. The true intent of the parties to be regulated by that contract shall not be defeated and justice overturned so long as any evidence remains which throws any glimmering of light on the subject, from which a jury may be enabled to infer the

real state of the transaction. The subscribing witnesses in the case above stated are not required, because the deed cannot be proved without them, as has been already evinced; but because were they not produced, the defendant would be deprived of the cross-examination of those persons he had provided to give testimony for himself, as well as for the other party, and who, if produced upon such cross-examination, would perhaps give material testimony for him. But if the subscribing witnesses are not to be had, the law chooses the least of two evils. It is better to dispense with the witnesses, and receive other proof which may be sufficient, than adhere to the rule when they cannot be had, and so, at any rate, destroy the deed. Thus, if the obligee removes the witness, his acknowledgment that he executed the deed is proof. H. Bl., 623. In all cases, therefore, where it is apparent to the court that there is no positive testimony to be had, there must be a recurrence to testimony founded on presumptions, or circumstantial proof, as it is called. Therein requiring, first, the best presumptive proof that is to be had, and in default of that, the next best, until we have passed through all the several grades of circumstances that raise presumption, from that which Lord Coke terms the violent, until we arrive at that which excites the light presumption that moveth not at all.

If this be the true theory of evidence, and if an unattested deed, being valid, may some way or other be proved, as it certainly may, then in the first place the party must produce witnesses who were present at the execution, though not endorsed nor subscribed; as in the case (208) where subscribing witnesses to an attested deed deny it, and if there are no such witnesses, then there must be a recurrence to presumptive testimony. And here, as in the case of an attested deed, when the witnesses were not to be had, proof of the party's signature would be admitted as a proof of his seal; so in the case of an unattested deed, I can see no reason why the same species of proof should not be admitted, where no better is obtained. There, also, Lord Coke's doctrine, so often before cited, of comparison by seals, handwriting, etc., might be admitted. The law also will here choose the least of two evils; and if sufficient proof of the seal shall be offered, other circumstances shall be admitted to prove the delivery. This is yet necessary. But a small matter is sufficient to establish it, when once the seal is proved to the satisfaction of the jury, as leaving the deed behind him after it was sealed and read, held a good delivery. Cro. Eliz., 7; *Shippen's case.* So where an obligation was written in a book, and the party put his hand and seal to the leaf in which it was written: adjudged this was sufficient, though there was no evidence of a delivery. Cro. Eliz., 613;

Fox v. Wright, and many other cases to the same effect. If no positive testimony can be given of a delivery, the party must be allowed to prove such circumstances as will induce the jury to find a delivery. In these two cases last cited it is surely more compatible with justice, and the rule of evidence in similar cases, to admit than at once destroy the deed by rejecting such circumstances which the jury might deem sufficient to convince their minds, together with other circumstances they might themselves be acquainted with. Surely there are a great variety of circumstances from which a delivery might very properly be inferred. Suppose a deed of feoffment produced, and the handwriting of the party proved, and also possession according to the deed. Co. Litt. 6 b.; Gilb. Law Ev., 100. Suppose part of the principal be paid upon a bond by the defendant, or interest; or suppose the bond should be shown to him, and he requested the party not to bring suit upon it; suppose the bond sufficiently described in a letter and acknowledged. 2 Nels., 762, pl. 45; 2 Eq. Ca. Ab., 413, pl. 9. Suppose upon the back of the bond he enter an endorsement taking notice of it as his bond. Buller 254; C. K. B. 500. Suppose he state it in a bill or answer in chancery. Buller, 236. Suppose he has made a parol confession of it. Doug., 92, 216, in which last case the proof evidently would have been deemed sufficient had there been no subscribing witness. Or, by like parity (209) of reason, suppose any other possible circumstance from which a jury might justly and fairly infer a delivery: surely it ought to be received. Even the possession of the obligee, where the other party could not show the illegal commencement of that possession, might afford a presumption in favor of the deed. But, as there is no case to warrant me in going so far, I will not yet say that that circumstance alone should be left to the jury. But such circumstances as are before mentioned, and all others of equal weight, I do think should be left to them, to infer a delivery from or not, according to the best of their judgment.

Therefore, in the case stated, I am of opinion that the witness was properly admitted to prove the signature of the defendant; and that the jury were at liberty to infer from thence that the seal affixed was the seal of the party; and as the admissibility of this evidence is the only doubt stated, as the jury have found a verdict in favor of the plaintiff subject to that doubt only, it must be intended there was some other circumstance given them in evidence sufficiently evincing the delivery; and, therefore, as to the first objection stated in this special case there ought to be judgment for the plaintiff, notwithstanding.

It seemed to be insisted on at the trial that the clause "In witness whereof, I have hereunto set my hand and seal," might be received as

an evidence of the seal; and as some case may hereafter occur in which that clause may have only the words "In witness whereof, I have hereunto set my hand," when in fact there may be a seal affixed, I will remark upon this clause a little; more especially as it is set down in this special case, and the opinion of the Court is expected upon it. I would observe, then, in the first place, that this clause contains a part of the words of the deed, and the deed itself, or any part of it, cannot be read until the sealing and delivery of it be first proved; and, of consequence, this clause cannot be read to prove the seal until after the seal has proved the clause itself; and then as to the purpose of its proving or disproving the seal, it is totally useless; and that such a clause is not only unnecessary in itself, but that the words of it have always been disregarded, is proved by such an abundance of authorities that the bare citation of them will fully establish the position that the omission of this clause or the addition of it, or the words of it, can have no influence whatever upon
(210) the writing itself. Some of them are the following: Co. Litt. 7 a; Salk., 714; 2 Rep., 5. The deed is good, though this clause be omitted. 2 Nels., 623, pl. 7, who cites Moor 3. It is not a conclusion of the deed, for that which is written after it is as much part of the deed as that which is written before. Also 2 Nels., 621, pl. 13, who cites 3 Bulstrode, 300. "In witness whereof, I have hereunto set my hand." The deed is good, if there be a seal, though the clause do not mention the seal. Cunning. Dict. *verbo* Deeds, cites Hetly, 75, and by the like reason, if it mention hand and seal, still it can operate nothing. 2 Str., 814, 815; L. Ray., 1541. For the seal is not established by the words of the writing, but *e converso,* the words contained in the writing are proved to be the words of the party by his seal. And if the words contained in this clause were allowed to prove anything, the party to be benefited by the deed would have nothing to do but to insert this clause. "In witness whereof, I have sealed and delivered," and the evidence of the deed would be complete. Suppose in the present clause that the word seal had not been in the clause, and yet the seal should appear, with the word seal within it, in the handwriting of the obligor, as was the fact here: would it not be a harsh determination to say it was not his seal? Yet we know such cases often occur.

1. It may be objected that if the words contained in this clause are not suffered to have any weight, then the holder of a promissory note might add a seal to the name of the party; and by that means avoid the act of limitations, and also circumscribe the party in point of evidence. To this, the answer is that the rules of evidence were established long before the statute of limitations, and that act did not intend to alter them.

2. That the law has guarded against such attempt by making the writing totally void, if it should be attempted; and also subjected the party to very severe punishment for the attempt.

3. If there are witnesses, they may be produced to say what they know of the seal.

4. If there are no witnesses, the circumstances to prove a delivery may throw some light upon the seal itself.

5. The law will not presume such turpitude in any man. The possibility of his committing such an offense will not vitiate the act, as if he had actually committed it; and in this case, as in all others, the injured party should prove the injury done him. Again, if the instrument should be held invalid, because, possibly, the seal might (211) have been affixed after the execution of it, then more good deeds would be destroyed upon suspicion than frauds prevented by it; for few men will attempt a fraud of this kind, under the multiplied hazard of receiving infamous corporal punishment and being forever degraded from their rank in society, and the total loss of the thing secured by the deed, especially if it be of great value. Experience shows that men, not well knowing the technical distinction between a seal and their signature, say, witness their hands, and put their seals also, and *e converso,* declare in this clause that they have put their hands and seals, where they have subscribed their names only. Here, as in all other cases, the law chooses the least of two evils. Once more, the subscribing witness to a bond may have subscribed, being about to depart for a foreign country, when, in fact, the deed may not have been executed; but this possibility will not cause a rejection of such testimony, nor shall the seal be rejected because not mentioned in the clause, for such possibility as is in the objection.

But it may happen in the case of an unattested bond that there may not be sufficient evidence by circumstances to prove the delivery; and this brings us to another question referred to the Court in this special case, which although it is not necessary to be considered in order to the determination of the case, which is an action of debt, and depends entirely upon the question whether this be the deed of the party or not, yet, as it has been referred to the Court, I suppose, for the purpose of having the law settled upon this point, also, I will make a few remarks on it.

The question is, whether an action on the case lies upon such an instrument, when it cannot be proved as a deed.

As to this, there is one rule certain, that no sealed instrument can be given in evidence to support an action on the case. Gilb. Law Ev., 100;

Cro. Jac., 506, 508. The law has given a remedy of another sort upon those sealed instruments. An action on the case depends upon parol evidence or writing only. Therefore, the action on the case must necessarily be destroyed when the evidence to support it is destroyed by extinguishment; and all parol contracts and agreements are held to be extinguished when they become clothed in a contract of greater solemnity, or evidenced by a sealed instrument, as these sealed instruments are themselves extinguished, so that no action can be supported upon them between (212) the same parties, when they have passed *in rem judicatan,* and have become matter of record. All this depends upon the rule of law already mentioned, that the best evidence shall be required. Thus, a bond shall not be evidence when there is a record of the same matter, nor parol evidence when there is a sealed instrument. This rule of law is not to be denied; and then the whole question is reduced to this—whether, when a seal appear, the party who produces the writing to which it is affixed shall be permitted to say it was not affixed to the writing originally? It has been for a long time a standing rule of law, framed first, indeed, for the protection of deeds, the only written instrument then in use, for unsealed instruments are but of modern date (3 Term, 330), but in policy extended to every written contract, that the least alteration in any material part shall render the whole totally void; and even an immaterial alteration, made by the holder of the instrument, shall make it void also. 11 Rep., 27. A bill of exchange, payable three months from 26 November, was held to be totally void; it being found by the jury that the top of the figure 6 was blotted out, while in possession of the holder, so as to make it appear to be the 20th instead of the 26th, and by that means to accelerate the payment, though in fact no such acceleration of payment had been attempted. 3 Term Rep., 320.

Now, then, to apply these rules to the case in hand. If the seal was not affixed to the instrument at the time of its execution, and the addition of the seal afterwards be an immaterial alteration only, then the instrument being in possession of the holder or obligee, the presumption will be that it was added by him, and will turn it upon him to prove how it came there like the case where the seal was torn off by a child—this raised a presumption of the deed being canceled, and turned it upon the plaintiff to show how the seal came to be torn from the writing. Cro. Eliz., 120; Palm., 403; Latch, 226. In the case of the bill of exchange, Lord Kenyon, speaking of the blot which made the alteration, said if it had been done by accident, that should have been found to excuse the party. He thought the alteration having been made after the instrument came to the possession of the payee, raised so strong a presump-

tion of his guilt that in point of law the instrument should be deemed void unless it could show the blot happened without his privity. And so I am induced to think in the present case, that if the addition can be considered as an immaterial addition only, yet to make men careful to preserve their written instruments free from altera- (213) tion or addition, it is good policy in law to suppose the alteration or addition made by the holder or obligee himself; therefore, the moment he shows a sealed instrument, and says the seal was not originally affixed to the writing, the whole instrument must be deemed void, unless he can show that the seal was affixed to it without any privity of his. But I take it, the addition of a seal is not an immaterial alteration only. It avoids the act of limitations; it excludes the giving of parol testimony to explain or control the writing in any shape; it makes the party liable to another kind of action than that he at first stipulated; it deprives him of that latitude of evidence he might have had in the action on the case, and, before the act for the amendment of the law, would leave him, in the case of a single bill as this is, no method of discharging himself but by a release or acquittance under seal. In every point of view, therefore, the addition of the seal is a most material alteration; and if it be material, then no matter how it happened, or by whom the alteration was made, the whole instrument is totally void, and no action whatever can be supported upon it, no more than if the seal had been torn off to make way for proof of the writing as a simple contract. The law requires that the contract shall remain unaltered; that the party may not be subjected in any other shape or manner than that which he has consented to. Besides, if when the signature of the party is proved, that stands as presumptive evidence of his seal, then an unattested instrument being produced, and the handwriting of the party proved, the presumption instantly arises and will stand for truth until the party plaintiff shall overturn it by evidence, accounting for the affixing of the seal, and that it was done without the knowledge of the plaintiff, or any criminal intent in him; and so *quacunque via data,* the seal appearing, it must be accounted for, to say the least, by the plaintiff himself. And therefore I am of opinion, upon the last point reserved in this special case, that debt is the proper action to be brought upon such an instrument as is therein stated, and that the action on the case can, in no instance, nor in any possible case whatever, be supported upon it; and this opinion receives credit from the argument of *Justice Heath,* in *Gibson v. Minor,* H. Bl., 622, where, *arguendo,* he lays it down as clear law that if the delivery of a bond cannot be proved, it can-

(214) not be concluded that it may be given in evidence as a note should, because the creditor having taken his security in a determined form, he cannot at his pleasure alter it against the stipulation of the debtor; and yet, says he, the obligation includes a promise to pay money.

MACAY, J., was of opinion the instrument must be declared upon as a sealed instrument.

WILLIAMS, J., was of opinion that the instrument could not be proved as a sealed instrument, for want of attestation; and therefore ought to be declared upon as a writing only.

ASHE, J., seemed to dissent from the opinion of MACAY, J., but concluded that there should be judgment for the plaintiff.

Cited: Devereux v. McMahon, 108 N. C., 146.

STRONG v. SPEAR.

An endorser may sustain an action in his own name, the possession of the note being *prima facie* evidence of payment to the endorsee.

DEBT, and *non est factum* pleaded. Upon the trial the bond was produced, and it was endorsed with an assignment to a Mr. McKay, whereupon it was objected by the defendant's counsel that the interest of this bond being in McKay, the present action by the original obligee could not be supported; such assignment by 1786, ch. 4, vests the whole property of the bond in the assignee.

PER CURIAM. This case is like that of *Smith v. St. Lawrence,* lately decided at Hillsboro; the bond being in the possession of the endorser, is evidence *prima facie* that he has paid the endorsee for it. Endorsers frequently bring suit upon bills endorsed by them, when the endorsee is refused payment, or cannot obtain it, and returns the bill, receiving payment of the endorser himself. *Dickens v. Harriott,* Show., 164, is very similar to the present. There a bill was drawn upon a person in Dublin, the payee endorsed to Dickens, and he to another, who demanded payment, and protested for nonpayment. Dickens then sued, and it was,

amongst other things, objected that the interest was vested in the last endorsee, as appeared by the endorsement. Then merchants were examined, who said whenever the bill was returned into the possession of the last endorser he might maintain an action. The Court recited this case upon memory only, the book not being in court, and judgment in the present case was given to the plaintiff.

NOTE BY REPORTER.—Some of the bar seemed dissatisfied with this decision, as they were with that of *Smith v. St. Lawrence* at Hillsboro, *ante*, 174. The case cited from Shower says above twenty merchants were examined, and affirmed that the plaintiff had a right to the action, although he had endorsed to D., the bill being returned into his possession; but then the endorsement in that case was, "Pay to D. value on my account," perhaps this (215) made D. only his servant or agent, in the same manner as if it had been, "Pay to D. for my use." See 2 Burr., 1227; Doug., 117, 639. *Smith v. St. Lawrence* was founded upon the case in Str., 1103, where the court permitted the plaintiff to strike out the endorsement, but that was a blank endorsement only. The necessity of a payment to revest the property of the note in the endorser must be admitted, and is not denied in *Strong v. Spear, supra; Smith v. St. Lawrence*, 174, and *Dook v. Caswell, ante*, 18. The only point of difference between these cases and those decided in the books is this, that the books require actual proof of payment by a receipt, or at least *viva voce* proof. These cases allow the possession of the endorser to be presumptive evidence of payment—as the payee or endorsee of a bill is never obliged to part with it until he has received payment from the endorser, which is a circumstance which renders the presumption very strong. Kidd, 88; Beawes., 461.

See *Dook v. Caswell, ante*, 18.

Cited: Casey v. Harrison, 13 N. C., 245; *Price v. Sharp,* 24 N. C., 421.

ADAMS v. SPEAR.

Where the bond does not agree with its description in the declaration, *semble* an amendment should be allowed.

DEBT, and *non est factum* pleaded. The bond was produced on the trial, and appeared to be a bond in the penal sum of £625, with condition to pay one-half of that sum. The writ was for the sum mentioned in the condition, and of course the declaration was supposed to be for the same sum.

PER CURIAM. The condition is no part of the obligation. It is inserted for the benefit of the obligor, to exempt him from the payment

of the penalty if he chooses to comply therewith; but he has his option not to perform the condition, and to forfeit the bond if he is so disposed. Consequently the bond produced, which is for £625, does not agree with the bond set forth in the declaration; but as it has been a practice, agreed upon by the bar, to suffer an alteration in the writ when issued by the clerk, as this was, where he has committed a mistake, we will now recommend to the opposite attorney to consent to the alteration. However, he would not consent to the alteration at present, but agreed it should be made at any time after this day. Whereupon, by consent, a juror was withdrawn.

See Anonymous, *post*, 401, and *Cowper v. Edwards*, *ante*, 19.

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SURVIVING PARTNERS OF AULEY McNAUGHTON & CO. v. WILLIAM NORRIS, SURVIVING PARTNER, ETC.

On a continuous dealing the statute runs from the last item.

ASSUMPSIT for goods, wares and merchandise sold and delivered. General issue and statute of limitations pleaded; and the principal question of law was, whether the act of limitations runs from the date of each article in the account or from the date of the last article only.

PER CURIAM. The act runs from the date of the last article in the account only, where the account has been running on from its first commencement; but where it is once deserted or ended between the parties, then from that time. Verdict was found accordingly, and the plaintiff had judgment.

See *Kimball v. Person*, 3 N. C., 394.

ADMINISTRATORS OF HOSTLER, ASSIGNEE, v. PATTERSON AND OTHERS, SURETIES OF McIVER, LATE SHERIFF.

Judgment against a sheriff for default may be entered for actual amount of damages.

THE sheriff had returned to an execution that he had levied moneys thereupon to the amount of £157, 8s. 4d., and now the question was, how judgment should be taken—whether for the penalty of the sheriff's bond,

to be discharged by the payment of the £157, 8s. 4d. and costs, or simply for that sum, not regarding the penalty; and at length it was entered up for £157, 8s. 4d.—one of the judges agreeing thereto, *reluctanter.* See 1777, ch. 8, sec. 2.

NOTE.—The practice now is to enter up judgment for the penalty of the bond, to be discharged by the payment of the real damages assessed by the jury.

——— v. ADMINISTRATORS OF RICHARD KENON.

The objection that a joint obligor is not sued must be made by plea in abatement at the proper time. It cannot be made at the trial of the cause. Such a plea cannot be made at all since the act of 1789, Rev., ch. 314, sec. 4.

DEBT, *non est factum,* payment and set-off pleaded; and upon the production of the bond it was objected that the other obligor named in the bond is alive and not sued.

PER CURIAM. The defendant ought to have pleaded that in abatement, if he supposed it would have been of any advantage to him; for by pleading over to the action he has admitted himself to be a lawful defendant. Wherever a plea is pleaded which according to the order of pleading is subsequent to another which might have been of advantage had it been pleaded at the proper time, he thereby waives the matter that was proper to be exhibited in that former plea; otherwise, there would be the greatest confusion in trials at law. The plaintiff would constantly be turned round upon objections he did not expect, and of course not prepared to combat. It would also be productive of a great waste of time were the court and jury to take up every objection which might be made through every stage of the proceeding and endeavor to ascertain its reality. The rules of pleading have (217) been formed with great wisdom, and with a view to the prevention of these mischiefs, and if observed the parties will never suffer injustice, at the same time that the weight of the whole cause will be reduced to one or two points, of which both parties are apprised by the pleadings. This objection, therefore, cannot be taken upon these issues. Gilb. Law Ev., 168; Co. Litt., 283 a; 1 Rep., 119. Also this objection is not good for another reason. 1789, ch. 57, directs that in all cases of joint obligations or assumptions of copartners or others, entered into

after the passing of that act, might be sued upon in the same manner as if they were joint and several, and this is a joint obligation entered into after the passing of that act. The plaintiff had a verdict and judgment.

See *Brown v. Clary, ante*, 107.

JOHN WINSLOW v. LEWIS BLOOM.

In an action of covenant for a certain sum in silver or Spanish milled dollars, the jury are at liberty to give the real value in our currency as damages, notwithstanding the act of 1783, Rev., ch. 187.

COVENANT, and covenants performed, pleaded. The covenant was for the payment of $452 (silver or Spanish milled dollars) on or before 1 April, 1794. Evidence was offered of the value of these dollars when exchanged into current money of this State. This was strongly objected to, on the other side, who insisted that the value of Spanish dollars was already settled by 1783, ch. 4, sec. 2.

PER CURIAM. The evidence is proper, and ought to be received. This is an action of covenant. The jury are at liberty to give such damages as will do complete justice between the parties.

NOTE BY REPORTER.—The act of 1783 declares at what rate the foreign coins there mentioned shall be estimated in our currency—a currency at that time only imaginary; we had no circulating medium of any kind. Since that time a paper money hath been emitted which also refers as to its value to this imaginary currency, the value of which is fixed, but only ascertainable by a comparison with the coined money of other nations. Our bills of credit, when issued, were intended to be a perfect representation of the value of this imagined currency; that is to say, eight shillings of these bills was intended to represent eight shillings of our currency, which by law was equal to one Spanish dollar; but these bills of credit, contrary to the expectation of the Legislature, depreciated immediately, and failed to answer the purpose expected from them. Eight shillings of these bills did not in fact represent eight shillings of our currency. The Legislature, however, built upon the expectation that these bills of credit would completely represent the same sum in our currency as they were issued for and in that belief directed it to be a tender in payment of debts. Thus far the law is positive, and must be obeyed; and, therefore, if on the day of payment the obligor or debtor will tender twenty shillings, for instance, of these bills in discharge of a real debt of twenty shillings in the currency of North Carolina, or two and a half dollars,

the creditor must either receive it, if the tender be made with all proper circumstances, or forego his interests and costs. This is an injustice which results from the positive directions of the act, though it was not (218) foreseen at the time when the act passed, but there is no part of the act that says the court in giving judgment may not take notice of the depreciation, and that the judgment is to be discharged in a currency degraded below its intended value; neither is there any law which says the court shall not increase the quantum of this degraded currency in the judgment they give till it becomes equal to that value which is represented by those $452. And where the court is not tied down by the express and positive directions of the Legislature the presumption is that the Legislature intended they should act so as to attain the real justice of the case before them. The true meaning of the act was that one Spanish milled dollar should not be deemed to be of greater value than eight shillings of our currency as estimated when and before the act passed; not that it shall be equal to eight shillings of paper money afterwards to be issued, and which would depreciate below its intended value. The many disputes that have arisen relative to the paper money now circulating seem to have originated from part of an act of the same session, declaring twenty shillings of this money to be equal to two and a half Spanish dollars, and that it should be a tender after that rate; hence it hath been inferred that as twenty shillings of this money is equal to two and a half dollars, and these equal to twenty shillings of the currency of North Carolina, as estimated at and before the session of 1783, that therefore each of them is equal to the other; and that is mathematically true; yet if two things are only equal to a third in some respects, and not in others, it cannot be affirmed that they are equal generally. Twenty shillings of the currency of North Carolina, were it in silver, coined by authority, would be a tender in discharge of a debt of two and one-half Spanish dollars, and as a bill of 20s. of the paper money now circulating would also be a tender in discharge of two and one-half Spanish dollars, it follows that as to the purposes of a tender they are equal, and have equal effects and consequences; but if we speak of value as applied to the assessment of damages, the case is far otherwise. One Spanish dollar is represented by 10s. of our paper money, and this dollar by 1783, ch. 4, represents 8s. of our currency as estimated at and before that session, and consequently was what was referred to by that act; and then apply the rule above mentioned, and it will make both the dollar and eight shillings of our currency equal to ten shillings of the paper money; and thus the law of 1783 has no influence upon the subject of assessing damages by a jury. It only operates in the case expressly pointed out by the act, where the debtor has made a tender, and then is only operative where the tender is made and pleaded *his omnibus concurrentibus quae in jure requiruntur*. As, therefore, the court and jury are not tied down by the act to any positive rule with respect to the assessment of damages, they should always be careful that the creditor shall have so much of the paper money as represents the real value of the contract sued upon. This answers the true meaning of the Legislature, which in former instances being misunderstood, hath exposed them to the imputation of enticing the citizens to the discharge of their debts with a less value than they engaged to pay; than which nothing was ever more untrue, nor any imputation more unmerited.

See Anonymous, *post*, 354.

PARKER v. STEPHENS.

When an executor omits to plead "no assets," it is an admission of assets which he can never afterwards controvert; and in such case the proper judgment is that the principal sum recovered be levied *de bonis testatoris* in the hands of the executor, and the costs *de bonis propriis;* and upon the return of the sheriff that there are no goods of the deceased in the hands of the executor, then a *sci. fa.* issues to the executor to show cause why the execution for the principal should not be levied *de bonis propriis.*

PLAINTIFF had brought an action against the defendant, as administrator of Charles Stephens, deceased, to which the defendant appeared and pleaded the general issue, act of limitations, a former re-
(219) covery, and set-off. All of which pleas were found against him, and damages assessed to £90, 4s., and costs to six-pence: and there was a judgment against him, to be levied *de bonis testatoris;* a *fi. fa.* issued, and the sheriff returned thereupon that there was not any property of the intestate's to be found, and upon this return the plaintiff took out a *sci. fa.* for the defendant to show cause why the plaintiff should not have judgment to be levied *de bonis propriis.* This cause now came on to be argued. It was argued on the part of the defendant that this *sci fa.* is irregular and improper, for that the first judgment should have been *de bonis testatoris si, et si non de bonis propriis,* and that not being so, it was erroneous; and that the court would not now help the plaintiff in this hard case, where the attempt is to subject the defendant's goods merely for his mispleading, or for his ignorance of the rules of pleading, when perhaps the fact may be that he hath not any of the goods of the intestate in his possession nor ever had.

PER CURIAM. We must not depart from the settled rules of law to avoid an inconvenience in a particular case. It is better for the individual to suffer that inconvenience than that the public should suffer a general mischief by having the rules of law rendered arbitrary and uncertain. The rule of law is well known, that an omission on the part of the executor or administrator to plead want of assets is a confession of them, so that he can never afterwards be permitted to say he had no assets to satisfy that demand. The proper judgment in such case is to be levied *de bonis testatoris;* for the law will not presume there are no assets when admitted by the executor that there are, until it shall appear upon the return of the officer. Godd., 199, secs. 7 and 8. The costs of the first judgment are to be levied *de bonis propriis,* because, having assets of the deceased in his hands, he ought therewith to have satisfied the debt, and not have incurred the costs of a suit, which as they must

necessarily be paid by some one, now the suit has been commenced, are justly charged upon him who hath occasioned them, and not on the estate of the intestate; and therefore in such case the true method of entering the judgment is this, the principal to be levied *de bonis testatoris,* and the costs amounting to so much, to be levied *de bonis propriis.* And the judgment to have execution *de bonis propriis* for the principal is always a subsequent judgment, founded upon the *sci. fa.* This judgment was therefore well entered and this *sci. fa.* well brought upon the return the sheriff hath made, and the plaintiff must have judgment according to the *sci. fa.* And he had judgment accordingly. (220) *Vide* Office Exec., 165 to 172.

See *post,* 298.

Cited: Lewis v. Fagan, 13 N. C., 301; *King v. Howard,* 15 N. C., 583.

JAMES RITCHIE v. DUNCAN McAUSLIN.

Administration granted when the next of kin are out of the country should be *durante absentia;* if otherwise, it is erroneous. The next of kin in another country may appoint a person to take the administration here. The court should not grant letters to a person not designated in the act, before the persons designated have refused. The Superior Court will repeal the letters when improperly granted, and make an *order* for the county court to grant them to the proper person. *Quere,* whether it should not have been a *mandamus.*

PETITION, to rescind letters of administration, granted by the county court of CUMBERLAND to the defendant, of the estate and effects of Auley McNaughton, deceased, in July Term, 1792. The next of kin beyond sea, since that time, have appointed the petitioner to apply for the administration as their agent and trustee. He exhibited this petition to the county court, who refused to repeal the former letters; and thereupon the petitioner appealed to this Court. He had a similar appointment also from Willie Ewin McClay, trustee of the sequestrated estate of the surviving partners of Auley McNaughton & Co. in Scotland.

PER CURIAM: Administration when granted, if the next of kin are infants, should be granted *durante minoritate;* if beyond sea, or out of the country, *durante absentia;* and if otherwise granted, it is erroneous.

Where the next of kin reside in a foreign country, and cannot personally attend to take the administration themselves, they may appoint a person in whom they have confidence to take it for them; and the court ought to grant the administration to their appointee. The court have not executed the power the law gives them when they have granted letters to a person not designated in that act before the persons designated have refused, but only where they have granted letters to the proper persons. When they have granted letters to improper persons, they may repeal them, and ought to do so, at the application of the persons properly entitled. 1 Cro., 469; 6 Rep., 18. The consequence is that the letters in the present case, having been improperly granted to the defendant, to the prejudice of the next of kin in Europe, should be repealed, and granted to their appointee. H. Bl. Rep., 152. This was ordered accordingly, and an order of this Court was made for the county court to grant letters accordingly.

Quaere, if it should not have been a *mandamus,* for if they refuse to comply with this order, how are they to be brought under the penalty of a contempt committed towards this Court.

The court further said that they did not regard the appointment of the trustee of the sequestrated estate of the survivors, because the survivors were entitled to all the joint stock in trade until the net balance was ascertained; and as to that, the power of the ad-
(221) ministrator commenced after the business of the survivors was finished; and besides, the administration would extend to such of the effects of the deceased as were not a part of the joint stock, and the survivors could have nothing to do with that, and the trustee stands only in their place.

See *Carthey v. Webb,* 4 N. C., 20; *S. c.,* 6 N. C., 268.

Cited: Little v. Berry, 94 N. C., 437; *Smith v. Munroe,* 23 N. C., 351; *Sawyer v. Dozier,* 27 N. C., 104; *Wallis v. Wallis,* 60 N. C., 79; *Williams v. Neville,* 108 N. C., 561; *Boynton v. Hearth,* 158 N. C., 191, 195.

INGRAM v. LANIER.

Where a person concerned in interest is stated in the bill to be moved away, and not since heard of for many years, so that he cannot be served with process, that shall be a good reason as between third persons for not making him a party; and the court will proceed to a hearing notwithstanding. When the court feels any doubt about deciding upon a plea, it can overrule it, and suffer the defendant to insist upon the same in his answer.

PETITION under the act of 1762, ch. 5, sec. 23, stating that the petitioner is the brother of Peter Lewis, deceased, who died possessed of an estate, leaving a wife, who had moved away and had not been since heard of, so as to be served with process; that he was the only next of kin of the deceased; that Lanier had procured letters of administration upon the personal estate of the deceased, and had possessed himself thereof, and would not account for the same, and deliver it or his share thereof to the petitioner.

There was a demurrer to this petition, for that the wife of the deceased was entitled to a moiety of the personal estate, and was not made a party. There was also a plea that seven years had elapsed since the death of the intestate, whereby the church wardens became entitled under the act of 1715, ch. 48, sec. 9.

PER CURIAM. After hearing the argument, as to the first point. When a person concerned in interest is stated in the bill to be removed to a foreign country, or to be moved away and not since heard of after many years, so that he cannot be served with process, that shall be a good reason as between third persons for not making him a party, and the court will proceed to a hearing notwithstanding. Here, that is stated in the petition as a reason for not making her a party. 2 Atk., 510.

As to the other matter, the old law is altered by the act of 1784, ch. 23, by which all the estate of the deceased not claimed is to be deposited in the treasury, subject to the claim of creditors and the lawful representative of such decedent. However, seven years may have expired before the passing of this latter act, in which case it may be doubted whether the first or latter law is to govern this case.

Let the demurrer and plea be overruled, and the defendant be at liberty to insist upon the limitation of time in his answer.

Cited: Spivey v. Jenkins, 36 N. C., 129.

STATE v. ———

The Court cannot order the State to pay costs as a condition of getting a continuance nor, indeed, it seems, in any case.

THERE were several actions of DETINUE that had been appointed to be tried on this day, Friday, 30 April. A motion was made on be-
(222) half of the State for a continuance of them all, upon the ground that since the commencement of the present term, and never before, it had been discovered there was a piece of testimony extremely material which might be procured by the next term: and upon this ground the Court were of opinion the causes should be continued, but they said if it were in their power to order it, the State should pay costs agreeably to the act of 1779, ch. 4, sec. 5. Whereupon Mr. Moore insisted that during the whole of this term, where the party moving for a continuance had been guilty of any of the least neglect, though it might not be so great as to overturn his excuse for not being ready, the payment of the costs of the term had been made a condition of his obtaining the continuance, and there could be no good reason why the State should receive more favor or indulgence than an individual, since justice was the only object of the Court. If it was just to compel an individual under certain circumstances to pay costs, it was equally just that the State, under the same or the like circumstances, should also be compelled to pay costs; and as for the doubt of the Court that they could not pass an order to compel the State, he would observe that in *S. v. Tatom,* determined at Hillsboro, on the last circuit, the Court allowed a set-off in favor of the defendant, which is in lieu of an action against the State; and he trusted if an order was made purporting it to be the opinion of the Court that the State ought to pay costs, that there was magnanimity and justice enough in the sovereign legislative body of the country to do voluntarily what justice required.

PER CURIAM. We cannot pass any effectual order or judgment against the State; neither is there any instance of a court saying to a sovereign body, they ought to do thus or thus. For us to pass an order without any precedent, and which it would be optional in them upon whom it was intended to operate either to comply with or not, would be to place ourselves in a ridiculous point of view. We have no power to make such an order.

Et per one of the judges: I was surprised at the adjudication at Hillsboro, which has been cited at the bar, when it took place. I argued that cause on the part of the State, and I could recollect no case like it

that I ever had read or heard of. I have thought much of it since, and looked much into the authorities. The practice of set-offs is founded upon a statute, and were it not for that, a set-off could not be allowable; it therefore can extend no further than the true spirit of the act will admit; that was to diminish the number of lawsuits and (223) expense to the parties. It intended, where two parties had reciprocal demands, that the defendant, instead of suing, might plead his demand of equal or greater value in bar; if of less value, might set it off upon notice given. By this means he had justice more easily done, and at much less expense than when both parties were to sue reciprocally. *Paynter v. Walker,* C. B. Easter 4 Geo. III.; Buller, 179; 1 Wils., 155; Cowp., 133, 135. It follows from hence that a defendant cannot set-off but in a case where he might sue the plaintiff if he thought proper. This was certainly the true meaning of the act of 1756, ch. 4, sec. 7, and as the case cited was brought on suddenly, on a motion on the part of the State for judgment, and determined suddenly, without time taken to consider, and as it was against the current of authorities, it was improper perhaps to cite it as a precedent, before it should be corroborated by some concurrent decision or by some case adjudged upon consideration. One of the reasons given for the decision in that case was that the defendant could not sue the State; and that was the strongest reason that could be offered to prove he should be allowed to set-off his demand. The circumstance of the practice of set-offs being introduced by, and being dependent on, an act of Assembly, was not at all attended to. But the practice was treated as an equitable practice founded on the common law, or in reason and propriety only; besides, it does not follow that because the party cannot set off, he cannot obtain justice from the public. The Legislature will surely have magnanimity and justice enough to pay the party his just demand, upon a proper application. The case cited, therefore is to be doubted of.

DEN, ON THE DEMISE OF WILCOCKS, v. ———.

Costs in Ejectment.

THERE were several ejectment suits brought against the inhabitants of a part of the town of Fayetteville, for recovering the respective lots of land on which they were respectively settled, and the issue of the contest depended solely upon the ascertainment of an old line of a tract

of land of 1,000 acres which lay adjoining to the town, the plaintiff alleging that these lots were within that line and the defendants that they were without. A surveyor and jury were appointed to survey and view the land, and the order for a survey and jury was made (224) in each of the causes; and at this term, the survey being not completed on the day on which the causes were called for trial, a continuance was moved for on the part of the defendants, and granted upon the terms of their paying the costs of this term, according to the act of 1779, ch. 4, sec. 5, whereupon it became a question whether each defendant should pay the whole of the expenses of the jury and surveyor, or whether the jury and surveyor should be allowed as for one cause only. It being alleged that although there were several cases depending upon the ascertainment of this line, yet the surveyor and jury had but the same trouble and labor as if there was only one cause; and that one running of the line of the 1,000 acre tract, answered for all. The Court took time to advise until MACAY, J., could search the record at Salisbury in the suit of Pacely and others, where the same question had been decided.

See S. C., *post*, 484.

NOTE BY REPORTER.—It seems as if each defendant, in case a verdict went against him, should pay the whole costs of the surveyor. The line must be platted for each, in the survey returned for his cause; also, each defendant's lot must be viewed and platted to show its situation relative to the long line. With respect to the jurors, their labor is over when the lines are once run and viewed. When they are viewing the long line, that is a service for the defendants jointly; but when they are viewing the lots, that is for each defendant singly; and if they take up several days in doing this, the lots first viewed and passed by should not contribute to the expenses of the lots not yet viewed. As to that part of the service, therefore, it seems as if each defendant ought to pay. We must wait, however, for a decision on this point to be ascertained of the law.

HALIFAX—APRIL TERM, 1795

SWEPSON v. WHITAKER.

An action will not lie against the sheriff for an escape upon mesne process. He ought to be proceeded against as bail, under the act of 777, Rev. ch. 115, secs. 16 and 69.

ACTION for an escape upon mesne process. The defendant was the sheriff, and Linton, the defendant in a former action at the suit of Swepson, was surrendered in court by his bail, and committed, as the plaintiff alleged, to the sheriff, the present defendant. There was no record of this commitment, and it was objected it could be proven no other way, the surrender having been made in court. It was also objected that though an action for an escape on mesne process will lie in England, it will not in this State.

By the act of 1777, ch. 2, secs. 16 and 76, the sheriff arresting is deemed to be the bail himself, where he does not return bail; and by section 20, upon a surrender made by the bail, the sheriff is to receive the body and hold the defendant in custody, as if bail had never been given. Now, if bail had never been given, the sheriff might have discharged the defendant without bail, and thereby have become bail himself, or he might have committed him to prison. The cir- (225) cumstance of committing the defendant to prison, cannot place the sheriff in any worse situation than he was in after having him in custody and before actually committing him. The defendant is his prisoner as well in the one case as in the other. If, therefore, his discharging the prisoner out of his custody before an actual imprisonment will only make the sheriff liable as bail, by parity of reason, his discharging the defendant from an actual imprisonment will have the same operation. The plaintiff in the action is not more injured in the one case than in the other; for if the sheriff is held to be the bail in both cases, then the defendant is in the power of the court, and the plaintiff may proceed in the action. Then if the sheriff be bail as well in the one case as in the other, he ought not to be liable to an action for an escape on mesne process, because in this action the sheriff can only discharge himself by a recaption before the action brought against him; whereas, if he be proceeded against as bail by a *sci. fa.* he may, by section 20, retake his prisoner, and surrender him to the court in discharge of himself, at any time before final judgment against him; and in fact the defendant in the present case did retake Linton and put him in prison, and had

him in court to answer the plaintiff's action, if he would have proceeded against him.

ASHE and WILLIAMS, JJ. Upon the last point we are of opinion that the action for an escape upon mesne process will not lie against the sheriff in this case: He ought to be proceeded against as bail. To proceed against him in this manner is to deprive him of many advantages.

Judgment for the defendant. *Ex relatione.*

NOTE.—But if the sheriff, to a writ of *capias ad respondendum* returns an escape, this negatives the supposition of his having become bail, and an action for the escape will lie. *Tuton v. Sheriff of Wake, post,* 485. Indeed, in such case it seems the only proper remedy. *Hart v. Lanier,* 10 N. C., 244.

Cited: Barker v. Munroe, 15 N. C., 412.

Dist.: Hart v. Lanier, 10 N. C., 244.

NEW BERN—SEPTEMBER TERM, 1795

CLEARY v. COOR and HAWKS.

An entry "referred to A, B, and C," means a general reference of the cause, and not merely to audit and state the accounts. The award of arbitrators ought not to be set aside unless in case where their decision is plainly and grossly against law; not where the point decided might be doubtful.

SUIT IN EQUITY, to which the defendant pleaded; and afterwards there was an entry in these words, "Referred to A, B, and C." Upon this the referees met and returned an award; exceptions were filed on the part of the plaintiff, and at the last term a rule to show cause why the award should not be confirmed was entered on the record. And now, at this term, Davie for the plaintiff, insisted the referees were not appointed to act as arbitrators, but to state the account, and that they had mistaken their powers.

PER CURIAM. If the intent had been to refer to them to audit and state the accounts, it would have been so mentioned, especially as there was a master whose business it was to make such statement; neither would the court have ordered an account to be taken before (226) the pleas were argued or put to issue and tried. Indeed,

by the last entry this seems to have been considered as an award by the counsel on both sides, who have mentioned it as an award.

Davie then insisted that this award ought to be set aside, being against law; for that the arbitrators had allowed Coor a considerable sum for his services as an administrator (this was admitted by Coor, now present in court, that is to say, he admitted they allowed 10 per cent in 1779, upon the value of the goods in 1776, which came to about an half per cent or ten shillings on the real value); and he cited Bl. Rep., 363; 3 Atk., 494.

The Court took time to consider, and having had before them 1 Atk., 64; Jacob, *Verbo* Arbitrators; 2 Brown, 701; 1 Brown, 271; 1 Stra., 301; Salk. 71, pl. 4-83, pl. 1, they next morning decided that the award of arbitrators ought not to be set aside, unless in cases where their decision is plainly and grossly against law—not where the point decided might be doubtful. In the present case, although no such allowance ought to be made by the strict rules of law, that is a point not universally known and clear; but the contrary is practiced in almost all the county courts in this State, that is to say, the county courts generally make such allowances. Let the award be confirmed.

See *Jones v. Frazier*, 8 N. C., 379.

Cited: Patton v. Garrett, 116 N. C., 857.

ANONYMOUS.

The action of account will not lie for a legatee against an executor, or the executor of such executor.

ACCOUNT. The jury had found a verdict for the plaintiff, subject to the opinion of the court, upon the question whether this action will lie against the executor of one, who as executor took the goods of the testator into his possession, and hired out the negroes, etc. This suit was commenced by one of several legatees.

In the argument of this case were cited 3 Bl. Com., 164; Reeves Eng. Law, 391; 2 Reeves, 168, 169; 3 Dyer, 277.

PER CURIAM. This action will not lie in the present case. The writ of account lieth against a man as guardian, bailiff, or receiver, and, by statute, against the executors of such; but it lieth not against an execu-

tor who makes a profit of the estate of the deceased, nor against his executor, for the law hath provided other means to call an executor to account, where all the legatees must join in one suit, and not each one of them harass the executor with a separate suit. There is not (277) any authority to show that an executor was ever charged in account as guardian: Whatever he recovers is assets for the whole estate, and not the particular property of any special legatee. There is no privity between the legatee and executor, which is essentially necessary to the support of this action. Co. Litt., 172. The executor does not act by the appointment or choice of the legatee, as is the case with the guardian, but by the appointment of the testator, though the guardian shall have an allowance of all his reasonable costs and expenses. Co. Litt., 89. And so it may be thought no inconvenience to the executor to be charged that way; it is convenient in this, that he is chargeable thereby by each legatee; whereas in the modes anciently prescribed in the cases of executors they must all join. It would not only be a perversion of terms, but a great wrong to the executor to charge him as bailiff, who is liable to account not only for the profits he actually made, but for all such as he might have made by industry and care; and as a receiver he ought not to be charged in this action, because the receiver is not to be allowed any expenses or charges which an executor may be, by 1715, ch. 48, sec. 7.

Judgment for the defendant.

———v. BROWN'S EXECUTORS.

The indisposition of a witness, whose deposition has been taken *de bene esse*, and was now offered to be read, cannot be proved by the oath of the party producing it.

PLAINTIFF brought this action against defendant for a sum of money which he alleged he lent to Brown, in his lifetime, when going to the Convention and Assembly in 1789. The defendant produced very strong circumstances to show that the instrument purporting to be signed by Brown, in acknowledgment of the receipt of this money, was forged. In order to rebut this testimony, the plaintiff moved to read the deposition of a woman who had lived at the house of the plaintiff about the time when this money was said to be lent, and who, as it was alleged, heard Brown's acknowledgment of the debt. This deposition had been taken *de bene esse.*

General Davie, for the plaintiff, offered to prove the present indisposition of the woman, by the oath of the plaintiff, and said that had always been the practice.

HAYWOOD, J. (who gave the opinion of the Court): I cannot say, because I do not remember how the practice hath been, but surely, upon principle, so material a fact as the indisposition of the witness, upon which depends the reading the deposition, and perhaps upon that the fate of the cause should be proven by some other person than the plaintiff, who may be greatly interested in having the deposition (228) read, rather than the witness examined and cross-examined in court. That the indisposition or death of the witness is to be proven by others is strongly implied in the words used in *Fry v. Wood,* 1 Atk., 445; and in 1 Mo., 282, 283, the falling sick of the witness was proved by an indifferent person. In the present case there was no one in court who could prove the indisposition of the witness, and the deposition was rejected, though it was afterwards read, by consent of parties.

See *Anonymous,* 3 N. C., 74.

ABNER NASH v. ADMINISTRATORS OF ABNER NASH.

A devise to the plaintiff of cash sufficient, in the opinion of the executors, not exceeding £1,000, to purchase a tract of land; in a following clause, the following devise: "I give to my wife all the negroes I obtained in marriage with her, and their increase, also one-third of stock, etc., and the residue I give to my children by my present wife." The estate is exhausted except the negroes contained in the residuary clause to the wife and children, and debts to a large amount remain unpaid. Plaintiff claims his £1,000. Decided that the plaintiff's legacy is general, but still entitled to be paid out of the residuary part devised to the wife and children, which, as a residium, can never be specific: that the children's part is to be first applied, as the wife's part, though general and residuary as to the plaintiff, is specific, in reference to theirs; that as the testator, in mentioning the sum of £1,000 for the plaintiff, contemplated a full enjoyment by the legatees of their respective legacies of slaves, therefore, under the discretionary power given to the executors of fixing the amount to be paid to the plaintiff, his legacy shall be abated from £1,000 in proportion to the value of the negroes that shall be required to pay the debts.

In this case there was a devise to the plaintiff, amongst other things, of cash sufficient, in the opinion of the executors, not exceeding £1,000, to purchase a tract of land on Tar River. In a subsequent clause, after giving several legacies to his children by his first wife, he says: "All

the rest of my estate I give and bequeath as follows: I give and bequeath to my beloved wife all the negroes I obtained by marriage with her, and their increase; also, one-third of all my plantation stock, household and kitchen furniture. And the residue I give and bequeath to my children by my present wife," etc., etc. The whole of the estate, except a part of the furniture, and the negroes comprehended in the residue to the wife and younger children, is exhausted; and there yet remains debts to be paid, to the amount of £4,000 and upwards. The plaintiff claims his £1,000 legacy.

Taylor for the plaintiff.
Davie for the defendant.

WILLIAMS and HAYWOOD, JJ., took time to advise, saying the judgment of the Court, when they had formed their opinion, should be entered as of this term. However, the judgment was not entered till the next term. At which time, by the consent of the attorneys on both sides, it was entered according to the opinion of HAYWOOD, J., STONE, J., assenting.

HAYWOOD, J. This legacy to the plaintiff is a money legacy, notwithstanding 1 P. Wil., 127, for, being a bequest of money, if it be not a specific legacy, it must of consequence stand in the rank of a pecuniary one. A legacy of money is specific only in such cases where the money is identified and distinguished from all other money; as money in such a bag, or in such a bond, or to be paid out of such a security, or (229) in such hands. 1 Atk., 508. But it is not a lost legacy, as contended for by the defendant's counsel; for it is not made payable out of any particular fund. Had it been, and the fund had failed, it would have been lost, as he contended. 2 Brown Chan., 125. Here, it is not said out of what part of the estate it shall be paid, and of course, by the rule of law, must be paid out of the residuary part. 2 Ves., 563; 1 Atk., 414, 418; 1 P. Wil., 404.

The residue mentioned in this will is argued to be specific, as negroes are the subject of it, and they will pass by the assent of the executor. 1 P. Wil., 540. Where the legacy is specific, it will pass by the assent of the executor; but every legacy which will pass by the assent of the executor is not therefore specific. The residue to Mrs. Nash in this case was of negroes; but it is not specific. There is no case in the books where a residuum hath been held to be a specific legacy. A residuum is the gleanings of an estate remaining after debts and legacies paid. 2 Bl. Com., 514; 1 Atk., 418; 3 P. Wil., 385; 2 Ves., 563; 1 P. Wil., 404. In

each of these cases, it is admitted on all hands, that if the legacy was specific, it was lost; but if a legacy of quantity only, it was to be made good out of the residuum. The rest of my estate cannot, in the nature of things, be a specific legacy, exempted from any dependence on the other legacies preceding it. It is a relative term; its quantity, and even its existence, depends entirely upon the previous raising of the particular legacies. There can be no residue if there be not estate enough to discharge the particular legacies to which it relates. Its quantity must depend upon the quantity of the particular legacies to be raised out of the testator's estate. It diminishes or increases in proportion to the largeness or smallness of the particular legacies which must first be taken from the net estate; and the question about contribution never arises but where what was to form the residuum is exhausted. 2 Ves., 562. Whilst there remains any of the estate which forms the residuum, it is liable to be resorted to by the particular legatees, unless their legacies are specific, or out of a particular fund.

It is argued by the defendant's counsel that as this legacy claimed by the plaintiff is a pecuniary one, and the residue specific, that the residue shall not come into contribution with it. It is said, on the other side, that this legacy claimed by the plaintiff is a specific one, because to be laid out in land; and that money to be laid out in land shall be taken as land; and that a devise of land is specific. It is so; but the argument is fallacious. It proceeds upon this rule of equity, that (230) what ought to have been done is considered as being done. The rule is here misapplied, and the whole doctrine built upon it. This rule is never applied in a dispute between a residuary and particular legatee; but always between the heir and personal representative of the particular legatee. The heir claims the money, though not yet laid out in land, as land, and founds his equity upon this, that the delay of the executor or trustee to lay it out in land, as he ought to have done, shall neither prejudice him nor benefit the personal representative. Here the Court will say what the executor ought to have done previous to the death of the legatee shall be considered as having been done, by force of which fiction the money will now go into the same hands as the land to be purchased with it would have done; and thus no one will be injured by the delay of the trustee. The misapplication of this rule caused the mistake in P. Wil., 127, noticed in 1 P. Wil., 539, and would occasion the same mistake now, were it not attended to. This is the only point established by the cases cited for the plaintiff, viz.: 1 P. Wil., 127; 1 Vern., 52, 471; 2 Vern., 536, 588, 679; 1 P. Wil., 172; 3 Atk., 254; 3 P. Wil., 212. But there is no dispute in the present case between the

heirs and personal representatives of the legatee, and therefore all those authorities are to be laid out of the case.

But if it were not the rule of law that the residuum were to be diminished by the particular legacies, in proportion to their amount, there is enough in this will to show it to have been the testator's intention that the debts at least should be paid out of the residuary part; and then it will follow that the particular legacies are not to be affected by the debts. After giving all the residue of his estate to his younger children, he gives power to his executors to sell any part of the land included in this residuum when they shall see occasion; and he adds, in the next sentence, that they shall collect and pay his debts as fast as possible, and pay the surplus of the moneys into his wife's hands for the benefit of his said younger children. His debts were in his contemplation when he directed this sale of the lands, and it was also in his contemplation that a considerable part of the moneys to be raised by these sales was to be exhausted by his executors, and the surplus to go to his younger
(231) children, whose lands were thus to be sold if necessary in the opinion of the executors. It seems evident, therefore, he contemplated the payment of his debts out of the property comprehended in this residue to his younger children. It is true, he seemed to suppose the lands would be fully sufficient for this purpose; but it is equally true, he supposed his particular legacies would not be liable to those debts; and then the rule of law more strongly applies. It is the strong bent of my inclination to make this legacy contribute, because the testator supposed his negro part of the residuum, at least, would be left for his wife and younger children, and possibly a surplus out of his lands to be sold. He did not foresee the great deficiency that would happen, and that it would become necessary to fall upon the negroes intended for his younger children. But yet I cannot persuade myself to depart from a rule of law so well established, and say that these negroes, being a part of the residuum, shall only abate in proportion with the particular legatees.

It is argued that although this be a specific legacy, the residuary legatees are not bound to contribute, because these legacies are of a different species of property, namely, of negroes and of money; and where there are two specific legatees of two different subjects, the one shall not contribute to make good the other. 2 Ves., 563. I take the law to be thus, where specific legacies are given to several persons, of several parcels of a particular subject, and that subject fails in quantity to supply all, there each legatee must abate in proportion; when, at the same time, other specific legatees of a different subject shall not contribute at all, or be at all affected by the deficiency. For in such case,

who shall say which one of the legatees shall be totally disappointed? And yet one, or more, must be totally disappointed, unless an abatement should take place. But when all the legacies, which were pecuniary, or unspecific legacies, are exhausted in the payment of debts, and there still remain debts to be paid, then all the specific legacies shall abate in proportion. For who shall say which of these specific legatees shall be disappointed of his legacy? They are all equally objects of the testator's bounty. 1 P. Wil., 404; 3 Bac. Ab., 483. In the present case there is no dispute between specific legatees of the same subject, insufficient for the payment of all, nor yet between specific legatees, where all other parts of the estate are exhausted. There yet remains a large residuum. 1 P. Wil., 404. But the truth is, neither of these legacies is specific; neither the plaintiff's nor that of the residuary legatee; (232) and, therefore, this argument is without foundation.

It follows, then, that the administrator *de bonis non* must pay the legacy claimed by the plaintiff out of the residue bequeathed to the younger children; and if that is not sufficient, then out of that part of the residue bequeathed to Mrs. Nash, for her legacy, though general and residuary as to the first children, is particular in respect of the younger children.

The only question then remaining is, What shall the plaintiff recover? The testator, after bequeathing a number of negroes to the plaintiff, particularly naming them, adds, "and cash sufficient in the opinion of my executors hereafter to be named, not exceeding £1,000, to purchase a tract of land on Tar River." The quantity of money is left uncertain, and the extent and quality of the land also. It is argued by the counsel that this was left in the discretion of the executors; that they might be at liberty to judge of the price of the tract to be purchased, from the circumstances in which they might afterwards find the estate; and that as the executors were to have regulated their discretion by these circumstances, so will the Court, now the matter is brought before them. No authorities were cited in support of this position, and there are but few to be found. There is one passage in Swin., 496, and another in God., 424, sec. 16, which favor it. In the latter of these books it is said from the civil law that the ordinary shall moderate the sum with respect to the testator's estate. In the former of them it is said that if such an uncertain legacy be given for the performance of some act or other consideration, etc., etc., so much is understood to be disposed as may satisfy or answer the purpose whereunto it is appointed, and as the ordinary, considering the necessity of the thing, and the ability of the testator, and the continuance of the gift, shall deem expedient. These books, it must be admitted, are not of the best authority; they contain collections, taken

partly from cases adjudged in our law and partly from the civil law; yet, as the rule laid down by them is so equitable in itself, and has not been contradicted by any adjudged case, it seems fit to be adopted in the present case, and then the Court will regulate their discretion by a respect to what, in all probability, the testator supposed was the net estate he had provided for his younger children, which seems to have been the slave part of their residue, or, in other words, he proba-
(233) bly supposed the plaintiff would have £1,000, when they had the whole of the negroes comprehended in their residue. Upon this principle, the plaintiff's legacy should be diminished in proportion to the diminution of their residuum; and for the purpose of ascertaining this, let the master ascertain the value of all that part of their residue that yet remains unsold, except negroes, and deduct that value from the debts remaining unpaid. Let him ascertain the value of the £1,000 legacy, dollars being now estimated at 10 s. and at 12 s. when the will was made. Let him then ascertain the value of the slaves contained in the residue, and what proportion the said legacy beareth to the value of the slaves, and deduct that proportion of the balance of debts, and, also, the £250 paid in part by the defendant, from the said legacy, and report the balance to this Court.

This report was made, and a decree made for the balance, with interest.

GLASGOW v. FLOWERS.

Where the law can give complete redress, equity will not interfere. Equity cannot change established rules of law, nor act as a court of errors, to correct erroneous decisions of law. When slaves are given to one for life, remainder over, the increase born during the life interest will go with the principal to the remainderman.

BILL IN EQUITY, the object of which was to be relieved against a judgment given by the Superior Court at HILLSBORO, during the last term, whereby Flowers, the now defendant, as the executor of Flowers, deceased, had recovered two negroes of Glasgow, which were the descendants of a negro woman given by the will of the deceased to his wife during her life; which two negroes had been born during the continuance of her estate. A title to these two negroes had been regularly deduced from the widow to Glasgow.

PER CURIAM. Where a case is so circumstanced that a court of law can give as complete redress as a court of equity can, a court of equity

should not interfere with it. Now the circumstances stated here are such as are properly cognizable in a court of law, and with respect to which a court of law can give as complete redress to the party injured as a court of equity could. The court decided in this case according to *Tims v. Potter,* 1 N. C., 12, which must now be taken, and is taken, as a decision establishing the rule of law on this subject. It is a very great mistake to suppose a court of equity can decide against the rules of property established by judicial decisions. The court of equity is as much bound to observe them as a court of law is. If the decision was wrong the court of law might have granted a new trial; and if ever a court for correcting errors should be established, the wrong (234) decision, if any there be, may be a subject for the jurisdiction of that court; but the court of equity must not undertake to act as a court for correcting erroneous judgments.

So the bill was dismissed for want of equity.

NOTE.—*Tims v. Potter,* 1 N. C., 12, so often cited in actions for the increase of slaves, was decided at Hillsborough three or four years after the war. It is a leading case, and governs a vast deal of the property of this country: and, therefore, it may not be improper to subjoin the substance of it in this place.

Glover gave a negro woman to his daughter, but reserved the use of the negro during his life. There was afterwards a judgment against Glover, and an execution, and the wench sold to satisfy it, Potter becoming the purchaser. Tims, the husband of the daughter, after the death of Glover sued for the wench and her children. The plaintiff had a verdict, and a special case was made as to the children born in the lifetime of Glover.

This special case was several times argued, the defendant's counsel citing and relying upon the cases that decide the interest of money accruing during the particular estate to belong to the owner for that time or *cestui que use;* and also 2 Bl. Com., 396; Puff. lib., 2, c. 4, p. 11.

After time taken to consider from one term to another, the Court decided and gave their opinion at length.

SPENCER and ASHE, JJ., being only present, WILLIAMS, J., being absent, but of a different opinion. They said the remainder carried with it the increase, and vested the property of the wench in the remainderman; and there was left in the owner for life only the use and possession, which use entitled him to the labor of the wench, and nothing more. The increase went to the remainderman, to compensate for the deterioration of the wench, by age, labor, and breeding, whilst in the service of the owner for life. This rule, they said, had prevailed ever since the first settlement of the country. It had been constantly understood to be the law. The practice of the country had been conformable to it. It was a convenient rule, as it enabled owners of such property more easily to provide for their families, in the distribution of it, and for these reasons it should not now be broken in upon. So there was judgment for the plaintiffs, as to the children, also.

Cited: Covington v. McEntyre, 37 N. C., 318; *Patterson v. High,* 43 N. C., 55.

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EDENTON—OCTOBER TERM, 1795

DEN, ON THE DEMISE OF SANDIFER v. FOSTER.

The last line of a boundary was from a white oak (which stood half a mile from the river), thence along the river to the beginning: *Held*, that the river is the boundary.

EJECTMENT. The land in controversy was patented in 1706, by one Gee, and a transfer of 200 acres of the tract was made to Bridgers by endorsement on the deed. In 1752, Bridgers conveyed to Robert Sandifer, who in 1765 devised to his son Robert Sandifer, after the death of the devisor's widow; but in the meantime he gave the lands to her for her life. She is yet alive, and hath conveyed the lands to the plaintiffs. In 1780, John Sandifer obtained a grant from the State, and conveyed to his son Robert, who conveyed to the defendant a part of this land. Gee's patent began at the mouth of Dividing Run, thence north, thence east, thence south to a white-oak, thence along the river to the beginning. This white-oak stood half a mile from the river; and if the line be run a direct course from thence to the beginning, a large part of the land described in the plaintiff's grant will be left out of Gee's patent; but if the river is deemed to be the boundary, the land described in the defendant's grant will then be included in Gee's patent, and, of course, be also included in Bridgers' deed.

Baker for plaintiff.
Keys for defendant.

WILLIAMS and HAYWOOD, JJ., after argument: The river in this case must be considered as the boundary of Gee's patent. It has always been thus uniformly decided in our courts.

The jury so found, and there was judgment accordingly.

Cited: Hartsfield v. Westbrook, post, 258; *Cherry v. Slade,* 7 N. C., 85; *Hurley v. Morgan,* 18 N. C., 430; *Slade v. Neal,* 19 N. C., 62; *Shultz v. Young,* 25 N. C., 387; *McPhaul v. Gilchrist,* 29 N. C., 173; *Literary Board v. Clark,* 31 N. C., 61; *Baxter v. Wilson,* 95 N. C., 143; *Brown v. House,* 118 N. C., 878; *Bowen v. Gaylord,* 122 N. C., 820; *Rowe v. Lumber Co.,* 133 N. C., 437; *Whitaker v. Cover,* 140 N. C., 284; *Boyden v. Hagaman,* 169 N. C., 202; *Power Co. v. Savage,* 170 N. C., 629.

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THOMAS JONES'S ADMINISTRATORS v. JOSEPH BLOUNT'S EXECUTORS.

When the subscribing witness to a bond is dead, and his handwriting cannot be proved, proof of the handwriting of the obligor may be received.

DEBT upon a bond for £526. The defendant pleaded a set-off, and produced two old bonds, one dated in 1760, the other in 1768, both attested; but the witness who attested one of them was a lady who had lived some time ago in Edenton, and was now dead, and her handwriting could not be proved by any one that the defendant could procure.

It was objected by Mr. Hamilton for the plaintiff, that when the handwriting of a deceased witness cannot be proved, it is irregular to prove the handwriting of the obligor himself, that being not essential to the deed, and not amounting to any proof of the delivery of it.

WILLIAMS and HAYWOOD, JJ. The law only requires the best evidence the party has in his power. The subscribing witness must be produced when there is one; if he be dead, proof of his handwriting may be admitted; and if the handwriting of the witness cannot be proven, then proof of the handwriting of the obligor may be received; this affording a strong evidence that the obligor meant to make himself chargeable by that signature. And the defendant in the present case was permitted to prove the handwriting of the obligor.

See *Clements v. Eason, ante,* 18.

Cited: McKinder v. Littlejohn, 23 N. C., 71; *Carrier v. Hampton,* 33 N. C., 311; *Howell v. Ray,* 92 N. C., 512.

STANDEN v. BAINS.

General reputation is admissible as evidence in cases of boundary. Marked lines and corners may be established as the true one, although variant from the courses and distances mentioned in the deed.

TRESPASS, *quare clausum fregit. Not guilty, liberum tenementum,* etc., pleaded. The plaintiff claimed under Arkill, who patented a tract of land in 1740, extending, as he alleged, to a line distinguished in the plat by the name of the dotted line. The courses and distances mentioned in the patent extended not so far, but only to a line distinguished in the plat by the name of the black line. The defendant entered this

intermediate tract in 1784, and took possession, whereupon the plaintiff brought his action. The court permitted evidence to be given that the dotted line, which was a marked one, had for a long time since 1740 been reputed the line of Arkill's tract. The patent called for a gum standing in Roberts' line; this gum was found at the termination of the dotted line. It next called for two lines of Roberts' tract; the dotted line was upon these two lines. It next called for Hoskin's corner: the
(239) dotted line went to that corner, and there was nothing to prove the black line to be the true one, but course and distance. There was no witness who could prove positively that the dotted line was the line of Arkill's tract.

PER CURIAM. The mistake of a surveyor in describing or laying down the boundaries of the land patented should not prejudice the patentee, if the jury are satisfied that the marked line was the true one, although the distances thereof will not correspond with the distances in the patent. Therefore, in the present case the jury may consider whether there is sufficient evidence to satisfy them that this dotted line was the real boundary, though not truly described in the patent; and if they think so, then to find for the plaintiff. The Court then recapitulated the circumstances above mentioned, as affording a proof of this being the true line, rather than the other, and the jury under their direction found for the plaintiff.

See *Bradford v. Hill, ante,* 22.

Cited: Cherry v. Slade, 7 N. C., 88; *Hartzog v. Hubbard,* 19 N. C., 243; *Campbell v. Branch,* 49 N. C., 314; *Huffman v. Walker,* 83 N. C., 415.

FERGUSON v. FITT.

When the vessel is lost, the goods that are saved are not liable to average. The master does not lose his wages by the loss of the vessel. These words, in a letter from a defendant to the plaintiff, "I would rather come to a settlement, although I should allow the account as insisted on by you, than wait the event of a lawsuit," are sufficient to take the case out of the statute of limitations.

CASE. For wages due to the plaintiff as master of a vessel, which he had navigated for the defendant to St. Eustatia, and upon an account

settled, and a special case made, stating, in substance, that these services were performed in 1788, or beginning of 1789, and that the defendant wrote to the plaintiff within three years, saying "he would rather come to a settlement, although he should allow the account as insisted on by the plaintiff, than wait the event of a lawsuit"; and the doubt stated on this point was, whether the act of limitations barred the plaintiff in this case. The special case further stated that when the vessel left Eustatia laden with rum and other articles, there were on board six puncheons of rum that belonged to the plaintiff, and that the vessel was lost, after it had passed the bar, on the homeward bound voyage, and that these six hogsheads of rum, together with about twenty-two hogsheads of other rum, the property of the defendant, were saved, and the whole, including the six hogsheads, came to the defendant's possession; and the doubt stated for the opinion of the court was whether the six hogsheads of rum should be subject to an average loss or not, and whether, the vessel being lost, the master was at all entitled to his wages.

PER CURIAM (after several days taken to consider). When a vessel is in danger of being lost, and part of the goods on board are cast overboard to save the rest, and the vessel afterwards comes safe into port, the goods that are saved shall be subject to average; but if the vessel should not come safely into port, then average shall not take place, for the only reason of average is because the goods preserved (240) were saved by the loss of the property thrown overboard; and then it is reasonable that the owners of the saved goods should make a just compensation to the owners of the goods thrown overboard. But this does not take place where the casting of goods into the sea is not the cause of the salvation of the goods preserved; and they relied upon Beawes. With respect to the wages, sailors lose them where the vessel is lost, from the time of their sailing from the last port of delivery. This rule is founded in policy, to make sailors careful of the vessel, and alert in the preservation of it when in danger. They relied upon 3 Bac. Abr., 593, Comm. *verbo* Navigation; 3 Burr., 1485; Doug., 539. But the master is not subject to this rule; there is no case which says he is. He must, therefore, have judgment. As to the act of limitations, the words used in these letters will take the case out of it.

Judgment for the plaintiff.

See *Ferguson v. Taylor*, and the note thereto, *ante* 20, for the acknowledgment requisite to take a case out of the statute of limitations.

Cited: Wells v. Hill, 118 N. C., 908.

COLLINS v. DICKINSON AND ALLEN.

A partition, in a partnership concern, is matter of right, and may be called for at any time.

BILL IN EQUITY, stating a partnership entered into by the complainant and defendants in 1784, for the purpose of entering, securing and improving the lands in Lake Phelps, and the lands adjoining thereto, and for the purpose of draining and preparing them for cultivation. The bill states many tracts of land secured, the lake drained, houses and mills built, and that the complainant has advanced much beyond his proportion. The bill prays a partition of the lands, and that the defendants be decreed to account for and pay to him the overplus of his disbursements.

They pleaded generally that the purposes for which the company associated were not yet completed, and that such a division as that prayed for will be ruinous to them should it take place, as each of them separately would not be able to manage the business so as to derive any profit from it. The account was referred to the master, and he had made his report to the present term.

(241) *Hamilton for complainant.*

PER CURIAM. A partition is matter of right; therefore, let it be decreed; and let the complainant have a decree for moneys reported due to him; and let commissioners be appointed to make the partition, and return their proceedings to next term, with maps or plats of the same.

A decree was entered accordingly for these purposes.

HALIFAX—OCTOBER TERM, 1795

STATE v. JOB GARRIGUES.

If the jury, in a capital case, separate without returning a verdict, the prisoner shall not be tried again for that offense.

THE prisoner had been indicted for murder, and put on his trial the last day of last term, and the jury, after the court had gone from the bench, but without adjourning, separated without giving any verdict;

and now it was moved by the Attorney-General that he might be again put upon his trial, and he cited Kelyng, 42, 52; Foster, 27, 29, 76; H. H. P. C., 294, 295. *E contra* were cited H. P. C., *verbo* Verdict, c. 47, s. 1, p. 439, where it is said to have been held for law ever since the Revolution, that a jury cannot be discharged in a capital case without giving a verdict.

PER CURIAM. The rule as laid down in 3 Co. Inst., 110, and 1 Inst., 227, is general and without exception that a jury in a capital case cannot be discharged without giving a verdict. Afterwards, however, in the reigns of the latter sovereigns of the Stuart family, a different rule prevailed, that a jury in such case might be discharged for the purpose of having better evidence against him at a future day; and this power was exercised for the benefit of the crown only; but it is a doctrine so abhorrent to every principle of safety and security that it ought not to receive the least countenance in the courts of this country. In the time of James II., and since the Revolution, this doctrine came under examination, and the rule as laid down by my Lord Coke was revived with this addition, that a jury should not be discharged in a capital case unless for the benefit of the prisoner; as if the prisoner be a (242) woman and be taken in labor; or if the prisoner after the jury are charged with him be found to be insane, and the like; or if at the prisoner's request a jury be withdrawn to let him in to take the benefit of an exception, which otherwise he would have lost, as in the case of *Foster*. In the present case the jury were suffered by the court's officer to separate without giving a verdict. As they could not agree to convict, it is strong evidence of the party's innocence; and perhaps he could not be tried again with the same advantage to himself as then. Perhaps his witnesses are dead, or gone away, or their attendance not to be procured, or some accident may prevent their attendance. We will not again put his life in jeopardy, more especially as it is very improbable we shall be able to possess him of the same advantages.

So he was discharged.

Cited: In re Spier, 12 N. C., 495, 496, 503; *S. v. Prince,* 63 N. C., 530; *S. v. McGimsey,* 80 N. C., 379; *S. v. Washington,* 89 N. C., 538; *S. v. Tyson,* 138 N. C., 628.

STATE v. ALEXANDER WILSON.

A burglary may be committed in a storehouse standing 24 yards from the dwelling-house, and separated therefrom by a fence, if the owner or his servants sometimes sleep therein.

THE prisoner was indicted for burglariously breaking and entering the dwelling-house of one Lawrence Smith, in the night-time, and stealing from thence a number of pieces of hard money, etc. Upon the evidence it appeared that the house which was broken open was a storehouse, standing at the distance of 24 yards from the dwelling-house of Smith, separated therefrom by a fence, and that it did not stand in his yard. The other facts necessary to support the indictment were well enough proven.

PER CURIAM. With respect to the term dwelling-house, as used in an indictment for burglary, it hath a technical meaning, not that meaning which is annexed to it in common acceptation. All outhouses standing in the same yard with the dwelling-house, and used by the owner of the dwelling-house as appurtenant thereto, whether the yard be open or enclosed, are in the eye of the law parts of the dwelling-house, and will satisfy that word used in an indictment of burglary. So if a storehouse stand out of the yard and curtilage, and be separated therefrom, but the owner or his servants sometimes sleep therein, it is in law a dwelling-house. 1 H. H. P. C., 557. And here it being proved by Solomon Smith that he acted as the storekeeper of Lawrence Smith, and as his servant, and that he had frequently slept in this house through the fall in which the breaking was committed, if the jury believe the prisoner is the person who broke the house and stole the money as laid in the bill of indictment, they ought to find him guilty of the burglary.

He was found guilty accordingly, and had judgment of death; (243) but the Governor pardoned him.

See *S. v. Twitty, ante,* 102; *S. v. Langford,* 12 N. C., 253.

Cited: S. v. Whit, 49 N. C., 352; *S. v. Jenkins,* 50 N. C., 431; *S. v. Pressley,* 90 N. C., 733.

ANONYMOUS.

The words of a will, directing all just debts to be paid, will prevent the bar of the statute of limitations.

ONE of the questions in this case was whether the plaintiff was barred by the act of limitations. The note of hand was given in 1783, in October or November. An action was brought seven or eight years after, but in the meantime defendant died, not long before the commencement of this suit, and by his will in one part thereof said: "After payment of all my just debts, then I give," etc.

Baker for plaintiff.
Davie for defendant.

PER CURIAM. The act of limitations was made to prevent the inconvenience of stale demands, and to hinder them after a reasonable length of time from rising up to charge him. This law, though very generally reprobated, is founded upon principles of justice, and ought to be adhered to; and had the act never received an interpretation which might govern the present case, the Court would now be of opinion that the using of such words in a man's will ought not to prevent the operation of that act, for that they are words common in almost all wills; but these words by former decisions have been held to have that effect, for the executor without such words is bound to pay all recoverable debts; but these words are supposed to bind him to something further—the payment of all just debts (2 P. Wil., 373; Salk., 154; 2 Vern., 141), whether recoverable at law or not, and are deemed to mean more than the law lays upon the executor without any such words used.

The plaintiff had a verdict and judgment.

Quere, whether this case is not overruled by *Walker v. Campbell*, 8 N. C., 304, in which it was held that a debt barred by the statute of limitations is not revived by a direction in the debtor's will that certain slaves be sold "and with the proceeds thereof, *after paying my debts, they*," etc.

Cited: Walker v. Campbell, 8 N. C., 306.

SUSANNAH WINSTEAD v. HEIRS AND TERRETENANTS OF RICHARD WINSTEAD, DECEASED.

A widow, since the act of 1784, can claim dower only out of the lands of which the husband died seized or possessed. A levy upon lands in the lifetime of the husband divests the widow's claim for dower upon those lands, though they may not be sold until after his death.

PETITION FOR DOWER, drawn according to the directions of the act of 1784, ch. 22, sec. 9, and the counsel have agreed to this special case. Winstead, possessed of the premises, was sued, and a judgment was obtained against him in Edgecombe County Court; an execution issued, and the sheriff levied on the land and other property a few days before the death of Winstead; and after his death, the personal property not being sufficient to satisfy the debt, he sold the land, and the defendant Duncan Dew purchased. The question is, as the husband died (244) since 1784, whether the plaintiff is entitled to dower.

This special case was made on account of a difference in opinion between WILLIAMS, J., and HAYWOOD, J., the latter being clearly of opinion she was not entitled to her dower; the other being very clear that she was entitled.

The following is the opinion of HAYWOOD, J., transmitted to the Court (WILLIAMS, J., sent none):

The two questions here are, whether a widow be entitled to dower in lands of which her husband died seized or possessed only, or whether she be entitled as at common law to dower in all the lands of which the husband was seized during the coverture; and, secondly, whether lands are evicted out of the possession of the debtor by the sheriff's levying an execution upon them in the lifetime of the debtor.

As to the first point, it was a principal object of this act to take off all restraints from the alienation of lands, to the end that this species of property might be accommodated to the purposes of individuals engaging in useful undertakings and to the principles of a republican government. This act destroys estates tail entirely, and in order to enable husbands to convey their lands, free from the incumbrances of the wife's claim of dower, it directs that this claim shall commence for the future, from the death of the husband; making a provision for her against unfair conveyances made by the husband with intent to defraud her of her dower; which plainly discovers the meaning of the Legislature to be that with respect to fair conveyances, she was not entitled to dower; which point at once proves and establishes the doctrine that dower at the common law is abolished, for by the common law the widow

was entitled to dower in all the lands the husband sold after the coverture; whereas, now, she cannot claim dower in them if fairly sold. If a wife can yet claim dower at the common law, the husband cannot convey his lands free from incumbrances, and the object of the Legislature is not attained. An affirmative act, if it imply a negative, may operate as a repealing act. Now, if a widow since the passing of the act of 1784 is to have dower in the lands her husband died seized of, it seems to follow she is not entitled to dower in lands he did not die seized of; otherwise, where was the use of saying she should have dower out of those lands he died seized of. If she is still entitled to dower at the common law, the whole of section 8 of the act of 1784 is nugatory and of no signification. The first thing it provides is that she shall have dower of the lands he died seized or possessed of. She was entitled to that, at the common law. It next provides against (245) fraudulent conveyances to defeat her of her dower; the common law entitled her as from the time of the marriage, and any subsequent conveyance, whether fair or unfair, was subject to her dower. Thus the whole clause is useless and vain. But if it is alterative of the old law, then every word has its full effect and operation; and surely a construction that gives some effect to every word is much preferable to that which destroys a whole clause.

If it be said the act intended to create a species of dower different from that at the common law, allowing the widow in some respects greater advantages, though less in others, and to give her choice either of the one or the other, I ask, Where is the authority for such a supposition? The act speaks of no such election, nor is there any reason founded in the spirit of the act to presume such to have been the intention. And, besides, the last clause of the act of 1784 expressly repeals all laws that come within the purview of that act; whereby, as I understand it, all laws providing for the same cases that are provided for by the enacting part of the act are repealed; and this expressly takes in the common law respecting dower. I am, therefore, of opinion that since the act of 1784, ch. 22, a widow is only entitled to dower out of lands her husband died seized or possessed of, and cannot have it out of lands he dies seized of during the coverture, but conveyed away before his death.

As to the second point, whether lands are evicted out of the possession of the debtor by a sheriff's levying an execution upon them in the lifetime of the debtor; for if they are, then the plaintiff's husband was evicted, and so not seized and possessed at the time of his death, as the act requires. I think there can be no doubt but that the completing act

of an execution hath relation to, and effect from, the time of the lien occasioned by the judgment or the execution attaching on the property; or, in other words, that every sale upon a *fi. fa.* hath relation to the teste of the writ, and is a sale from that time; if not, in the case of lands, from the time of the judgment, and every extent upon an elegit is an extent from the time of the judgment rendered. The reason of this fiction is founded in justice—it is for the purpose of preventing subsequent incumbrances interfering with the interests of the plaintiff, who might (246) be defeated of his debt if such subsequent incumbrances were allowed to have priority to sales happening afterwards, though the executions had issued before. For this, or some such reason, I presume it is that in every case where the law makes a lien to take place on the property, whether real or personal, the execution is good from that time. In the case of a recovery of a real estate, the recoveree died before execution issued, yet as the judgment was as of the first day of the term, and the execution also, the execution when executed vested the property in the recoverer as from the time of the judgment; so that the recoveree was divested of the possession and seizin as from the first day of the term when the judgment was given. *Shelley's case,* 1 Rep., 106 b. When a judgment is recovered in debt against the ancestor, if a *sci. fa.* be taken out against the heir, and others terretenants, this *sci. fa.* goes against the heir as a terretenant, and not as heir; because, the land being bound by the judgment against the ancestor, is in *custodia legis,* and descends not to the heir; and if under such circumstances the heir gets possession, he is treated as a terretenant. *Herbert's case,* 3 Rep. In *Baker* and *Long, ante,* 1, one of the two parcels of land laid in the declaration was sold under a judgment given against the ancestor in his lifetime; the other parcel under a judgment against the executors, and by the judgment of the Court. The plaintiff recovered the latter, and lost the former, because the judgment against the ancestor had evicted the lands out of his possession so far that they did not descend to the plaintiff. In the case of an execution bearing teste before the death of a testator, but not executed nor even levied till after, it may be lawfully executed; because the lien on the goods commenced with the teste of the writ, and the legal possession of the goods are from that time *in custodia legis,* and are not in the possession of the executor as executor. 2 L. Ray., 849, 850. But if the teste of the writ of execution be after the death of the testator, there the goods in the hands of the executor cannot be touched. 3 P. Wil., where it is held by *Lord Parker* that the possession of the goods are evicted out of the lands of the testator in such case by the teste.

Consider it upon the reason of the thing, if the levying the execution will not evict the possession, then what will? Will the sale by the sheriff do it? The sheriff has no right to give possession. The actual corporal possession may still be held by the debtor, but the sale passes the fee and all the interest that the debtor hath. If it is the sale, or the levying either, that works a legal dispossession, then the law no longer (247) governs property in these cases, but the sheriffs in the different counties; for the sheriff by delaying to levy and sell, or by forwarding the levy and sale, will make the widow to be entitled or not to dower, and the creditor to lose part of his debt or not.

Suppose in the present case it had pleased the sheriff to sell on the day he levied, then she would not have been entitled to dower; but as he has sold after the death of the husband, she is entitled. This involves such an absurdity as cannot be endured. Most clearly, the rights of the widow do not depend upon the good pleasure of the officer. The law undoubtedly hath fixed them upon a better foundation. The law makes the lien of an execution against lands to commence from the teste of the writ, and were it not for *Bell v. Hill, ante,* 72, I should think from the judgment, and to that all subsequent acts have relation; so that the purchaser is in as from that time, and, of course, has all the interest that the debtor had as from a time prior to his death. Like the case where a testator by his will empowers his executors to sell his land, and after his death the executor sells accordingly, the vendee is in by the testator. The law deems it a sale by the devisor himself, for the purpose of overreaching the descent to the heir. Plow. Com., 475. The possession of the heir in that case, after the death of the devisor and before the sale, is just such a kind of possession as that of the husband in the case now before us was, after the teste of the execution or perhaps the judgment—of no consideration in law, when a sale doth in fact afterwards take place.

Let us suppose another case. If a man devise that his executor shall sell his lands, and die; and after his death his heir, who is a married man, enters and dies, and afterwards the executors sell pursuant to the will, would the wife of the heir be entitled to dower? Surely she would not. Yet in this case the heir was as much seized of the land and inheritance as the husband was in the case now before us. But in both cases the seizin and possession of the husband and heir vanish away when the sale takes place, because then the purchaser is in—in the one case, from the devisor immediately, and in the other, from the commencement of the lien upon the land; and whether that commence with the judgment, the teste of the writ, or the levying, each of these preceded the death of the

(248) husband. I have no doubt but that judgment should be for the defendant, the vendee.

In October, 1796, the cause was again moved, MACAY and STONE, JJ., being present; but MACAY, J., not being prepared to give his opinion, the cause was adjourned. It was afterwards moved when WILLIAMS, J., was present, who inclined to change his former opinion. Afterwards the cause went off without a decision.

Cited: Hodges v. McCabe, 10 N. C., 79; *Frost v. Etheridge,* 12 N. C., 43.

——— v. DEBERRY.

For recurrent damages, consecutive actions will lie.

CASE, for nuisance in erecting a mill.

PER CURIAM. (HAYWOOD, J., only present.) This action will be for every fresh continuance after a former action brought. It is not usual to give heavy damages in the first verdict, that is chiefly to ascertain the fact whether nuisance or not. If the party afterwards remains obstinate, and a second action becomes necessary, there the damages are usually high. There is some evidence of the assent of the plaintiff's father that defendant might build the mill, and of a subsequent agreement that the plaintiff's father would rest satisfied if the defendant would cut down the dam to 7½ feet; but as no land can be conveyed without deed or other notorious acts, so a man's lands cannot be charged by any matter of less solemnity. A license to overflow a man's land by a millpond, for this reason is not good if only verbally given—and this to avoid the danger of charging or affecting a man's real property by suborned oaths.

See *Carruthers v. Tillman, post.,* 501., Rev. ch. 773, Laws 1809, points out a new mode of obtaining redress where lands are overflowed by a millpond, which takes away the common law right of suing, unless in the case specified by the act. *Mumford v. Terry,* 4 N. C., 308. In proceeding under the act of 1809, if the defendant dies, the heirs cannot be made parties, and the suit must abate, *Fellows v. Fulghum,* 7 N. C., 254.

NEW BERN—MARCH TERM, 1796

DEN ON THE DEMISE OF SLADE v. NATHAN SMITH.

An actual possession is not necessary to prevent the operation of the statute of limitations until an adverse possession commences, which adverse possession must be a continued one for seven years to bar the plaintiff. A deed, which is, in form, a bargain and sale, except that the consideration is expressed to be love and affection instead of money, may be construed a covenant to stand seized. It seems that judicial proceedings, speaking of an act of Assembly, may be evidence of such act when it is lost by time. A bare right of entry cannot be transferred.

EJECTMENT, for 360 acres of land on the north side of Trent River, beginning at the mouth of a creek, then down the river, thence by a line at nearly right angles from the river, and so round to the creek, and down the creek to the beginning. The plaintiff's title was deduced thus: The Lords Proprietors on 12 November, 1713, granted to James Castage; he died under age and without issue, leaving an only sister, Jane, married to Finyaw, whom she survived, and in 1764, conveyed to her son, James Finyaw, who on 24 March, 1791, conveyed to the lessor of the plaintiff the whole 360 acres, describing it by the boundaries mentioned in the original grant.

This action was commenced in April, 1791.

On the part of the defendants, it was proven by an old deed, dated 10 January, 1714, and by the records of the court of orphans of the same year, that one Brice, guardian of the grantee, Castage, had (249) by permission of the court of orphans, sold 160 acres of this land, beginning at the lower corner tree on the river, running up the river, and then into the woods for complement. A deed of 1744, and another of 1764, were produced in the latter of which Mr. Cornell was a party. These proved that the second line of this tract, and the third corner, were deemed at those periods to be the line and corner of Vassimore, the bargainee, who purchased of the guardian; whereby the location of the 160 acres was confined to the lower part of the tract. On the part of the defendant it was further proven that on 23 July, 1774, Mr. Cornell obtained a grant for a large part of this tract of land adjoining the river and creek, and that in April, 1775, he took possession, which hath been continued ever since, first by Edwards, his son-in-law, and by his widow and her children since.

Davie, for defendant, argued that as there was no evidence of possession in the Finyaws for a great length of time preceding the entry of

cornell, that therefore Cornell's entry had taken away Finyaw's right of possession, for when a grantee has not had possession for seven years before, and another claimant enters, as Cornell did in this case, the act of limitations will toll the entry of such person. Seven years passing without an entry on the part of the first grantee, and another person then found in possession, tolls the grantee's right to turn the other out of possession; his right of possession is lost. There is no necessity under the act that the possession of the enterer should be continued seven years.

PER CURIAM. Whatever construction may have prevailed in England upon their statute of limitations, it is clear, with respect to our act, when a man hath obtained a grant of land, he thereby gains a constructive possession, which continues until an actual adverse possession commences, and that adverse possession must be continued seven years before the *jus intrandi* or right of possession of the first grantee is lost. A single act of entry cannot take away the grantee's right of possession, because such entry may be made without any notoriety, whereas seven years actual possession affords notoriety and, as it were, calls upon the owner to assert his right. In the present case, unless there hath been such actual possession for seven years as is allowed of in law
(250) computations, the plaintiff's right is not tolled. As to the time elapsed between 6 March, 1773, and 1 June, 1784, that was not allowed of by the express direction of two acts of the General Assembly; and the possession that can be counted in the present case is only from 1 June, 1784, to the time of the commencement of the action, which was short of seven years by two or three months. An objection hath been made to the propriety of disallowing the time between 1 March, 1773, and 15 November, 1777, the act of 1777 only saying it should be disallowed when pleaded to actions brought; whereas the act of limitations is never pleaded in this action of ejectment. The answer to that is, *ubi eadem est ratio, ibi eadem est lex,* the reason of that provision was, because during the time that intervened between these two periods there were no courts in this country. Does not this reason apply with equal force to an ejectment case as to any other? A man out of possession when the law provides him with no means to gain possession should not have the not getting of possession during that time imputed to him as an abandonment of his property any more in the case of a real estate than in that of a personal estate. What is still a more full answer to the objection is this, that if the act of 1777 had not been made, the act of limitations would not have run during the time there were no courts in the country to which the plaintiff could apply for the recovery of his right.

No laches in such case could be imputed to him, nor could any presumption be founded upon his delay, as there is in all cases where the act applies.

The Court here cited Co. Litt. in his chapter of entries, where it is laid down that a descent cast in time of war will not toll the entry of him who hath the right of entry, because, saith the book, where the courts are not open for the administration of justice, whether occasioned by rebellion, insurrection, or foreign invasion, it is said to be time of war, and laches are not then imputable to the party. So here, though the act had not been made, the intervening time was such as could not subject the plaintiff to the imputation of laches. He could not in that time assert his right. The courts of justice were shut up as to the possession of Edwards. In general, it is very much to be doubted whether such a possession, had it continued for seven years, could have tolled the entry of the owner; he had no deed nor any color of title: but it is unnecessary to give any opinion upon this point now.

The defendant's counsel then proceeded to state other objections to the plaintiff's recovery. He argued that the words used in the deed from Jane Finyaw to her son were give and grant; and the (251) consideration, natural love and affection. It therefore could not be a bargain and sale, for want of a valuable consideration, and there were no words made use of to show the intent of the parties that it should operate as a covenant to stand seized; therefore, it must have been intended as a common-law conveyance, and then it was void for want of livery and seizin. He cited 2 Bl. Com., 310, 316, 311, 227. This was answered on the part of the plaintiff, by citing 5 Bac. Ab., 362; 2 Wils. 22, 78.

PER CURIAM. There is no doubt but that the conveyance in the present case does operate as a covenant to stand seized, *ut res magis valeat,* and therefore that it is good in law.

The defendant's counsel then urged that though there was no act of Assembly to be found in any of the printed books, previous to the date of the deed from Brice, the guardian, to Vassimore, in 1714, and to the proceedings of the orphans' court in the same year, the history of this country would prove there were Assemblies held previous to that time; the Lords Proprietors landed here in 1711; there are many old grants bearing date in 1711 and 1712, and some as early as 1706; the deed itself purports to be made pursuant to an act of the General Assembly, and the orphans' court on their record say their consent to the contract was given pursuant to an act of Assembly.

PER CURIAM. As to this point, the general rule is that the Court must declare the statute law as it is to be seen in acts and statutes yet extant. That law, however, is sometimes from necessity otherwise collected. It hath been said by very learned men that many parts of the common law were acts of Parliament worn out by time. 2 Wils., 248. The common law is preserved and evidenced by judicial proceedings. In the present case there are judicial proceedings which speak of an act of the Legislature that is not now extant, upon which the deed to Vassimore purports to be founded. The deeds of 1744 and 1764 prove Vassimore's having a corner and boundary line in this tract of land. This proves that for a long time after the date of Vassimore's deed the neighborhood recognized it as a valid transaction. All these circumstances, but particularly the proceedings of the court of orphans, seem to be enough to justify the conclusion that the act of Assembly spoken of in the proceedings of the orphans' court did once exist. But there is no absolute necessity for resting the cause upon this point, and as it is a new one, the Court (252) will not give a positive opinion upon it.

The defendant's counsel then made another objection, which was, that in 1771, and for a considerable time before, up to April, 1775, Cornell and Edwards had been in the actual possession of part of the land, namely that part adjoining the river and creek, claiming it as their own under a grant from the King. As to the upper part they had not been in possession, neither had the Finyaws any actual possession for fifty years back; therefore, as to the part held under the grant of 1774, Finyaw, the vendor, in 1791, at and previous to the time of his conveyance to the lessor of the plaintiff, had no other means of acquiring the possession but by a suit at law; he had not the actual possession, but only a right of entry; and that by the known rules of law he could not sell or convey to another. For this he cited 2 Bl. Com., 290; Co. Litt., 214 a, and the case of *Few v. Alves,* decided at Hillsboro last term. On the other side were cited Espinasse, 433, who cites Salk., 423.

Upon this point the Court were with the defendant, and so gave in charge to the jury. They found the defendant not guilty as to all the land comprised in Brice's deed to Vassimore, and guilty for the residue; and there was judgment accordingly.

See *Strudwick v. Shaw, ante,* 5; *Park v. Cochran, ante,* 178; *Clark v. Arnold,* 3 N. C., 287; *Dennis v. Farr,* 5 N. C., 138.

Cited: Bruce v. Faucett, 49 N. C., 393; *Parker v. Banks,* 79 N. C., 485; *Weathersbee v. Goodwin,* 175 N. C., 239.

DEN ON THE DEMISE OF POLLOCK v. HEIRS OF ZERIMIAH HARRIS.

When a natural boundary, and courses and distances, are all given in a deed, the natural boundary will prevail in cases of a variance; and in doubtful cases a regard to this preference must always be observed.

EJECTMENT. The patent under which the plaintiff claimed was the oldest. It called for trees standing in a swamp at one place, in a branch at another, in a pocosin at another, for a pine standing in a marsh near a hill, thence to a pine in an Indian old field near the river Neuse, thence a course and distance across the river to the northwest side of the river, thence a course and distance to a particular corner. The line from the pine last mentioned, run according to the course and distance in the patent, crosses a part of the old field and river also. It also runs through an adjoining marsh in a very miry part of it, stopping where that line intersects the river; and running the next line according to the course and distance in the patent, it crosses the river in two places (the river there forming almost an island by the circuity of its course) and terminates on the southeast instead of the northwest side of the river. If that line is made to terminate in the peninsulated piece of land, and on the northwest side of the river, and the next line be run from thence according to the course and distance in the patent, it would (253) not cross the river as it ran at the date of the patent. The river from one part of this bent to the other, which that line would not cross, having been formed since by a canal cut for the purpose, and in that case the plaintiff would be entitled to recover part of the land described in the declaration; but if the second line from the pine is made to terminate on the northwest side of the river, immediately after crossing it, not regarding the distance in the patent, then the next line run according to the course and distance in the patent from thence crosses the river in two places, and in that case the plaintiff is not entitled to recover; or if that line is continued until the distance called for in the patent is completed, the next line from thence crosses the river in two places, and in that case the plaintiff is entitled to recover. The latter is the line contended for by the plaintiff, the former that contended for by the defendants. If the land, however, should be run out according to the courses and distances in the patent from the beginning, then the lines do not extend to the swamp, pocosin and marsh, severally called for in the patent, and the land is very far within the lines that do extend to them—so far within them that the plaintiff is not entitled to recover anything. These courses and distance lines were distinguished from the others which were extended to the several natural boundaries mentioned in the patent, by being called the dotted lines.

PER CURIAM (after argument as to the dotted lines). The dispute with respect to them may be decided by laying down the rule with regard to boundaries. It is this: Wherever the beginning is ascertained, and the lines from thence are by the words of the patent to terminate at a natural boundary, as a swamp, branch, creek, river, mountain, hill, or the like, if either the course or distance mentioned in the patent will not extend the line to the natural boundary, the course or distance, or both, must be disregarded, and the line, notwithstanding these, must be extended to that natural boundary, if the course will lead to it; but if the distance falls short, the line must be extended beyond the distance till it arrives at the natural boundary. And in the present case, if the dotted line will not extend to or intersect the natural boundaries called for in the patent, and if, on the contrary, the other lines will extend to them, the result in point of law is that these latter are to be deemed the lines described in the patent; and then there can be little doubt (254) with regard to any of them until we arrive at the pine in the marsh. As to the line leading from thence, it is remarkable that the counsel on both sides have admitted that there was no actual survey of the land before the patent issued; hence follows an unreasonableness in supposing that the line from thence was run through the marsh. It was of no value in those times, and the surveyor and chain carriers would hardly have run through so miry a part of it for the purpose of taking in so small a portion of it. If we suppose the course mistaken, which might easily be, and that the line run in fact along the edge of the marsh, and in that direction terminated on the river, it will still terminate in the old field, which may be considered as a natural boundary; and in this direction the distance will be completed without crossing the river, which the patent doth not call for, as it has done in other instances where the line does cross the river. That direction and termination is attended with this further advantage, that the next line drawn from thence according to the course and distance in the patent, crossing the old field longitudinally, crosses the river but once, as mentioned in the patent, and completes the distance in the peninsula without crossing the river a second time; and then the termination of that line is on the northwest side of the river, as called for in the patent, and not on the northeast. It would be attended with this further advantage, that the next line drawn from the termination last mentioned, according to the course and distance in the patent, issues from the peninsula, through the narrow neck of land that connects the peninsula with the adjoining land, where at the date of the patent there was not any canal, and will not cross the river as it ran at the date of the patent. Whereas, if it be drawn from either of the other two points, it will cross the river at two places, although that

circumstance is not mentioned in the patent. The circumstances upon which this supposition is founded are all of them circumstances arising from the natural boundaries that are in this case, namely, the marsh, the old field, the river crossed but once, the line terminating on the north-west side, and the river not crossed at all by the last line; and as they are furnished by a consideration of the natural boundaries, they are competent to justify the jury in disregarding the course called for in the patent, of the line from the pine; especially as the patent mentions natural boundaries in every other instance where the lines did intersect them, and as in the description of the last line it has not mentioned crossing the river at all; whereas it must cross it in two places (255) if what either the plaintiff or defendant contends for be true. According to the before mentioned supposition, it will cross at the canal, where at the time of this patent there was none; and so it will be accounted for, why the patent in describing this line has not mentioned the river, as it did with respect to the line next preceding, and in every other case where a natural boundary was touched. If this supposition be adopted, the plaintiff is entitled to recover a part of what he contends for only.

The jury found the defendant not guilty.

NOTE BY REPORTER.—This verdict must have been founded upon a supposition that the line in controversy was to be drawn from a termination of the line next preceding, being at a point immediately after its crossing the river, and not at a point further on in the peninsula—from whence the last line being drawn by the course and distance in the patent would have crossed the canal.

See *Bradford v. Hill, ante,* 22.

Cited: *Cherry v. Slade,* 7 N. C., 86.

LOWTHORP v. SMITH.

If one of two joint owners of a vessel forcibly take possession of her, and send her to sea, without or against the will of the other, and she is lost, he will be liable in trover for her.

TROVER for one-half of a schooner. This schooner formerly belonged solely to Smith; he sold the one-half to Lowthorp, who superintended the affairs of the vessel for two or three voyages, but on her returning from the third voyage, which was to London, Smith forcibly took pos-

session of her. The next voyage was in February, to Charleston. This voyage Lowthorp forbade. The next voyage was intended to Cape Francois; it was neither forbidden or consented to by Lowthorp. Smith sent her out without consulting him. The vessel was lost on her outward bound voyage.

The counsel for the plaintiff cited Buller *Nisi Prius,* 34; Salk., 290.

On the part of the defendant it was admitted that where one of two joint owners takes the whole to himself, and destroys the thing owned, trover will lie; but if the thing be forcibly taken at first, and afterwards used as the common property of both, and for the benefit of both, and whilst so employed shall be lost, that such loss is a common one. Here the vessel at first was forcibly taken by the defendant, and the first voyage to Charleston forbidden; but it does not appear they afterwards disagreed about the vessel. The last voyage was not forbid by the plaintiff, and it may be reasonably presumed, as there is no evidence to the contrary, that it was by consent.

PER CURIAM. If one of two joint owners takes possession of the whole, no action will lie for this, for one hath as much right to the
(256) possession as the other; but if, after taking possession, he destroys the property, he is then liable, because the joint ownership does not empower him to destroy the property of the other; and if such joint owner, after getting the sole possession, shall, without the consent or against the will of the other owner, send the vessel to sea, and she be lost in that voyage, the jury may consider such loss as a destruction of the vessel occasioned by the joint owner by means of sending her to sea, and find for the plaintiff. Molloy b, 2, c. 2, s. 2, 3.

The jury found accordingly for the plaintiff, being of opinion that the loss in this case was a destruction occasioned by the defendant, and of course, a conversion in him. They assessed damages to £1072.

Cited: *Grim v. Wicker,* 80 N. C., 343.

ROGERS v. BRILEY.

The interest to exclude a witness to a will must be either an express legacy directly to him, a legacy with an express use for him, or a secret trust and agreement on the part of the legatee for his use; and a declaration by witness that the legatee holds for his use will not exclude, unless it be proved that the legatee had made an engagement to hold for his bene-

fit. Though a fact be positively sworn to by one or two witnesses, and they agree pretty well in their testimony, yet the jury, either from their character or the circumstances of the case, may disbelieve them, and find against their evidence.

Briley had offered for probate a paper purporting to be the will of one Jones, whereby the greater part of the property was devised to him. This probate in the county court of Pitt was opposed by Rogers, who had married the only daughter of the deceased; and the issue made up was *devisavit vel non,* pursuant to the act of 1780, ch. 23, sec. 1. One of the subscribing witnesses was Briley, son of the legatee; he was offered to prove the will, and there was an objection to the competency of his testimony upon the ground of his having said in conversation that the property was devised to his father for the use of him, the witness, or in trust for him, and the reason why it was not devised directly to him was because he was involved in his circumstances, and his creditors might have seized on the property had it been bequeathed to him. A witness in court proved he had made these declarations.

PER CURIAM. The objection to this witness is as to his competency. The objection is grounded upon this, that if he establishes the will, his father, the legatee, may then be compelled to fulfill the trust he has undertaken. Now, in the case of a will the interest of the witness can only appear by one of these three ways: either by having a legacy expressly and directly bequeathed, which is not the present case, or by having a legacy bequeathed expressly in trust for him, which is also not this case, or by having a legacy bequeathed to a third person, without any use or trust declared, but upon a secret trust and engagement on the part of the legatee to hold for him; that is not the present case, for there is no proof that Briley, the father and legatee, hath ever made any such engagement; and though such a declaration made by the witness may tend to diminish his credibility, it is not sufficient to re- (257) move his competency.

The witness was sworn; he proved the execution of the will, as did also the other subscribing witness. They swore to the sanity of the deceased at the time of the execution. Their testimony agreed in the circumstances attending the execution, such as the place, persons present, time of the day, and that his name, as well as that of one of the witnesses, was written by this other witness, Briley. Their evidence was corroborated by that of Mr. Collins, an attorney, who swore Bailey came to him, requesting him to go to the house of the deceased and write his will for him, and be a witness of its execution. On the other side it was proven that the day after the will bore date the witness Briley showed it to a near

neighbor of the deceased, and told him he wished to prove it at the next court, and that the testator at this time was in good health; that the testator had an only daughter, and said only a few days before the date of the will that he should make no will, as he had but one child; that he was upon good terms with his daughter, though he had formerly been otherwise with her first husband; that Briley, the witness, on 17 December, eight days before the will bore date, applied, in company with another man of the name of Wyatt, to a Dr. Jones for ratsbane, and got some from him; that some time after the doctor saw him and asked him if he was not the man that had been at his shop, when he denied that he had; that a coroner's inquest was held over the body, and that it was the opinion of the jury, and the physician who was then examined by them, that the deceased died by poison; his death happened eight or ten days after the date of the will, and Briley and the other witness both said he was well at the time of the execution. The testator, a few days before the date of the will, expressed his ill opinion both of the witness Briley and of his father, the legatee, in strong terms.

PER CURIAM. Though a fact may be positively sworn to by one or two witnesses, and though these witnesses may concur in many of the circumstances, the jury are not absolutely bound to believe the fact they swear to, if they have reason, either from the character of the witness or the circumstances with regard to that case, to disbelieve them. On the contrary, a great number of circumstances coming from witnesses of good credit, and concurring in the establishment of any posi-
(258) tion, might establish it.

The Court then recited the circumstances before stated on both sides, and left it to the jury, upon the consideration of them, to say whether or not this will had been duly executed.

The jury found it was not the will of the deceased.

HARTSFIELD v. WESTBROOK.

One line of a boundary was from a poplar on a swamp, "thence down the swamp to the beginning": *Held*, that the swamp, and not a straight line from the poplar to the beginning, is the boundary.

THE patent called for a beginning at a tree, which stood (though not so expressed in the patent) near the swamp, thence in a rectangular course from the swamp, thence south ——— degrees west, thence north

to a pine (which also stood near the swamp, but not said to be so in the patent), thence to the beginning, not taking any notice or making any mention of the swamp. The patentee conveyed part of this land to Eaves, who conveyed to Hartsfield. Eaves' deed began at the beginning corner of the patent, thence a rectangular course from the swamp, thence south, thence north to the swamp to a poplar, thence *down the swamp to the beginning.* The trespass complained of was on the opposite side of the swamp from the poplar. It was within the land of the plaintiff, if a direct line from one boundary to the other was the true one; but not within it if the swamp was the true boundary.

PER CURIAM. The swamp is to be considered as the boundary, but that this judgment may not be hurried, you may move the matter at another day. Should the opinion of the Court be altered in the meantime, they will then set aside the nonsuit now ordered.

The plaintiff was nonsuited.

A few days afterwards it was moved by General Davie that this nonsuit should be set aside, saying he wished the opinion of the court upon this point, because another suit was depending in court upon the same point, between Hartsfield and Fuller, which would be disposed of immediately should the Court be of opinion that the swamp was to be considered as the boundary.

PER CURIAM. A case similar to the present was decided at Edenton last term, *Foster v. Sandifer, ante,* 237. The expression there was, "thence along the river"; here it is, "thence down the swamp to the beginning." They are both of the same import, and *Foster v. Sandifer* is therefore fit to govern the present, and accordingly the swamp in the present case is to be considered as the boundary. Let the nonsuit remain, and the rule to show cause why it should not be set aside, discharged.

Then General Davie dismissed the other suit of *Hartsfield v. Fuller.*

Cited: Rogers v. Mabe, 15 N. C., 194; *McPhaul v. Gilchrist,* 29 N. C., 173; *Baxter v. Wilson,* 95 N. C., 143; *Brown v. House,* 118 N. C., 879; *Rowe v. Lumber Co.,* 133 N. C., 437; *Whitaker v. Cover,* 140 N. C., 284; *Power Co. v. Savage,* 170 N. C., 629.

(259)

BLACKLEDGE v. SIMPSON.

When to a bill filed, stating errors in an account settled four or five years ago, defendant pleaded specially, denying each error and also all fraud, if the plaintiff does not take issue and prove the error or fraud, the Court will not disturb the account.

THIS was a bill stating errors in an account settled between the plaintiff and defendant some four or five years ago, particularizing the errors, and praying to have them rectified. The defendant pleaded specially and particularly to each error assigned, that there was no such error as was assigned, and denied the fraud and imposition charged in the bill, both in his plea and answer. The plea was now argued, and after argument:

PER CURIAM. Where a bill is for an account generally, then the plea of a stated account is a good plea in bar; for the account having been settled by the parties, the presumption is that it hath been fairly settled, and the Court will not open it again merely because asked for by the party; but where the bill states a settled account and errors in the account, and fraud or imposition in the settlement, then if the defendant does not deny the error and fraud, the plaintiff's allegations remain unanswered, and the Court will open the account as to the errors pointed out; but if the plea denies the error and fraud, and the fraud be denied in the answer, also, so that issue may be taken upon the error and fraud, the plea of a stated account is a good bar in law. And if the plaintiff doth not take issue, and prove the error and fraud, the Court will not open the account in any manner; but if issue be taken upon these points, and found for the plaintiff, then the Court will order the account to be opened as to the errors complained of and proved. But the plea and answer must deny the error as positively as they are alleged, so that issue may be taken on these very points. For want of that particular, the plea would be ill. But here it is full, and issue may be taken precisely and specially upon the errors and fraud, and therefore the plea is good and must be allowed; but the plaintiff must still reply and take issue.

DEN ON THE DEMISE OF SASSER, PER GUARDIAN, *v.* BLYTH.

A, seized in fee of the premises in question, executed a deed to his son, in which he stated that for the preferment of his son he conveyed the land to him and to his heirs forever: *Provided*, that this deed shall not take effect during the lives of the grantor and his wife; but the premises should remain first to him for his natural life and then to her for her life: *Held*, that the last clause of the deed was a good reservation of the life estates, and that the fee is a good remainder upon them.

EJECTMENT. Special verdict, stating, in substance, that John Sasser, Sr., being seized in fee of the premises in question, in April, 1774, executed a deed to his son, in which it is stated that for the better preferment of his son, etc., he conveyed to him several tracts of land described in the deed, and amongst others, the premises in question, to him and his heirs forever; in which deed is contained a clause to the effect following, to wit: "*Provided*, that this deed shall not take effect during the lives of the grantor and his wife, but the premises therein mentioned should remain, first to him for his natural life, then to his wife (260) for her natural life." John, the grantee, died seized in fee, intestate, leaving a brother, who died intestate, leaving James, his only son, an infant. John, the elder, also on 5 June, 1778, executed a deed for the premises in question in consideration of natural affection, to his daughter Mary Blyth, and her heirs, after his decease, on condition that she and her husband should live with him and take care of him, and also by another deed, dated 24 January, 1782, he granted the premises to his said daughter in fee, absolutely and without any proviso. John, the elder, died seized in 1782. John Sasser, Jr., lived with John, the elder, till his death, in 1776. Mary Blyth and her husband lived with him in like manner, and continued in possession after the old man's death.

Baker for plaintiff.
Taylor, e contra. (270)

STONE, J. I am satisfied judgment ought to be given for the plaintiff. This is a covenant to stand seized.

HAYWOOD, J. I am also satisfied in my own mind that judgment ought to be given for the plaintiff; but I have reasons for declining to give my opinion judicially, unless it shall become absolutely necessary. I was formerly applied to, while at the bar, for my opinion on this very deed, and after consideration gave the same I now entertain. Let it lie over till next term, Judge MACAY will then be here. If he should be of

the same opinion with the judges now present, judgment will of course be entered for the plaintiff.

September Term, 1796. This special verdict was again argued before MACAY and STONE, JJ., and they gave judgment for the plaintiff.

(271) NOTE BY REPORTER.—It will not be improper here to observe that this opinion of three of the present judges, founded upon consideration, after argument by counsel, upon a case made by a special verdict, is directly against that of *Ward v. Ward*, 1 N. C., 59, decided as to this point at Halifax, April Term, 1793. That was an ejectment cause, upon the trial of which a question arose upon a deed of bargain and sale, made to the lessor of the plaintiff by his father in 1771, of the premises in question, which conveyed the whole estate absolutely to the bargainee; but in the premises of the deed there is an exception of the grantor's lifetime in any part or parcel of the land. Whether the lessor or the plaintiff took a fee by this conveyance, as a life estate was reserved to the grantor, was the question.

Davie, for the defendant, laid it down as an established rule of law that a fee cannot be created by deed to take effect or arise *in futuro;* and here he said the grantee was not to take till after the grantor's death. The Attorney-General, Haywood, entered into a discussion of the doctrine of uses, to show that the use might be limited to take effect in this manner by the statute of uses, although it would not have been good at the common law.

PER CURIAM. (ASHE and WILLIAMS, to the Attorney-General.) We differ with you in opinion in respect to the operation of the statute of uses, but we are clearly of opinion that here the fee immediately passed to the grantee, and that the reservation is void.

Cited: Savage v. Lee, 90 N. C., 323; *In re Dixon,* 156 N. C., 28; *Brown v. Brown,* 168 N. C., 14.

——— v. STANTON.

Notice need not be given under the act of 1762, Rev. ch. 70, sec. 3, to the drawer, if he has no effects in the hands of the drawee. The receipt of part of the money from the drawee does not discharge the drawer, and as to the balance, he is entitled to notice only when he would be so in case of the whole being unpaid.

THE case was one man drew an order on another, in favor of a third, and soon after moved away to another State. The drawee paid part, and refused to pay the residue, and it was protested as to that part. Three or four years afterwards the drawer returned, and was sued for the balance, the money being first demanded of him by the payee.

It was argued for the defendant that by 1762, ch. 9, sec. 5, the drawer ought to have had notice of the refusal to pay in a reasonable time—the words of that section being, "That no person or persons whatsoever shall prosecute any suit against any person or persons who shall give such order, for the money therein mentioned, before the same shall have been first protested for nonacceptance, and notice given thereof to the drawer before such suit shall be brought; and if any suit shall be brought on any such order, before notice and refusal to pay as aforesaid, the plaintiff or plaintiffs shall be nonsuit, and pay costs," and for want of such notice he is discharged. Also a receipt of part from the drawee is a giving of credit to him, and discharges the drawer.

PER CURIAM. Where the drawee has no effects of the drawer in his hands, there is no necessity for notice of nonacceptance to the drawer; for he must know without notice that he had no effects in the other's hands, and the design of notice is, that the drawer may be warned in time to get his effects out of the drawee's hands. Of course, where there are no effects in the hands of the drawee, such notice is useless and vain. As to the receipt of part of the drawee, that is for the (272) benefit of the drawer, as it discharges so much of his debt due to the payee. This was formerly held otherwise, and even now where the drawer may sustain a loss for want of notice of nonpayment of the balance, he must have that notice. Notice, however, of nonpayment of the balance cannot be necessary where notice of the whole would not be so. The fourth clause of the act of 1762, ch. 9, makes notice necessary only in cases of an order drawn directing money in the hands and possession of a second to be paid to a third person. The notice directed by this act is confined to such orders only. This is not such an order, if there was not any money in the hands or possession of the drawee, so far as regards the balance.

REPORTER. See *Pons v. Kelly*, 3 N. C., 45. But see *Austin v. Rodman*, 8 N. C., 194, in which it was held that the drawer of a bill of exchange was entitled to notice of its dishonor, though the drawee be not indebted to him either when the bill was drawn or fell due, provided the drawer had reasonable ground to believe that it would be honored; and a written authority from the drawee to the drawer to draw is sufficient ground.

EDENTON—APRIL TERM, 1796

HAGAN v. PAINE.

A consignee was instructed to exchange the consigned produce for that of Surinam. When he arrived there, he found it impracticable to make the exchange for anything but sugar and coffee, which were contraband by the law of that country; but still such kind of traffic was usual, and the law had not been enforced against it for many years. The consignee ventured to make the exchange for the contraband articles, but owing to an attempt to enforce the law, he had to resort to a subterfuge, in the doing of which some of the sugars were damaged: *Held*, that he was not responsible for the loss.

CASE. *Non assumpsit,* etc., pleaded. The case upon the evidence was this: Hagan had shipped on two vessels of the defendant, destined to Surinam, seventeen hogsheads of tobacco and forty barrels of pork, consigning them to Paine, for him to exchange them for goods of the production of Surinam, to be brought in return to this State. The vessels and cargoes arrived safely at Surinam, but the cargo could be sold for nothing but the paper currency of that country; neither molasses nor specie could be procured for it; it could be exchanged for nothing but sugar or coffee, each of which was contraband by the law of that country, but were notwithstanding, usually and commonly purchased by the ships and vessels of all nations resorting thither, and there had been no instance of a seizure or information lodged with the officers of the Government for many years. The tobacco was exchanged for sugars, and after they were shipped, a vessel in the harbor laden with sugar was seized. It then became necessary to reland the sugars, and have them conveyed to another part of the seacoast, and for the defendant's vessels to depart as if for their homeward voyage, and to return secretly and take in the sugars. All this was done, and about one-half of the sugars were lost in the operation, getting wet when put into the flats. The vessels took in the sugars in this damaged state, and carried them to Gaudaloupe.

Counsel for the plaintiff: A factor, agent, or consignee ought to pursue the directions given by his principal with respect to the (273) goods committed to his care. If instructed to sell for ready money, or to sell generally, which is for ready money, he cannot sell upon credit without running the risk himself; if he fails to pay customs in a foreign port, he runs the risk of the forfeiture if any should ensue thereupon; if he attempts to transport goods prohibited to be exported, and his own Government should seize the goods, the loss is his own. 2 Mo., 100; *Vide* 3 P. Wil., 185, 187, 279; Cow., 255.

E contra: It was argued that though in general the law is as stated on the other side respecting factors or consignees, and their consignments, yet sometimes *impotentia excusat legem.* Exceptions may be made to this general rule where the defendant, the consignee, proves to the satisfaction of his jury that it was impossible to comply with the terms of the commission given by his principal; if he cannot sell for ready money, when empowered to sell; and that is implied in the case in 2 Mo., 100, where one of the reasons rendered by the Court for their judgment is, for that he did not plead he could not sell for ready money, implying if this had appeared to the Court, then judgment would have been different. By parity of reason, if he could not exchange the consigned goods for goods of the country that were legally exportable, though in general he ought not to exchange for contraband goods, yet in a case like the present, where such goods in the common course of trade were usually and generally purchased, and it was generally thought not to be unsafe to purchase them, there ought to be an exception from the general rule. And of that opinion were the Court, and there was a verdict for the value of the sugars saved, and judgment.

BLACK, ASSIGNEE OF BLANCHARD, v. BIRD.

A negotiable instrument in the hands of an assignee is not subject to any payments that do not appear endorsed, if it was assigned before or at the time it became due; but if it was assigned after it became due, then all such payments as it can be presumed the assignee had notice of shall be good against it. An assignor and assignee are both members of the same firm; a bill is made payable to the assignor, expressed to be for a debt due the firm; a payment to the company will be a good payment against either the assignor or assignee members of that company.

ACTION upon a bill sealed for £242, 16s., 10d., Virginia money, payable by Bird to Blanchard, twenty days after sight, expressed to be for a debt due from Stuart to Blanchard & Co., and dated in May, 1792. A clerk of Blanchard received 248 barrels of tar, at the rate of six shillings, Virgina money, per barrel; and in March, 1793, Blanchard received from Stuart 1,500 bushels of salt, at three shillings per bushel, in all, amounting to about the sum mentioned in the bill. Black was a partner of the company of Blanchard & Co.; the endorsement of Blanchard was blank, so that it did not appear when the assignment to Black took place; but a letter from Black to Bird was produced, (274)

dated January, 1794, which informs Bird that he, Black, had the bond in possession, and required payment. Upon this evidence, the cause was argued at the bar at great length on both sides.

PER CURIAM. This bill hath been discharged by Stuart in the deliveries of salt and tar proven in the cause. The question is, as these deliveries were not endorsed, nor the bond taken up, whether they are to be considered as a good payment as to Black, the assignee. As to which the Court is of opinion that this bill is a bill belonging to Blanchard & Co., though made payable to Blanchard only. It is expressed to be for a debt due to the company, and is given to a partner as one of the company. Blanchard is only in the nature of a trustee for the whole company; his act is binding upon the whole company. The company after this transaction could not support a suit upon the open account against Stuart. Then the payment having been made to a clerk of Blanchard, it is a payment to Blanchard; and a payment of a partnership debt to him, being one of the partners, binds the whole partnership; and Black, the assignee, is one of them; wherefore the payment is a good one as to Black, the present plaintiff. Secondly, supposing this not to have been a partnership bond, but to belong to Blanchard only, having been made payable to him only; yet the circumstances of this case render it probable that the assignment was not made till after the payments, probably not till some time about the beginning of 1794; and then this bill was assigned a year and six months after it was payable. If a paper be assigned at the time it is payable or before, and no payments endorsed, the assignee will hold discharged of all payments that may have been made previous to the assignment; but if that be made after the day of payment, then the jury are at liberty to take into consideration any circumstances from whence they may reasonably presume the assignee knew of the payments. The presumption is strengthened in proportion as the time of the assignment is at a greater or shorter distance from the time of payment, and in the same proportion these collateral circumstances will have the greater or less weight. In the present instance a great length of time has intervened, and therefore a slight circumstance will do to raise a presumption of notice of these payments in the assignee. After such a length of time, why did not Black
(275) make some inquiry of Mr. Stuart respecting this bill, before he took the assignment? Had such inquiry been made, he would not have taken the assignment at all. The length of time was enough to put him upon inquiry, yet he made none. Add to this that from his situation and connections with Blanchard it may be presumed he might have known something of the transactions, had he taken proper pains.

If the jury believe he might have had knowledge of the payments by inquiry, then they should find for the defendant; otherwise, for the plaintiff. They found for the defendant. Cases cited, 3 D. and E., 81; H. Bl., 89.

Cited: Reddick v. Jones, 28 N. C., 109; *Toms v. Jones,* 127 N. C., 466.

WHITBIE'S ADMINISTRATORS v. FRAZIER.

If the husband dies before administration taken upon his wife's *choses in action,* her administrator, and not his, is the proper person to administer them; but the husband's representative will be entitled to the surplus after payment of her debts.

DETINUE. The mother made a gift of the negro in question to Sarah, the daughter, to take effect in possession after the death of the mother. Sarah married and died, and then the mother died, the husband surviving, and last of all the husband died, without taking, administration to his wife. The administrator of Sarah now sues for the negro. It was objected that the property in the negro passed into the husband upon the death of the wife, he being her next of kin; that he was entitled to administration, and was not liable to make distribution; and though he died before administration taken out, that cannot prejudice him with respect to any right he had as next of kin; that his wife's personal estate, not yet reduced into possession at her death, vested in him as a legacy, or as a distributive share, that will go to the representatives of the sharer, and that as this was a vested interest in the husband, his representatives succeeded to his rights, and not the representatives of the wife; and therefore they, and not the representatives of the wife, are entitled to this action; and for this were cited 1 Wils., 168; 3 Atk., 537; Lovel., 73, 82, 85; Pre. ch., 21, 260; 3 P. Wil., 443.

The Court took time to consider, in order, as they said, that this cause might be specially made up for the further consideration of the judges, should the objection appear upon further reflection to be of weight enough to raise a serious doubt; and after some days consideration they gave their opinion.

PER CURIAM. It is not necessary to make up the special case; this action was formerly brought by the administrator of the husband, and determined by two judges to have been improperly brought for that very reason. One of the Court now present, on hearing this matter

(276) first moved, was inclined to think the action should have been in the name of the administrator of the husband, but upon further consideration he is convinced of his mistake, and it was occasioned by not distinguishing between the right of property and the right of action. It is a true position that the property of this negro was vested in the representative of the husband, in the same manner as a legacy is vested in the legatee, or a distributive share in one of the next of kin, who, if he dies, will transmit his share to his representative, in this case the husband was entitled as next of kin, and not as husband, and by his death hath transmitted the right he had to his representative; that was only a right to demand the negro of the administrator of the wife after debts paid. No person is entitled to receive this negro in the first instance, but only as administrator of the wife, to the end that her property in the hands of her administrator may be subject to the payment of all just debts contracted by her *dum sola.* The husband was indeed entitled to be her administrator, but he did not apply; another might be appointed, who will be a trustee for the husband as to all that part of the wife's choses in action that such administrator shall recover or get in above what will satisfy her debts. This administrator is entitled in the first place to the possession of all her choses in action, and is accountable to the husband, or the representatives of the husband, in the same manner as he would be accountable in other intestacies to a distributive sharer and his representatives; so it would be of no use to make up this special case, all the judges of the State being of this opinion, the other judges now upon the other circuit having decided this very case before, and the two now present, being of the same opinion. So the plaintiff had judgment. The Court relied upon Co. Litt., 351; H. B., 538.

Cited: Johnston v. Pasteur, 1 N. C., 582, 583; *Lewis v. Hynes, post,* 278; *Kornegay v. Carroway,* 17 N. C., 406; *Weeks v. Weeks,* 40 N. C., 120; *Wooten v. Wooten,* 123 N. C., 223.

MURFREE v. REDDING.

Making a man master and giving him command of a ship is, *ipso facto,* giving him power to take a load for freight in a foreign port; and his contract in such case binds the owner.

BILL IN EQUITY and answer. Redding had recovered judgment against Murfree for a negro. Murfree complained, and stated in his bill that

Redding had put one Scranton on board his brig, as master, and sent him with a load from New Bern to Murfreesboro, and that he had put the negro on board with him, and authorized Scranton to sell the negro. This the answer denied. The bill further stated that Scranton, whilst at Murfreesboro, took in for freight a load of tar for him, and a Mr. Figures, and had never accounted for it; and that Redding, as owner, ought to be liable. The answer denied that Scranton was appointed master for any other or further purpose than that of (277) navigating the vessel from New Bern to Murfreesboro, and back, and if he had taken in a load upon freight at Murfreesboro, he did it without any authority or permission from him.

PER CURIAM. A master has a right to make such contracts, and usually is the person who does actually make them. The owners cannot be in every port where the ship goes to make them. The very making a man master, and giving him the command of the ship, is a giving him power to take a load for freight in a foreign port, or in a port at a distance from the place of the owner's residence. His appearing as master is enough for any man to contract with him upon the credit of his employer; and as it appears in the present case by the statement of Redding himself that the cargo was lost by the attempt of Scranton to cross the bar without a pilot, and as the rule *respondeat superior* is here applicable with great propriety, therefore let the injunction be dissolved as to all but the value of the load of tar; and as to that, let it be continued until the hearing. Books cited: Moll. b. 2, ch. 1, secs. 5 and 6; Moll. b. 2, ch. 2, sec. 14; Term Rep., 75, 78; Lex. Merca., 95; Sid. 411; 2 Ch. C., 238.

See *Howard v. Ross*, 3 N. C., 333.

DEN ON THE DEMISE OF LANE v. REBECCA DAVIS.

The act of 1784, Rev. ch. 204, sec. 5, will bar a remainder dependent upon an estate tail, in possession of tenant in tail, at the time of passing the act.

EJECTMENT. Upon the trial of this cause at the last term the jury found a verdict subject to this question of law, whether the act of 1784, ch. 22, sec. 5, for docketing entails, could bar a remainder dependent upon an estate tail, in possession of tenant in tail at the time of passing the act. If it could, they found for the defendant; if it did not, then the verdict to be entered for the plaintiff.

At this term it was argued by Mr. Hamilton that the Legislature of North Carolina had no power to pass any law having a retrospective view. The Bill of Rights, which is a part of our Constitution, section 24, expressly negatives the power of passing *ex post facto* laws. The act in question not only forbids the making estates tail after the passing the act, but also attempts to bar and do away all such entails in remainder as existed and had been legally created before the passing of it. Article 43 of the Constitution enables the future Legislature to regulate entails in such manner as to prevent perpetuities. It gives them no power to destroy rights that had been acquired legally by means of entails prior to that time. It was not only against reason to give retrospective operation to acts of the Legislature, but the common law is ex-
(278) pressly against it. 19 Vin. Ab.; 4 Ba. Ab., 637; 2 Mo., 310; 2 Show., 17; L. Ray. 1352; 5 Bac. Ab., 407; 4 Burr., 2161; 19 Vin., 544; 10 Rep., 55; *Standon v. Morgan,* in Plow. Com.; 1 Salk., 198.

Curia advisari: And a few days afterwards gave judgment for the defendant.

Cited: Holliday v. McMillan, 79 N. C., 325; *Springs v. Scott,* 132 N. C., 560; *Anderson v. Wilkins,* 142 N. C., 158; *Richardson v. Richardson,* 150 N. C., 552.

HILLSBORO—APRIL TERM, 1796

LEWIS v. HYNES.

Though a husband does not assign or convey his wife's choses in action or her expectant legal interest in personal chattels, they do not survive to her at his death.

OLD LEWIS devised negroes to his wife for life, and after her death, to his children equally. One of the daughters married Lewis, who died in the lifetime of his wife and of her mother, the widow of the first Lewis; then the mother died, and the widow of the latter Lewis married Hynes. The question was, who was entitled to these negroes, the executors of the latter Lewis or Hynes, the second husband?

PER CURIAM. WILLIAMS and MACAY, it was (*ut audivi*) decided in favor of the executors of Lewis upon argument.

REPORTER. *Quaere:* The authorities upon which this decision is grounded (Fearne, 440; 9 Mo., 101; 2 P. Wil., 608) only prove that the husband may dispose for valuable consideration, and that equity will protect such assignment. 1 P. Wil., 566; 3 P. Wil., 411; Fearne, 446, 447; Co. Litt., 46 b; 10 Rep., 51 a; 1 Salk., 336; will none of them support this decision; neither does H. Bl., 538, for though a vested interest in remainder was there held to vest in the husband, that was the case of a chattel real; and 2 Atk., 124, and the authorities cited in *Whitbie v. Frazier*, prove that vested interest in the wife, not reduced into possession, do not go to the husband as husband, but as next of kin to the wife where he survives her; whereas, if they went to him as husband, because vested interests in the wife, there would be no occasion to claim them, nor indeed could he claim them as administrator of the wife. These negroes were but choses in action of the wife of the latter Lewis, which the first husband had never reduced into possession; and as she in fact had not become entitled to the possession till after the death of the mother, which was subsequent to that of her husband, the action in her right commenced only from the death of the mother; so that during the life of the first husband he could not even sue or demand the negroes in right of his wife; and it seems difficult to imagine how the executors could acquire these rights, which the person they represent had not. *Ideo quaere de hoc.*

Overruled: Weeks v. Weeks, 40 N. C., 120.

HALIFAX—APRIL TERM, 1796

MINGE v. GILMOUR.

Tenant in tail sells land in 1778, and dies leaving a larger estate of land to his son, the present plaintiff; he is bound by the warranty of his ancestor and assets descended. He is also bound by the express words of the act of 1784, Rev. ch. 204, sec. 5.

OLD MINGE held this land in tail; in 1778 he sold to Gilmour, then died, leaving lands, of £8,000 or £10,000 value, to his son, the present plaintiff, who is the heir in tail.

PER CURIAM. After much argument at the bar, he is barred by the warranty of his ancestor, and the assets descended to him, being of as much and indeed greater value than the lands in tail. Secondly, he is barred by the express words of 1784, ch. 22, sec. 5, that declares all sales and conveyances made *bona fide,* and for valuable consideration, since 1 January, 1777, by any tenant in tail, in actual possession of any real estate, where such estate hath been conveyed in fee simple, shall be good

and effectual in law to bar any tenant or tenants in tail and tenants in remainder of and from all claim and claims, action and actions, and right of entry whatsoever, of, in, and to such entailed estate, against any purchaser, his heirs, and assigns, now in actual possession of such estate, in the same manner as if such tenant in tail had possessed the same in fee. But as to the warranty, the plaintiff's counsel contended that warranty and assets cannot bar the estate tail, because that had not been turned to a right before or at the time when warranty descended. He cited Co. Litt., 388 b. There was a verdict and judgment for the defendant.

Cited: Jacocks v. Gilliam, 7 N. C., 56; *Holliday v. McMillan,* 79 N. C., 325; *Bass v. Navigation Co.,* 111 N. C., 449; *Springs v. Scott,* 132 N. C., 560; *Anderson v. Wilkins,* 142 N. C., 158; *Richardson v. Richardson,* 150 N. C., 552.

BUNN v. MOORE'S EXECUTORS.

Rule prescribed for calculation of interest when there are partial payments.

THIS case, which had been reserved for the consideration of the Court for three or four years last past, now came on to be decided. The Court said it was no longer necessary to keep this cause waiting for the opinion of the Court, as it had already been considered by the judges and they had proceeded, in consequence of that consideration, to direct in several cases which occurred within the present circuit how interest should be calculated; that on the Western Circuit last spring MACAY, J., had concurred in giving such directions, or had given them himself. [General Davie, at the bar, said MACAY, J., had told him his opinion was as the directions had been given this circuit.]

PER CURIAM. The interest must be calculated by the following rule: It must be calculated upon the principal, from the time it commenced to the day of the first payment; if the payment was equal and no more than equal to the interest then due, it must extinguish the in-
(280) terest; if it exceeded the interest, the balance, after extinguishing the interest, must be deducted from the principal; if the payment was less than the interest, then the balance of interest must remain until the next payment. Interest must then be calculated upon the principal remaining, to the time of the next payment, which next payment must

be applied in the first place to the whole of the interest then due, and so *toties quoties*. And in the present case, let the interest be calculated by this rule. And the plaintiff had judgment. *Vide* 4 Term, 613.

Cited: Overby v. Fayetteville, 81 N. C., 61; *Readè v. Street,* 122 N. C., 303; *Aiken v. Cantrell,* 127 N. C., 416.

DAWSEY v. DAVIS.

Motion to dismiss a cause by the plaintiff in a *certiorari*, who had been defendant in the court below, upon the ground that the plaintiff in the suit below had not given security in this Court for costs, in pursuance of a notice served upon him for that purpose. *Per curiam*, if the suit is now dismissed, we must order the court below to proceed to judgment. Where a cause is removed by *certiorari* granted by a judge out of court, it must be placed upon the argument docket, and defendant's affidavits will be received to show the impropriety of granting a new trial. If the *certiorari* be obtained in court upon a rule made upon the other party to show cause, the case when removed shall be put upon the trial docket without further argument.

STATED to the Court to be a *certiorari* to remove a cause from an inferior jurisdiction, and that a rule had been made on the plaintiff in the cause below to give security in this Court for costs; otherwise this cause to be dismissed. It was also stated that this notice had been served on him, and that he had not given the security required; whereupon the counsel for Davis, the defendant below and plaintiff here in the *certiorari,* moved that the case should be dismissed.

PER CURIAM. If the cause be now dismissed from this Court, a *procedendo* must issue to enforce the execution of the judgment below, because the obtaining a *certiorari* was for the purpose of having it determined by the Court here whether it was proper to grant a new trial, and the judgment below remains in force until an argument be had here and the new trial granted; and if the cause should be dismissed before the new trial is granted, the obstacle to the execution of judgment being removed, it remains to be executed; and the Court here ought to certify the court below of this proceeding, which is done by a *procedendo.*

The counsel for the defendant then moved that the cause should be set aside for trial at the next term.

PER CURIAM. When a cause is removed by *certiorari* granted by a judge out of court it must be placed on the argument docket; and the affidavits of the defendant may be received to show the impropriety of granting the new trial. The Court, therefore, will not order a new trial, until the affidavits on both sides be received. The affidavits were then produced on the part of the plaintiff in the *certiorari;* the defendant had none; but these being not sufficient to grant a new trial upon, the Court ordered the cause to stand over for other affidavits, which it was said could be procured.

It was further laid down by the Court in this case as the rule (281) of practice that if the *certiorari* was obtained in this Court upon a rule made on the other party to show cause, and upon argument had upon that rule, that then the cause when removed should be placed immediately on the docket of causes for trial, without any further argument to be had; but if obtained before a judge out of court, then it was subject to the rule above mentioned.

See Anonymous, *post*, 367; *Reardon v. Guy*, 3 N. C., 245.

STATE v. EVANS.

Where an outrageous act, as a maim, is proved, the law presumes that it was done with that disposition of mind which the law requires to constitute guilt, until the contrary is shown.

INDICTMENT for assaulting one Joseph Wright Nicholson, and for that the said Evans, on purpose, unlawfully did bite off the right or forefinger of the right hand of him, the said Joseph Wright Nicholson, with intent in so doing the said Joseph Wright Nicholson to maim and disfigure, against the act, etc. The evidence was that Nicholson applied to him at Nash courthouse, about the middle of the afternoon, to borrow some money, which displeased Evans, who said, as he was poor, Nicholson intended to insult him. On the same evening, after dark, two men, Williams and Viverett, were playing at cards, and some dispute arose between them. Nicholson jocosely said to Williams, "Why don't you whip him?" who replied, jocosely also, that he was afraid to attempt it. Nicholson, in the same strain, offered to bet a dollar that he could flog Viverett; whereupon, immediately, Evans stepped forward, saying he would accept the offer, pulled a dollar out of his pocket, and was handing it to one Woodward as stakeholder. Nicholson snatched the dollar and put it in his pocket; Evans demanded it; Nicholson, continuing the joke,

said he had no money of his; Evans still demanded the money, and not having it delivered, proceeded to say, "You act like a scoundrel!" Nicholson replied, "You can't make me so." Evans answered, "But I can flog you," and came up to Nicholson in an angry manner. Nicholson said, "I will not fight you myself, but I have a negro fellow shall fight you." This exasperated Evans to a great degree. He came up several times offering to strike, Nicholson continuing each time to say he would take the law of him. At length Evans stepped off a little way, pulled off his clothes, and came up again; upon which Nicholson took hold of his arm to turn him off, and when he was turned, struck him, upon which the blow was returned, a fight ensued, and immediately Evans bit off the finger, as stated in the indictment.

PER CURIAM. Whenever an act of an outrageous kind is com- (282) mitted, and in order to its being punishable, the law requires a certain disposition of mind to accompany it. The act being once proved to be committed, the law will presume it done with that disposition till the defendant shows the contrary—as in the case of killing, that being proved, the law will presume it was done with malice prepense, till the contrary be shown by the evidence; so here, the law requiring the act of biting off the finger to be done on purpose, unlawfully, and with intent to maim, when the act itself is proved, the law will presume it was done on purpose, and with intent to maim, as it actually was a maim, till the evidence sheweth the contrary—such as that it was done by accident, or done in such a manner as was not likely to be attended with that effect; or that the act done was in pursuance of some office or sentence of the law, as slitting the nose, in the case of a conviction and judgment of forgery, by the proper officer; or that it was done for the necessary self-defense of the party, against some great bodily harm attempted by the person maimed, and that there was no other means of preventing the mischief, or other circumstances of the like kind.

No such circumstances of excuse or justification have appeared on the evidence in the present case. Had Nicholson made the first assault, perhaps it might have justified the other in beating him, but it could not justify a maim. Nicholson's behavior in the present case was surely very improper, but the defendant has carried his chastisement too far. This is a practice that ought to be discouraged, and if a sudden recounter shall be deemed sufficient to excuse the party maiming from the penalties of this branch of the act, it will be of very little avail; for then in every sudden affray the one party may bite off the nose, fingers, etc., of the other, and excuse himself by saying it was done in the heat of passion, upon a sudden affray. And though Nicholson would have no right to

complain, had he received a gentle scourging from the defendant, yet the other party being a man, as the evidence is, of very superior bodily powers, there cannot be the least excuse for acting as he has done.

The jury convicted the defendant, and he was fined £5, and sentenced to six months imprisonment, according to the act of Assembly.

See *S. v. Irwin, ante,* 112.

Cited: S. v. Crawford, 13 N. C., 426; *S. v. Ormond,* 18 N. C., 121; *S. v. Skidmore,* 87 N. C., 513.

SHERROD v. DAVIS.

If in an action against two defendants for a joint contract one of them cannot be taken, after the *pluriès* writ, the other may be proceeded against alone.

THIS was an action brought against two defendants, upon a joint contract. One of them lived out of the State and could not be taken,
(283) but the process of the court had been regularly issued against him, to the *pluries* which had been returned, *Non est inventus.* The plaintiff then proceeded against the other, and obtained a verdict against him; and it was moved in arrest of judgment, that it was irregular to proceed against Davis till the other had been taken. This motion having been placed on the argument docket, came on now to be argued.

General Davie argued, in substance: That by the law of England, where one of two joint defendants could not be found, the plaintiff proceeded to the outlawry against him, and then declared against the defendant that was in court, that he, together with the other, took upon himself and promised, etc. See Stra., 473; 2 Atk., 510, 511. And if in a court of equity the process against the absent defendant was carried on to sequestration, when it appears the plaintiff has done everything in his power, by using the utmost process the law allows to compel the appearance of the absent party, it suffers him to proceed against the other for the whole. By parity of reason, when in this country the court perceives the plaintiff has used the whole series of process that the law allows him to enforce the appearance of a defendant, it will, in like manner, allow him to proceed for the whole against the defendant who is in court. Now, by the act of 1777, ch. 2, sec. 23, when the sheriff returns *non est inventus,* the plaintiff may take a judicial attachment, or an *alias* or *pluries,* at his

election; but the act speaks not of any further process, nor indeed is there any further process which can be used here. The law of outlawry is not in force for want of the proper officers to conduct it. It appears by 5 Com., 241, and by Jacob's Law Dict., which though not a book of authority, seems to have treated of outlawry much at large, and with considerable accuracy, that there must be a *fielazer, exigunter,* etc., to make out the process necessary at the different stages of the proceeding. Also, the act which puts in force such parts of the English law as are now in use says only such parts of the statute and common law as were before in force and use here and not incompatible with our form of government shall be still in force. But the proceeding to outlawry was never in force here, and therefore is not a part of our law, and by section 12 of the Bill of Rights no man can be outlawed, etc., but by the law of the land; but there is no law in force here for that purpose. If the law of outlawry be not in force here for any of these reasons, then there is (284) no other process that a plaintiff can use but that mentioned in the act of 1777, before-mentioned; and the plaintiff having proceeded to the extent of that process, should be suffered, upon the principles before stated, to proceed against the other.

Baker, e contra: This was not such a case as if it happened in England an outlawry could have been pronounced upon; that outlawry was the putting *extra legem* persons who were subject to it, and had taken the oath in the Court Leet (5 Com. Dig., 650), but it was error if pronounced against a subject to another government, and resident out of England, or if out of the realm upon public business. Here, the absent defendant was a citizen of another government, and resided within the limits thereof, so he could not have been outlawed; and if he could not have been outlawed, then, according to the argument on the other side, it was not possible to proceed against the other, the reason why they do not in England proceed against the outlaw being that his property is forfeited to the King, so that there is nothing for the plaintiff; but until the outlawry takes place there is a possibility of recovering something against him as well as against the other, and if the absent defendant is under such circumstances that judgment of outlawry in England could not be pronounced against him, I apprehend there can be no proceeding against the other until the absent defendant be actually brought in, for in England they never proceed against the arrested defendant till it appears by the outlawry there is no possibility of making the other enter into the defense with him. Indeed, our act of Assembly seems to contemplate no other end of process than the taking the defendant, for it directs the *alias* and *pluries* to go till the party be arrested. See 1777, ch. 2, sec. 78.

PER CURIAM. The judicial proceedings of this country have never recognized the law of outlawry previous to the Revolution, and therefore that part of the law of England cannot be considered to be in force here at this day. The words of the act are that all such statutes, and such parts of the common law as were here before in force and use within this territory, etc., and so much of the said statutes, common law, etc., as are not destructive of, repugnant to, or inconsistent with the freedom and independence of this State, and the form of government therein established, and which have not been otherwise provided for, etc., are hereby declared to be in full force; but this part of the common law having never been used here before the Revolution, cannot within the terms of this act be now received here as law, though there is nothing in the Constitution to repel such a law, should the Legislature think proper to establish it; on the contrary, the Constitution admits the possibility of outlawing a citizen. Declaration of Rights, sec. 12, "No man shall be outlawed but by the law of the land." This implies he may be outlawed *servato juris ordine.* But although a man may not be outlawed here, yet there is the same reason in certain circumstances for allowing the plaintiff to proceed against one of two defendants in court, where the other cannot be taken, as if it were the practice to outlaw the absent defendant. The true reason why in England after outlawry the law allows a proceeding against the defendant who is taken is not because the property of the other is forfeited, but because *lex nemini coget ad impossibilia.* It requires both to be sued if possible, that both may bear their equal burden of the contract they have jointly undertaken to perform. It is for the benefit of the defendant who is in court and amenable that this is required. When it appears to the Court, however, to be impossible for the plaintiff to bring both into court, the law will no longer require this of him, for that would be to require an impossibility, and to defeat the plaintiff of his just demand. Although from the nature of the contract each defendant was answerable *in solidum,* this would be unjust; and the law does not require it after it hath become evident that the plaintiff cannot arrest both. In England this impossibility is evidenced by the outlawry, the utmost process that the law knows and the plaintiff hath in his power to use. So in this country the law will require the plaintiff to proceed against both upon a joint undertaking, that both may be contributory to the performance of this joint contract, until the plaintiff hath procured legal evidence that it is out of his power to enforce the attendance of some one of them or more; and by analogy, this should seem to be effected here by the last process that the law has provided, the *pluries,* or the attachment, etc. Though this is a point not expressly decided in this State since the Revolution, yet the constant opinion and practice of the bar

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hath been, etc., and it seems extremely reasonable; otherwise one defendant, by withdrawing himself, might forever prevent a recovery against his codefendant. This would be a serious mischief, indeed. Many defendants would avail themselves of it immediately. Our (286) vicinity to other states would make it the easiest matter in the world to be practiced, and a decision of that kind would occasion the loss of many just debts and demands. If it were necessary in order to support this opinion to show that this is such a case as an outlawry would lie in supposing it to have happened in England, it is sufficient to say that it is totally immaterial whether the outlawry would be erroneous or not, for the reasons mentioned by the defendant's counsel, or for any other reasons, an erroneous outlawry remains good till reversed by the party; and before he can be admitted to have his writ of error, he must appear and put in bail to the suit. L. Ray., 349; 2 Salk., 496. And then the purposes of the plaintiff's proceeding to outlawry are satisfied. But there is no necessity to resort to this consideration. The plaintiff here has used the utmost process that the law allows him; he has, therefore, done everything in his power which the law required of him, and he must now be suffered to proceed against the other defendant; otherwise, he would be without any remedy. This would be to carry the rule in favor of the defendant much further than the reason of the rule will allow of. It never meant to deprive the plaintiff of his debt when both could not be taken, but only to prevent him from proceeding against one only when both might be taken.

Judgment for the plaintiff.

See *Anonymous*, 3 N. C., 70. Where one defendant is taken, and an *alias* and *pluries* against the other defendant returned "Not found," the defendant taken shall be allowed to plead to the action, and the plaintiff shall come to issue as to him. *Price v. Scales*, 6 N. C., 199.

ANONYMOUS.

If a plaintiff procures a copy of his bill and a *subpœna*, and delivers them to the sheriff in time to be served on the defendant ten days before the term, and the sheriff neglects to make the service until ten days before the next term after that, the plaintiff's bill shall not be dismissed by a plea in abatement under the act of 1782, Rev. ch. 177, sec. 3.

THE plaintiff had filed his bill in equity against the defendant, in the office of the clerk and master, and had procured a copy of the bill, and a *subpœna* which he had delivered to the sheriff in time to be executed;

but the sheriff did not execute the process at all before the next term. At which term the defendant appeared and pleaded in abatement that the process had not been served upon him ten days before the term at which by the process he was required to appear. To this plea the plaintiff demurred.

HAYWOOD and STONE, JJ. The clause of the act upon which this plea is grounded is in the act of 1782, ch. 11, sec. 2. It directs "That no writ shall be served by the sheriff unless he has a copy of the bill ready to deliver to the defendant; and he is hereby required to deliver the said copy immediately after the service of the said writ; nor shall any service be valid unless it be made at least ten days before the term at which the defendant is required to appear; and where the service is by *sub-*
(287) *pœna,* the defendant shall be served with a copy of the bill at least ten days before such term: in failure of any of which requisitions the defendant may plead the matter in abatement, and the bill shall be dismissed." The intent of this clause is to allow the defendant ten days time to consider of the defense proper for him to make, to employ the necessary counsel, and draw his answer, plea or demurrer. The Legislature supposed that all these things could not be done in a shorter time in most cases; and this time they have secured to him under the penalty of a dismission of the plaintiff's bill in case of an attempt to shorten the time allowed by law. The mischief intended to be avoided is that of forcing the defendant to make a defense before he has time to prepare for it. These provisions are similar to those made for a similar purpose in the act of 1777, ch. 2, sec. 14, where process at law, returnable to the Superior Court, is directed to be executed ten days before the beginning of the term, and if otherwise executed, that it shall be adjudged void upon the plea of the defendant. And in section 74 of the same act, where process returnable to the county court is directed to be executed at least five days before the return thereof, and if executed at any other time, that it may be abated on the plea of the defendant. These several clauses being all intended for the same purpose, it is proper that the construction put upon them should be uniform. Now it has never been deemed to be the meaning of the clauses in the act of 1777 that process issued in time to the sheriff, and returned unexecuted, should be abated by the plea of the defendant, but an *alias* issues. The process is only abatable under the operation of these clauses where it hath been executed within the times prescribed, or, in other words, where it has been served in less than ten or five days before the commencement of the term. As the inconvenience arising from shortness of time was that only which was intended to be avoided by the act of 1782, and is no greater in an equity suit than in a

suit at law, there can be no reason why a nonexecution of process by the officer in the former case should subject the plaintiff to a dismission of his suit any sooner than it will subject the plaintiff to an abatement of his suit in the latter, especially as the expression of the acts in both cases is confined to a service of process within the ten days, and not to a nonexecution of process before the term. The words of the act of 1782 are, "Nor shall any service be valid unless it be made at least (288) ten days before the term." The act here speaks of service actually made, and says it shall be invalid if not made a certain time before the term. It says nothing of the case of a nonexecution of process. The words of 1777, sec. 14, are, "And shall be executed at least ten days" before the beginning of such term. The words of sec. 74 are, "And shall be executed at least five days before the return thereof" —all expressive of the same thing, namely, a service within the time, or a shorter time, before the next term than the act directs.

Were this plea allowed it would establish the doctrine that whenever a defendant in equity could be apprised of a bill filed, and process taken out, he might, by withdrawing or concealing himself from the sheriff until the arrival of the term, cause a dismission of the plaintiff's bill; though, were it an action at law, the consequence would be otherwise. It would also establish this other equally absurd doctrine, that an officer by neglecting to serve an equity process might subject the plaintiff to a dismission of his suit and costs, when the same neglect in process at law would produce no other inconvenience to the plaintiff than delay. But surely it could never be the intent of the act of 1782 to make the plaintiff's suit in equity depend for its continuance in court either upon the pleasure of the officer or the honesty or the generosity of the defendant; neither could the act mean to dismiss the suit unless for some irregularity prejudicial to the defendant, which the nonexecution of process upon his is not, for that has only the effect of giving him longer time, and is an advantage to him. Moreover, the defendant is to take advantage of the irregularity or failure mentioned in the act by pleading it in abatement, both by the act of 1782 and the clauses in the act of 1777; but the rule is well known that a defendant cannot plead until he is called into court for that purpose by a service of process, unless he appears voluntarily, and the plaintiff will accept of such appearance. This evinces the meaning of the act to be that the plea in abatement is to be by a person served with process, and for an irregular service of process, not a pleading by a person not served with process at all, and who for that reason in legal contemplation is not in court. It points directly to the case of process actually served, but within ten days next before the term. This plea does not disclose that case, but another, a total nonexecution of process, which

is to be remedied by a continuation or reissuing of process, and cannot, according to the true meaning of this act, cause a dismission of the suit. So the plea was overruled.

Cited: Worthington v. Colhane, 4 N. C., 166; *Governor v. R. R.,* 38 N. C., 471.

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MOORE KNIGHT AND WIFE v. THEOPHILUS THOMAS.

The word creditors, in the act of 1784, Rev. ch. 225, sec. 7, respecting parol gifts of slaves means as well those who have become creditors since the parol transfer as those who were such before.

TROVER. Thomas, as sheriff, had sold the negroes in controversy as the property of one Pass, to satisfy an execution of one of Pass's creditors. It turned out upon evidence that Pass had conveyed those negroes by parol, before witnesses, to the wife of the plaintiff, sometime before this creditor obtained judgment, and before the debt was contracted.

It was argued at the bar, and admitted by the Court, that the judges heretofore have decided that under the acts of 1784, ch. 10, sec. 7, a parol conveyance of negroes is good as between the parties themselves, as before the making of this act; but was void as to creditors, as well creditors who became such after the conveyance as those who were creditors at the time; for the mischief intended to be remedied by the act was that subsequent creditors had been defeated of their debts contracted upon the credit of a man's visible property, by means of secret gifts to children and others, made before the debts contracted oftentimes, and when the party may have been in good circumstances. The Court now assented to this construction of the act, and upon this ground granted a new trial, the jury having found for the plaintiff as to one negro, who had been delivered in the presence of witnesses some years before. Pass had become a debtor to that creditor upon whose execution the negro was sold, and even before he became involved.

See *Farrell v. Perry, ante,* 2.

Cited: McCree v. Houston, 7 N. C., 451; *Rhodes v. Holmes,* 9 N. C., 195, 196; *Palmer v. Faucett,* 13 N. C., 242; *Peterson v. Williamson, ibid.,* 332; *Bell v. Culpepper,* 19 N. C., 21; *S. v. Fuller,* 27 N. C., 29.

WILMINGTON—MAY TERM, 1796

SNEED v. MITCHELL'S EXECUTORS.

If one of two joint payees endorses all his interest to the other, that other may maintain an action in his own name for the whole debt.

ACTION brought to recover money due upon a note of hand. The note, when produced, appeared to have been given by Mitchell to Sneed and another, jointly; and that other had endorsed upon the note a writing purporting that he had relinquished all his right and interest in the within note to Sneed.

Hill, for the defendant, objected that this endorsement should not be received as evidence for the purpose now intended, namely, that of showing the sole interest and right of action to be in Sneed.

Slade, e contra: Though it be in general true that a contract made with several persons jointly must be sued upon by all jointly, that does not hold universally; for if some of them are satisfied, and their demands extinguished, they need not be made parties.

PER CURIAM. Each of two joint partners are entitled to the whole —the one may release his interest in the whole to the other, and that other will then be entitled to the whole as before; but with this additional circumstance, that the joint interest of the other having now fallen off, he is entitled solely to the whole. This circumstance, however, must be stated in the declaration, otherwise the joint contract produced in evidence will not support the plaintiff's claim.

The Court do not recollect any case like the present, though (292) cases circumstanced like the present must very often have occurred; but upon principle there can be no good reason why this action should not be supported. Were this an endorsement of part, it would not be good, for the defendant cannot be subjected to more than one action by any act of the plaintiff's. This endorsement, if it be considered as transferring a right, causes no multiplication of actions; the parties as to these remain precisely in *statu quo*. In truth, the endorsement by one of two joint payees is good to transfer the whole contents of the note to an endorser, but it is not necessary to go upon this ground now. There can be no doubt but that one partner may release to the other, and leave him solely entitled to the money and the action; and of course, the plaintiff is here entitled to recover.

The reason why a contract made with several persons jointly must be sued by all is because if they were to sue severally they could recover

only their several proportions; no one could recover all to the exclusion of the others; and if each could recover only his proportion, then the defendant upon one contract would be subject to as many suits as there were persons with whom he made it. If one might sue alone, by the same reason each of them might sue alone. All this mischief is avoided by one joint action brought by all. If each one of them could sue, then either the defendant would be doubly charged or one of them might recover and receive the money to his own use without the interference and to the total exclusion of the others. This inconvenience is avoided by a joint action; but wherever the reason of a rule ceases, the rule will also cease. In most instances, more properly speaking, the rule extends no further than the reason of it warrants; and wherever the case is so circumstanced that an action by one only will not be accompanied or followed by the mischievous consequences before mentioned, there can be no good legal objection against it that appears in the present instance. Where one cannot be injured by the other's proceeding for the whole, as he cannot be when he has relinquished his whole demand, there is no reason for saying he shall not proceed alone. It injures not his companion, nor does it take from the defendant any advantage he might have were the action brought by both; nor does it subject him to any of the disadvantages the law was careful to prevent when it ordered
(293) those plaintiffs to sue jointly that were jointly concerned.

The plaintiff had a verdict and judgment. *Vide,* 4 Bac. Ab., 661; 1 Mod., 102; Lord Raymond, 340.

STATE v. JOHNSTON.

One bidder at a sheriff's sale is sufficient, but the bidder must be one who is able to advance the money which he offers as his bid. A return in the name of the high sheriff by his deputy, if false, will render the sheriff liable *criminaliter.* When a defendant in court is ordered into custody for a fine, it will be improper to discharge him and order a *fi. fa.* to issue for the fine. The Court will not permit independent facts, for which the party would be liable to another prosecution, to be given in evidence in order to enhance a fine.

INDICTMENT against the defendant, for that one ———— recovered a judgment in this Court against Howard, and took out execution, and put the same into the hands of the defendant, being high sheriff of the county of Onslow, to be executed; and that he had made return thereupon that he had levied, but could not sell, for want of bidders, which was a false return, etc.

The judgment was produced on the trial, and also the execution with the return upon it. It was proven that the execution was put into the hands of the defendant in due time to be executed; that he delivered it to his deputy, who seized goods and appointed a day of sale; that on that day the plaintiff appeared with an intention to bid for the property, and also another person, a Mr. Dawsey, who was sent to purchase negroes for his father; that the deputy offered the property for sale, and that the defendant Howard bid for each article as it was offered a much higher sum than it was worth; that such bids were received by the deputy as good ones, the consequence of which was that no person present bid higher. In one instance the plaintiff bid, but Howard, the defendant, immediately bid upon him a much greater sum than the property was worth, which bid was also received. The deputy returned the execution to the defendant, his principal, requesting him to make a return upon it, which he accordingly did, as stated in the indictment, viz., that the property seized could not be sold for want of bidders.

PER CURIAM, after argument. When bidders cannot be had at a sale advertised by the sheriff, the usual return is that the property cannot be sold for want of bidders, which being in the plural number, has occasioned a vulgar error, which unhappily hath formerly been countenanced by some of the profession and adopted but too generally by sheriffs—that there must be two bidders at least at a sheriff's sale. Some have held there must be three—the sheriff is to sell to the highest bidder, and highest is in the third degree of comparison. These opinions are founded on very great mistake. If one bidder appears, and no other, the sheriff ought to sell to him. The substance of what the sheriff is commanded to do is to make the money mentioned in the execution by selling the property; consequently, if one person having the (294) money offers a bid, the sheriff should sell to him, and receive the money from him, if no other bidder appears; and if in such case the sheriff returns that he could not sell for want of bidders, that return is untrue. But the sheriff is not to receive the bid of any person who has not the money.

A bid means an offering of so much money for the property exposed to sale; not the mere verbal saying of the party that he will give so much; therefore, the bid of Howard, who had not the money, ought not to have been regarded; he was not a bidder. Should the sheriff, even after he has cried a bid, become satisfied that the person making it hath not the money, he should reject that bid and sell to that person who was the highest bidder having the money to pay.

It is objected that a principal is not liable criminally for the misconduct of his deputy. That is true, but here and, indeed, in every case

like it, the high sheriff is supposed to make the return; it is made in his name; it would not perhaps be good, in strictness, were it made otherwise. It is also proven in the present case that the return was actually made by the high sheriff himself; and though from the representation of his deputy he might not have known that the return was untrue, yet as he was a sworn officer, it was his business to see that every return made by him was a true one. It is at his peril if it prove otherwise. Should an objection of this kind prevail, no sheriff could be punished criminally for a false return; he might make all his returns upon the representation of his deputy; and then the deputy could not be punished, for he did not make the return; nor could the high sheriff be punished, for he did not know but that the return was true; and thus a sheriff would have it in his power to give what indulgence he pleased to the debtor, and defeat the end and purpose of all law and courts of justice.

The jury convicted him; then the prosecutor moved to be at liberty to read to the Court the returns upon a great number of other executions made by the same sheriff, in order to aggravate the fine; and it was moved by Jones, Solicitor General, that the Court had in other instances allowed the character of a defendant to be shown by affidavits, in order to enhance the fine.

PER CURIAM. This has been only done where the matters shown to the Court by way of aggravation have been relative to the matter for which the defendant hath been convicted, not where they are independent facts for which the party is liable to another prosecution. (295) We will not hear the other returns read.

A few days after the Court fined the defendant thirty pounds, and ordered him into the custody of the sheriff of New Hanover till the fine was paid.

Some days after this an application was made to discharge the defendant out of custody, as he had not wherewith to pay the fine now with him, and to issue a *fi. fa.* to the county of Onslow for the levying thereof; and it was urged that the Court had done so in the case of the Warrenton fines.

PER CURIAM. The proper process to compel payment of a fine is a *capiatur pro fine,* which is issued when the party is not in court at the time the fine is laid, but when he is in court, and is ordered into custody, it is like being in custody upon a *capias ad satisfaciendum,* and then a discharge from them by the plaintiff's consent will discharge the party from any other execution; and perhaps should the Court now give into the present motion, it may hereafter be said that a *fi. fa.* was irregular,

as his discharge from his present confinement could not have been procured had the State opposed it. So the motion was denied. *Vide* Salk., 56; Co. Inst., 218; Salk., 400; 4 Bl. Com., 368; 8 Rep., 59 b.

See *S. v. Joyce, ante,* 43.

Cited: Cummings v. McGill, 6 N. C., 360; *Dobson v. Murphy,* 18 N. C., 590; *Fleming v. Dayton,* 30 N. C., 454; *Brickhouse v. Sutton,* 99 N. C., 109.

ANONYMOUS.

Suit commenced against an executor returnable to the Superior Court, and suit afterwards commenced returnable to the county court, which sat first. To these latter suits the executor put in such pleas as made the assets responsible for their payment, and to the suit in the Superior Court he pleaded that he had no assets except what was liable to the payment of the other suits. The latter plea is not good; he ought to have confessed judgment to the suits in the county court, and then plead those judgments to the suit in the Superior Court.

ACTION against an executor, who pleaded that he had fully administered all the assets of the testator except so much which was liable to former judgments and suits. This action was commenced prior to some others, which were the suits alluded to in the plea; but this action was returnable to the Superior Court and the others to the county court, which was held before the Superior Court; and to these suits in the county court the pleadings were such as admitted assets of the testator sufficient to satisfy them.

In support of this plea is was argued for the executor that although before any suit commenced an executor, in case of deficiency of assets, may pay which of two creditors of equal dignity he may think proper, yet where one of them hath commenced suit, he cannot pay the other to his prejudice; and, therefore, he who first commences his action is first entitled to payment. The executor in the present case could not with any safety plead otherwise than he hath done; he hath pleaded the truth of his case to the suits he was first bound to plead to; he hath admitted assets, and made an appropriation of them to the creditors in these suits; and to this suit which he was afterwards bound to plead to, (296) he hath pleaded in substance that appropriation. There was no other course for him to take. This method of pleading is sanctioned by

Waters v. Ogden, Doug., 453, 454. There the executor had assets, but to a certain amount, not adequate to the payment of the demand of either creditor; but he confessed what assets he had to the demand of one creditor, and to the other demand of the other creditor he pleaded the other suit, and the confession of the assets he had to that demand, and it was held well. In the present case the executor had not assets to satisfy all the creditors; but he pleaded to the suits in the county court so as to admit and appropriate to these demands all the assets he had, and he has pleaded that appropriation to this suit. It would be excessively hard should he be compelled to satisfy this demand also, which must be out of his own pocket if satisfied at all.

E contra. It was argued that amongst creditors of equal degree it is not the first suit that entitles to priority of payment, but the first obtaining of judgment. Off. Ex., 138, 144. Where there are several demands of equal dignity, and the creditors all sue, and the executor hath assets but for part, if he pleaded to each of these demands that he hath assets but to a certain amount, each of them may have judgment to that amount; or if he plead to each *plene administravit,* at the trial a verdict must be against him upon each demand to the amount of the assets, because at the time of the plea pleaded each plea was untrue, and the jury in each cause must upon such evidence say that it was not a true plea at the time when pleaded; and so the verdict in each cause must be for the plaintiff. If he plead to some of these suits the amount of the assets, and to the others that he hath made an appropriation of his assets, that will not be good pleading, because after suits commenced he has not a right to pay whom he pleases first, but only such of them as could first get judgment. In such case, where there is a deficiency of assets to pay all, the proper method to be observed by an executor is to confess judgment to some of the creditors to the amount of his assets, and plead the judgments to the other suits. Wood's Inst., 332; Nels. Ab., 787; God., 219, 223, 324; 1 P. Wil., 295. As to the case cited from Douglas, that is not applicable to this. There the assets were not sufficient to satisfy the demand of either plaintiff, and for that reason the plaintiff
(297) to whose suit the appropriation was made would not enter judgment so that it could be pleaded to the other suit, and the executor had no means to compel him to enter it; but in the case now before the Court the assets in the hands of the executor were to a much larger amount than the several demands sued for in the county court, and had the executors confessed judgment severally to the amount of each demand, the Court would have compelled the plaintiffs in those suits to have entered their respective judgments so that they might be pleaded to this suit.

ANONYMOUS.

PER CURIAM. Where there are several demands of equal dignity, and a deficiency of assets to pay all the creditors, before any suit brought the executor may pay, to the amount of the assets, which of them he pleases; but if suit be brought, he can no longer make a voluntary payment; the commencement of the suit, and his having notice thereof, restrains him from making any voluntary payment; but still it is not priority of suit that entitles to priority of payment, but the first obtaining of judgment. Consequently the pleading a former suit, as the executor has done here, is no good plea in bar of the plaintiff. It should have been a plea of a former judgment, and that would have been good. The proper course for an executor to take, when there is a deficiency of assets and he is sued by several creditors of equal degree, is to confess judgment to as many of their demands as will cover his assets, and plead these judgments in bar of the other creditors. Where there are two or more suits of equal dignity commenced against him by several creditors, and he hath not assets enough to pay any one of them, he must plead to some one of them the amount of his assets, making an appropriation of them to that demand, and plead that matter in bar to the other suits.

The plaintiff had judgment.

Cited: Bryan v. Miller, 32 N. C., 130; *Wadsworth v. Davis,* 63 N. C., 252.

ANONYMOUS.

The plea of *plene administravit* must be true when it is put in, and not at the time of the trial.

ACTION against an executor, who pleaded *plene administravit,* and upon evidence it appeared the executor had really administered all the testator's assets in payment of his debts, but that a great number of these payments had been made, some upon judgment and others voluntarily, a long time after the plea pleaded, but previous to this time.

PER CURIAM. The only thing now to be considered is whether the plea of fully administered were true at the time it was pleaded, not whether it be true at this time. And as it appears that assets to more than the amount of this demand have been expended since this plea in the discharge of judgments obtained since the pleading thereof, the plea, of course, could not be true when pleaded. (298)

The plaintiff had judgment.

See *Evans v. Norris, post,* 411; *McNaughton v. Blocker, post,* 417.

HOGG'S EXECUTORS v. WHITE'S ADMINISTRATORS.

The administrator had failed to plead *plene administravit*, or any other plea showing a want of assets, and the plaintiff had obtained judgment, and upon execution issued, "*Nulla bona*" had been returned: *Held*, that the administrator was bound to pay *de bonis propriis;* and for that purpose a special *fi. fa.* might issue, reciting the return of "*nulla bona*," and commanding the sheriff to levy *de bonis intestati*, if to be found in the hands of the administrator, if not, *de bonis propriis.*

IN this action the administrator had failed to plead *plene administravit,* or any other plea showing a want of assets. Plaintiff had proceeded to judgment in the usual form, to be levied *de bonis testatoris.* He had taken a *fi. fa.* upon this judgment, to which the sheriff had returned, *Nulla bona.*

It was moved on the part of the plaintiff that a special *fi. fa.* should issue to the sheriff to levy the debt *de bonis testatoris,* if any to be found, and if not, *de bonis propriis* of the administrator.

Spillar argued *e contra* that there could be no judgment *de bonis propriis* against an executor or administrator but when he pleaded a false plea, the falsity whereof was within his own knowledge, and which plea, were it true, would be a perpetual bar to the plaintiff.

PER CURIAM. It is contended that before an executor can be charged *de bonis propriis,* some process should be issued against him to which he might show by pleading that he ought not be charged *de bonis propriis;* and certainly if in a case like the present the defendant may plead *plene administravit,* such process should go before a judgment *de bonis propriis* shall be entered. It is to be considered, then, in the first place, where were a *sci. fa.* now issued, could the defendant be admitted to plead to that, *plene administravit,* as to which the rule in this case, as in all others, is this: Where the defendant to the original action might have pleaded a matter of defense, and failed to do it at the proper time allowed by law for that purpose, he can never afterwards be admitted to plead that matter to any other suit grounded upon that original suit. He cannot plead to a *sci. fa.* any defense he might have pleaded to the original action out of which it is derived. Now, it is evident he might have pleaded *plene administravit* to the former action, if the fact were such that he had fully administered; and, therefore, should a *sci. fa.* now issue, it could be of no service to the defendant, as to any defense he might set up under it. As to the manner of charging an executor *de bonis propriis,* the practice has varied at different times in different courts; sometimes they have proceeded by way of *sci. fa.* inquiry, whereupon *nulla bona* returned, the sheriff was commanded to make the money as

before; and if he could find no goods of the testator, then to inquire by a jury whether the defendant had wasted; and if the jury found a *devastavit,* then to return the verdict to court; whereupon there went out a *sci. fa.* against the executor to show cause why the plaintiff should not have satisfaction *de bonis propriis.* Off. of Executors, 166. At other times the practice hath been for the sheriff to return a *devastavit;* or, if he is unwilling to do so, for the court to compel him to return a *devastavit* (Off. of Exrs., 168; God., 199), and thereupon to issue a writ of execution commanding him to levy *de bonis propriis;* or, where the sheriff returns *nulla bona,* to issue a special *fi. fa.* commanding him to levy the debt *de bonis testatoris,* or if it could appear that the (300) executor had wasted, etc., then to levy it of his own goods. Off. of Exrs., 167, 168; *Pottifer's case,* 5 Re. As to the *sci. fa.* inquiry, and *sci. fa.* thereupon, it is said in the books before cited that that course hath been long disused, it not being so beneficial a course for the defendant as that which directs the sheriff to return *devastavit;* for that, in the first case, if the verdict be wrong, the defendant is without redress, no remedy lying against the jury; attaint will not lie, being not a verdict upon an issue joined, and he has no remedy against the sheriff, for he is justified in his return by the verdict. However, the other way of returning a *devastavit* seems equally useless; for if the defendant hath failed to plead a want of assets, it is an admission of them, and a jury will not have it in their power to say *non devastavit.* So if the sheriff, after such omission, returns *devastavit,* he cannot be liable to an action for that return; for the jury, as well as the defendant, are estopped by the record to say that he did not waste as the sheriff hath returned. Salk., 310; L. Ray., 589. Either of these methods, then, can answer no valuable purpose. The defendant by omitting to plead want of assets becomes so absolutely liable to answer *de bonis propriis* that no plea he can make, nor any finding of a jury, can afterwards exempt him. If the defendant can have no benefit by either of these modes but that of delay, it follows that the law will not require either of them to be pursued; for in directing process the law always supposes the defendant may have some defense to make; where he can have none, it is useless and nugatory to issue process to him. In every possible case at the common law where the defendant omits to plead want of assets, whether it happen by confession of the action, judgment by default, or otherwise, such omission amounts to an admission of assets. It must be deemed that there are assets enough when the executor whose business it is will not say the contrary. And when a judgment is once given against an executor, who has assets enough, he is bound to produce them, or pay the judgment himself *de bonis propriis.* 3 Term, 685. To permit the

defendant to plead a want of assets, after the proper time for pleading is passed, is not only against that order which in all cases is observed, but it tends to make proceedings in court infinite, and to introduce delays, which the order of pleading was invented to prevent; and, besides, to what time will such a plea after judgment relate? If it relate (301) to the time when it is put in, then the assets may have been applied in the intermediate time in discharge of other debts. This enables the executor, after suit instituted against him, and even after judgment upon it, to pay other creditors, which is directly against law; for after suit instituted, he cannot, voluntarily, pay any other creditor of equal degree first. Or will it relate to the time when process in the original suit was first taken out? Shall the plea state that at the time of the leading process in the first suit taken out, or any time since, he had not in his hands any of the goods, etc., of the testator to be administered? If this must be stated, then why not enforce him to plead in the first instance? Is it not better that he should do so and show his situation at once than put the plaintiff to the fruitless expense of a second suit by *sci. fa.* It would be better, as it would save the additional expense and litigation of a second suit. That is a strong argument to prove that the law requires it. It cannot be supposed in a case which so often happens that the law has not fixed upon that mode of conducting the pleadings that is best calculated to oust delays and prevent litigation and expense; and then what reason can there be why a special *fi. fa.* to levy *de bonis testatoris si et si non de bonis propriis* shall not issue at once? The return of *nulla bona* is then as complete a proof of a *devastavit* as if that were returned expressly, for if by the previous judgment and proceedings it appears to the court he has assets, and is bound to produce them or pay the debt, and also by the sheriff's return of *nulla bona* that he has not produced them, does it not follow that he is by what already appears upon record liable *de bonis propriis?* Does the record not prove that he has no other alternative, and can make no plea to exempt his own proper goods? The return of *nulla bona* proves his liability as completely as that of a *devastavit,* since both must inevitably end in the same consequence—that of an execution *de bonis propriis.* It cannot, therefore, be of any service to the defendant to require a *sci. fa.* or a return of a *devastavit;* they can be no more than forms leading to the same event, as that of a special *fi. fa.* issued upon a return of *nulla bona,* and as the *sci. fa.* grounded immediately upon the return of *nulla bona* or upon the finding of *nulla bona* upon a *sci. fa.* inquiry can be of no service whatever to the defendant, as he cannot avail himself of the plea of *plene administravit* under them, not having done it before, there is no good legal reason for using these modes

preferably to that of a special *fi. fa.* upon the return of *nulla* (302) *bona.* The ultimate proceeding either way will turn out the same thing, and nothing more will be gained by the *sci. fa.* than a few terms longer delay to the plaintiff.

But if it can be supposed the common law is not so, yet since the passing the act of 1784 there is the greatest reason and justice in the world that the executor or administrator who fails to plead *plene administravit,* etc., should pay the debt out of his own pocket, for by such omission he effectually hinders the creditor from having any satisfaction out of the land. Since, therefore, a further process by *sci. fa.* against the defendant will be of no real benefit to him, by letting him in to plead fully administered, and as the issuing of a special *fi. fa.* upon a return of *nulla bona* is sanctioned by the Office of Executors, a book of high authority upon this subject, and also by the judgment in *Pottifer's case,* 5 Re., 32, and as the principle of these cases is recognized in a decision of the Court last spring at Fayetteville, let a special *fi. fa.* now issue, reciting the return of *nulla bona,* and commanding the sheriff to levy the debt of the goods of the intestate in the hands of the administrator if to be found, and if not to be found, then of the proper goods of the administrator himself; which was done accordingly.

See *Parker v. Stephens, ante,* 218.

Cited: King v. Howard, 15 N. C., 583.

MAXWELL v. HOLLAND.

Notice to take deposition may be given by publication when the defendant is a nonresident.

MR. MCLAIN had been counsel for the defendant, and after his death no other counsel had been employed, and the defendant had removed to some part of the world, the plaintiff knew not where. The plaintiff wished to take the deposition of a man who lived in New England, and prayed the court to direct to whom and in what manner notice of taking it should be given, there being neither party nor counsel upon whom it could be served.

PER CURIAM. Let notice be given in the *Fayetteville Gazette* three weeks successively, that the deposition will be taken at a certain place

and day, at the distance of three months after the publication. The plaintiff should not lose his testimony because the other party hath removed himself, and failed to appoint an attorney upon whom notice might be served.

ANONYMOUS.

If a *certiorari* be obtained to remove a cause upon the ground that an appeal had been refused in the court below, the case shall be placed upon the trial docket, without showing any other cause.

THIS suit had been commenced by a warrant issued by a justice of the peace. There was an appeal from the judgment of the justice to (303) the county court, where a trial by jury was had. There an appeal was moved for, which the county court denied. He then obtained a *certiorari* to remove the proceedings into this Court, upon an affidavit stating the above facts. This *certiorari* was set down on the argument docket in this Court, and now the plaintiff in the *certiorari* stated the reasons for obtaining it as above; and it was argued on his behalf that wherever the county court refuses an appeal, where by law the party is entitled to it, and moves for it in proper time, and offers to perform the requisites for obtaining an appeal, and a *certiorari* is obtained for that cause, the Court here will grant a new trial without inquiring further than whether an appeal was refused; and as it is admitted in the present case that the appeal was refused, it is not incumbent upon the plaintiff in the *certiorari* to show any other cause in order to obtain a new trial here. And of this opinion were the Court clearly; and the other side admitting that an appeal had been refused, though the party praying it offered to assign reasons, and give security for prosecuting with effect, they ordered the cause to be set down for trial, and to be placed amongst those for trial at the next term. And it was done accordingly.

See *Chambers v. Smith*, *post*, 366.

MILLS v. McALLISTER.

Since the act of 1762, Rev., ch. 69, the courts may exercise a discretionary power in the appointment of guardians.

THIS was a dispute about the guardianship of the child of James McAllister, deceased. It originated in the county court of BRUNSWICK, and came up to this Court by way of appeal from thence.

The guardianship was applied for by McAllister, the uncle of the infant on the father's side, but the county court appointed Mills the guardian, who was no way connected to the infant by blood. It was now stated at the bar and admitted that McAllister, the uncle, the present applicant for the guardianship, with several others of the family, in the lifetime of the deceased, had signed a deed purporting to be a conveyance for a very valuable tract of land to James, the deceased, and that since his death the applicant claimed that tract of land, or a considerable part thereof, to his own use, in the face of that conveyance.

Taylor for Mills.
General W. R. Davie for McAllister.

Taylor argued that the guardianship ought not to be committed to McAllister, the uncle, because it was a rule of the common law in the case of a tenure in socage that any person to whom upon the death of the infant his inheritance might by any possibility descend should not be entrusted with the guardianship of the infant. (304)

E contra. It was argued by General Davie that though the rule respecting guardianship in socage was as laid down by Mr. Taylor, that such of the next of kin to whom the inheritance could not descend should be the guardian. It was equally true, by that rule, that (305) such person as was qualified to be the guardian must be next of kin. Co. Litt., 88, b. It is laid down expressly that none can be guardian in socage but the next of blood. This part of the rule will at all events go to the exclusion of Mr. Mills.

PER CURIAM. Guardianship in socage was a consequence of socage tenure, and dependent upon the existence of that tenure. Where there is no such tenure, there is no such guardianship, strictly speaking; though it may be very proper to pay some attention to the rule in the appointment of guardians, as it is calculated to prevent the orphan from falling into hands where he could not with safety be trusted. In like manner, as where the ancestor died seized of an inheritance that lay not

in tenure, it is held, as a rule, that the next of kin to whom the inheritance cannot descend should have the custody of him, Co. Litt., 87, b. As all our lands are now allodial, the rules cited at the bar on either side are not strictly obligatory on the Court. The act of 1762, concerning the management of orphans and their estates, was passed at a time when the lands of this country were held by socage tenure, and from thence that act may be supposed to have been framed with a view to the rules relative to guardianship in socage. That supposition will vanish if it be considered in how many material points the guardianship established by that act differs from the guardianship in socage. The guardianship in socage needed not the appointment of any court; the person entitled to be guardian was as precisely marked out by law, and as well entitled by it, as the heir at law himself. Where there were two or more in equal degree of kindred, to whom the inheritance could not de-
(306) scend, the law gave a rule of decision not by saying they should apply to a court for the appointment of the one or the other, but by saying that he who could first get possession of the heir should have the guardianship of him. When the ancestor died seized of lands, part of which descended on the orphan's death to relations on the father's side, and part to relations on the mother's side, in that case, although the heir must fall into the possession of some person liable to the temptation meant to be avoided by the rule, no court was called upon to appoint a guardian not liable to that objection, but such of the next of kin as could first get possession of the heir should have the custody of his person, and the kindred on either side might enter as guardian on the possession of the lands that could not descend to them. Co. Litt., 88, a and b. This proves that the guardian in socage derived his appointment and authority from the law immediately, without the intervention of a court; and he might enter immediately on the death of the ancestor upon the lands descended to the orphan, and also might immediately take possession of the ward; but the act of 1762 manifestly intended that no person should interfere with either but in consequence of the appointment of the county or Superior Court; and that no person should receive the appointment unless he gave security as the act requires. This was a circumstance not required in the socage guardianship. If the act had intended that a person designated by law should be entitled to the guardianship, it would have been useless to have vested the power of appointing him in the county or Superior Court; their appointment of a person already appointed by law would be at least a redundant if not an absurd act. The socage guardian could not interfere with any part of the ward's property but his lands held by socage tenure, not with his copyhold lands and the like, and not with any part of his personal estate;

by this act he is entrusted with the whole estate of his ward of every kind. In England it was usual for the ordinary to appoint a guardian over the body and personal estate where there was no land held by socage tenure. Wood's Inst., 68; L. Ray., 1334. The act of 1762 consolidates the guardianship of the body, lands and personal estate, and vests the appointment of a proper guardian in the county or Superior Court. When personal property came to be considerable in England, the inconvenience of the guardianship in socage began to be felt, and was attempted to be remedied by the act of 12 Car. II., ch. 24, allowing parents to appoint guardians to their children till 21. These testamentary guardians did not lose their authority by the ward's arrival to the age of 14 years, nor could they be displaced by the ward's (307) choosing another guardian at that age. These were some of the inconveniences experienced under the former law. Orphans of the tender age of 14 oftentimes made imprudent choices of guardians. These testamentary guardians, however, like others, were liable to be removed by chancery, after the abolition of the Court of Wards in the beginning of the reign of Charles II., for misbehavior in their trust, or for giving room to suspect they were about to marry their wards in disparagement. The act of 1762 adopts the same provisions amongst its first clauses, from whence there is reason to believe the Legislature were actuated by the same motives as the framers of the act of Charles. The act of 1762 evidently contemplates that the guardianship committed by the court should be of the same duration as that made by the appointment of a parent, namely, to the age of 21; for sections 11, 12, and 13 give directions about preserving the estates of orphans, and leasing out their lands till they arrive to the age of 21. This act, therefore, cannot have a regard to the old law relating to guardianship, but meant to alter it entirely. It gives the court power to appoint, till the ward come to age, such person as they may think proper to be his guardian, with authority to remove him whenever he misbehaves in the trust they have committed to him. This is a much more effectual mode of procuring proper guardians, and of keeping them steadily to their duty, than if the court were obliged to appoint the next of kin to whom the inheritance could not descend, who in numerous instances might be very unfit persons. As the Court have a discretional power of choosing the most proper person, they should make their election of that person who can best attend to the affairs of the orphan and whom they have reason to believe will attend to them with the greatest advantage and most fidelity to the orphan. Mr. McAllister is stated to live at the distance of 400 or 500 miles, in another State. Should he be appointed, he must either carry the ward with him to his place of residence, where the court cannot from

time to time be informed of his treatment, or he must leave the ward in the possession of some agent, instead of attending to the charge of his education himself. Add to this that the estate of the ward must (308) in like manner be committed to the management of an agent, or be greatly neglected. Mr. Mills resides on the spot, near to the orphan's estate, and in the county where it lies. Should he mismanage either with respect to the person or estate of the ward, intelligence may immediately be conveyed to the court, and his misbehavior corrected. Mr. Mills has no prospect of ever succeeding to the ward's estate, whereas Mr. McAllister has; and though this is not a consideration absolutely obligatory in the court, they will not entirely disregard it. Though they may appoint whoever they think most proper, even the next of kin in the immediate line of succession, they will not out of prudence do this where the estate is large, and any other person equally as well qualified offers or can be procured to take the guardianship upon himself. The Court of Chancery in England always governs its discretion by this consideration, among others, though the contrary was once avowed in the case of an application by *Justice Dormer*. There is also another circumstance in the present case which hath been mentioned at the bar, and is not denied, that ought to have great weight. It is stated that Mr. McAllister claims part of this very estate, the wardship of which he is now seeking. It is said in avoidance of this objection that the orphan upon his arrival at 14 years may choose another guardian, and call him to account for the profits; but if we appoint Mr. McAllister, he will be entitled to the custody of the evidences of the plaintiff's title to this estate; and shall we give the custody of these evidences to the man whose interest it is, and who is so much concerned to suppress and conceal them? Surely, the Court would act a very imprudent part to do so. Wherefore, let Mr. Mills be appointed; and he was appointed accordingly, and gave bond and sureties as the act requires.

Cited: Grant v. Whitaker, 5 N. C., 232.

NIVEN CLARK v. KENAN AND HILL.

The action of trover may be supported against executors for a conversion in the lifetime of their testator.

TROVER, originally brought against the party who converted; but he dying, his executors were made parties under the act of 1786, ch. 14, and the plaintiff proceeded to take a verdict against them.

The defendants moved to arrest judgment for that they as executors were not liable to a recovery of damages by the plaintiff for a conversion in the lifetime of their testator, and of which he alone was guilty. They relied upon *Hamly v. Trott,* Cowp., 371.

E contra. Argued by Mr. Hay. (309)

Curia advisari. And after three or four days consideration, they delivered their opinions that this action was maintainable against the executors for a conversion by their testator in his lifetime. *Hamly v. Trott,* they said, was entitled to much respect, having been determined upon deliberation by men of the greatest talents; yet it seemed upon consideration to leave some injuries without redress at the common law, and particularly the cause stated by the counsel. It is (311) better to adhere to the decisions that have formerly taken place here, since they have been made, and are found to be productive of no inconvenience, than by deciding differently from the other judges to make the rule of law uncertain. Should these decisions be found in any future time to produce disorder, they may be altered by the Legislature, or by a solemn judicial determination to the contrary. So there was judgment for the plaintiff.

See *McKinnie v. Oliphant, ante,* 4.

DEN ON THE DEMISE OF ANDREWS v. MULFORD.

Where two patents or grants bear date on the same day, the number of the patents or grants must determine their priority. No possession except an actual one, by the claimant himself or his tenant, commenced *bona fide,* under a patent or grant, adverse and continued for seven years, will give title under the act of limitations. When the act of limitations once begins to run, none of the impediments mentioned in the act will stop its course.

EJECTMENT. Andrews had lately purchased a tract of land of the heirs of Mr. Waddle, the patentee. Mulford derived his title under Spikes, the patentee of an adjoining tract. He proved the beginning of Spike's tract, and every line and corner mentioned in the patent, and located that tract beyond doubt. Andrews proved that a line called Waddle's line was seen when recently made, many years ago, by one of the witnesses on the other side, which line included a part of the land comprised in Spike's patent, and this line had been acknowledged in con-

versation since, by Spikes. It was also proved that Waddle informed Spikes many years ago that that was his line. Both Spikes' and Waddle's patents were dated on the same day. Waddle's was numbered with the number 4, and Spikes' with the number 73; but Spikes' survey was made several months before Waddle's. Spikes used this disputed part of the land, with the other part included within the lines of his patent, very soon after it was issued, by keeping his cattle upon it, and continued to use it as a range until 1770, when he took actual possession in person. About the beginning of the late war, Mr. Waddle moved to Europe, carrying with him his two sons, infants of very tender years, who returned and came of age within three years previous to the bringing of this suit, which was commenced some time in 1794. Spikes purchased his location of this land from a man who had built an hut, and lived upon it several years, intending to enter it in the land office prior to the time of Spikes' entry.

Counsel for Andrews.
General Davie for defendants.

PER CURIAM. HAYWOOD, J., only present. Will it not be proper to consider whether, if the act of limitations began to run from the time actual possession was taken (which is stated to have been in the lifetime of Mr. Waddle, the patentee, and about three years before he went to Europe) its operation can be suspended by his going beyond sea, or by his death, leaving infant heirs.

Counsel for the plaintiff: General Davie and myself have formerly considered of that question. It is a rule adopted only in the case of fines in England; it does not apply to the act of limitations.

PER CURIAM. The Court thinks it is equally applicable in cases subject to the act of limitations. There are many authorities to that effect, and the reason of the thing strongly supports that position. The Court will inform the jury that is the law. If they should find accordingly, and you shall be of opinion, upon further consideration, that the law is not so, a new trial may be moved for, and the Court will hear this point more deliberately argued.

The counsel on both sides assented to this proposition.

PER CURIAM. The first point in order to be considered is whether the land in dispute be included within the boundaries of Waddle's patent. If it be, then other points will arise to be considered; if it be not, then

the dispute is at an end. There is full proof that the land claimed is within the boundaries of the patent under which the defendant claims. This is not doubted by any one; it is not disputed by the plaintiff. For them to recover, it is necessary to show a title superior to that of the defendant. Their patent is for land lying on the same stream, very probably for a part of the land in dispute. One of the chain carriers, in making Spikes' survey some weeks after, saw and showed to Spikes a line then recently marked, running through the land contained in Spike's patent, and, as he describes it, must have run somewhere between the boundary of Spikes' patent and the line now described in the plat, and claimed to by the plaintiffs. That line has been since spoken of and admitted in conversation by the defendant. When Spikes sold, he refused to warrant the land in dispute, because of Waddle's claim.

The Court then enumerated the other circumstance given in evidence relative to the corner pine, and the other line spoken of at the bar, and concluded this point by saying it is not the province of (318) the Court to draw any conclusions with respect to this line, whether it existed, or where it is. Such conclusions can only be drawn by the jury. The Court only recapitulates the evidence in the presence of the counsel, to assist the memory of the jury, not for the purpose of directing them to lay stress upon this or that part of the testimony. Should the Court deliver an opinion with respect to the evidence, the jury are only bound by it should that opinion coincide with their own, drawn from the evidence they have heard. Should the jury, however, in the present case believe that Waddle's patent covered the lands in dispute, then the next circumstance to be considered is which of these two patents is entitled to preference. They are both dated on the same day. Waddle's is numbered with the number 4, and Spikes' with the number 73; but Spikes' survey was made several months before Waddle's.

The rule that hath hitherto prevailed is that the patent or grant of the first date shall be preferred. There is no other evidence of title by appropriation of lands but that of the grant. He who first obtains his grant without fraud, obtains title; and from that moment may exclude all others from the possession. We cannot be influenced in determining a point of preference by the first survey or the first entry, or the first payment of money for the land. Any of these circumstances, or all of them together make no title. If the grant does not follow, they signify nothing; and when it does follow, they cease from the moment of its execution to be of any consideration. That, and that only, creates the title; and that only is to be consulted where the question of title arises between different claimants. Supposing this rule not to have been founded upon propriety at first, it would be attended with terrible con-

sequences to alter or impair the force of it at this day. Rules of property, where they have once become fixed and known, and to be generally acted under, should never be broken in upon but for reasons of the most urgent necessity, and then only by the Legislature. In such instances it is of much more consequence that the rule should be certain and notorious than that it should be conformable to strict notions of justice. Should we decide by preferring the grantee who had his land first surveyed, it might perhaps serve the purposes of a decision well enough in the present instance; yet many cases might occur where the fact (319) of the first survey could not be ascertained, as in the case of old grants issued before the practice of annexing plats began, and in cases of new grants, where the plat annexed to either of them was severed from the grant and lost. In all such instances it would be necessary to adopt another rule of decision. It is better to follow one that will answer for the decision of all cases which may arise—by adhering to the old rule of preferring the grant first perfected; and, when they are dated on the same day, of preferring that grant which from some circumstances apparent on the face of the deed may appear the best entitled to it.

In the present case it appears in the fact of Waddle's patent that it was numbered with the number 4, whereas Spikes' was numbered with the number 73; from whence the strong presumption is that Waddle's grant was first completed, and that it was numbered in the same order with respect to the other deed in which they were severally completed; and if any other circumstance of equal weight should appear in the face of the grant, it should have equal influence in deciding the preference. If Waddle's grant be entitled to preference, then it will be necessary to consider whether Spikes or those claiming under him have acquired a title by possession under the act of limitations.

It is urged that the possession of the ax-enterer, as he is called, of whom Spikes purchased the location, it to be taken into computation, and, next, that the possession which Spikes had by his cattle is to be reckoned. We will consider them, separately, and for that purpose it is proper to state briefly the true import and intent of the act of limitations, so far as it regards the landed estates of the country. That act had two objects in view—the one and principal object was to fix upon a mode of settling disputes between different claimants of the same lands under different grants or titles.

The Legislature considered, where one of the claimants settled upon the land, and continued on it seven years, with the reasonable expectation of enjoying it in fee that his deed or grant gave him, that it was more agreeable to justice and the policy of an infant country that wanted

settlers to confirm the title of such a possessor than to suffer him to be turned out of possession by another who had no other merit than that his grant was first dated. The term of seven years was fixed upon by the Legislature for that purpose. A prior patentee who would not enter during the space of seven years, when the subsequent patentee, and those claiming under him, were in the actual possession, giving open and public notice of his claim, was by that law deprived of (320) his title forever. He shall not take advantage of an industrious settler and turn him off, after he has improved the land for seven years together; but then in order to gain a title by possession under this act, these circumstances must concur. He must be possessed of land which hath been actually granted; a possession of vacant lands will not do, unless attended with such circumstances as required by the late act of Assembly, for limiting the claim of the State; he must take possession with a belief that the land possessed is his own, as under a patent or deed, under some patentee; he must take possession with such circumstances as are capable in their nature of notifying to mankind that he is upon the land, claiming it as his own, as in person or by his tenant; this notorious possession must be a continued possession; a secret taking possession and not continuing it, as it cannot answer the purpose of notoriety to adverse claimants, cannot extinguish their claim for not having been put in in due time.

The other object of the act was to quiet the possession of such persons as before the passing of it had taken irregular conveyances, not strictly supportable by law, but yet fair, and for valuable considerations. This is provided for by the first clause of the act, and need not be enlarged upon now. The case before the Court is no way affected by it.

To apply these rules to the present case. The possession of the axenterer was of vacant and unappropriated lands, and is not a possession within the purview of the act. Such possession could operate, if at all, only against the King or the Lords Proprietors, not as the act meant, against another individual claiming under them by another grant or deed. It is not the possession of a settler having a belief that the land he settled upon was his own. As to the possession which Spikes kept by his cattle, that it is not such possession as is calculated to give notice to the adverse claimant that his land is occupied and claimed by another. Cattle may be a long time ranging upon land without its being publicly known whose they are, or that they were put upon the land by their owner, or that he meant to claim it; but if a man settles upon the land by himself or tenants, and continues that possession, builds a house, or clears the land and cultivates it, his claim then becomes notorious, and gives fair notice to the adverse claimant to look to his title. As to the

circumstance of Spikes having once taken possession of the land, and continuing there some time, and then leaving it again: a single act of taking possession, and then leaving the land, will not do; for then (321) every man who has a patent or deed for land, and lives at a distance from it, is in danger of losing his title by some other person having a color of title, making a secret entry upon it and at the expiration of seven years afterwards setting up that possession as a title. Were this the law, no man would ever be secure of his title for lands he did not actually reside upon, either by himself, his tenant or agent. The possession that is capable of ripening into title must be notorious, and continued for seven years without entry, claim, or action on the other side. As to the remaining possession that Spikes had, it is stated that about the beginning of 1770, or thereabouts, Spikes, or the person that claimed under him, took actual possession of the land in question, built a house upon it, cleared a field, and continued the possession down to the present day; and that, on the other side, Waddle had no actual possession of the land included in his patent, or of any part of it, and that he was in this country when the adverse actual possession commenced, and for four or five years afterwards, when he removed to Europe. It is here proper to observe that from 6 March, 1773, to 1 June, 1784, the whole intervening time is struck out of the computation of time under the act of limitations, by different acts of the Legislature made in the time of the war and since, and is not to be regarded; and where a man is beyond seas when his title accrues, and is of full age, he is allowed eight years to put in his claim against an adverse occupant. In the present case Mr. Waddle was in this country when the act of limitations first began to run upon him, that is to say, when actual possession was first taken and continued by the adverse claimant; and Mr. Waddle resided here for some years afterwards, and until after the discontinuance of our Superior Courts in 1773, so that at the time he went to Europe the act had run upon him three years; and if we connect 6 March, 1773, with 1 June, 1784, excluding the intermediate time, and compute on till the time of commencing this action, which was some time in 1794, there will be a space of computable time of thirteen years and more between the first taking of actual possession and the commencement of this action.

It is urged, however, that there are two circumstances to interrupt the running of this time, Waddle's being beyond sea, and then his death, and the infancy of his sons to a period within three years before (322) the commencement of this action. These circumstances will not hinder the running on of the statute, when it has once begun to run. The act of limitations regards the interest of both parties; it provides the term of seven years to the end the plaintiff's claim be not

destroyed by too short a time; for the safety of the possessor, it provides that his possession shall not be disturbed after seven years, unless there are strong reasons founded in justice to the contrary, and these are pointed out in the exceptions it makes to the general rule established by the act, as coverture, etc.; but these provisions would be easily frustrated if a man after the act has run upon him almost the whole seven years could defeat its operation by going beyond sea; and the act would have but little effect towards quieting titles and possessions if, after a man had been improving and cultivating the lands for almost seven years, that possession would be all rendered nugatory by the death of the adverse claimant, or by coverture, imprisonment or the like, before the time had been actually completed. We may easily suppose a case where the act of limitations would not be of any assistance at all to a possessor as the Legislature intended it should be. A man improves land and settles upon it, and continues the possession for seven years, lacking a few days; the adverse claimant dies, his heir but just born, but a few days before his arrival to the age of 24 (for infants have three years allowed them after their infancy) dies, leaving his heir but just born also. Where, contrary to the plain meaning of the act, the possessor could not acquire a title after fifty-four or fifty-five years continued possession. As such cases must frequently happen, the law will not allow itself to be defeated by making such use of its exceptions. The computation of time shall not be suspended by the occurrence of any of these circumstances which would have prevented its attaching had the title of the party out of possession accrued during the time of their existence, as infancy, imprisonment, etc.; but where the title comes to persons under such incapacities, and that title is already worn away by the attrition of several years time, with the quality of still wearing away, they must take it as they find it, with its disadvantages as well as with its advantages, and must use the same diligence to prevent a total dissolution of title as the ancestor or person from whom they claim was bound to use. And if this reasoning will apply to the cases of these persons whose hapless situation is not brought on by their own means, as infants, persons insane, and the like, much more will (323) it apply to the cases of those who seem to act as if they intended to avoid the operation of the act, as a person imprisoned, he that removes beyond sea, or as a woman that marries after the act begins to attach. These voluntary acts of theirs ought not in reason to defeat the possessor of the benefits intended for him by the law of the country.

The conclusion resulting from this mode of considering the subject are that the title of the plaintiff in the present case is barred by the defendant's possession. There was a verdict and judgment for the de-

fendant accordingly, and the motion for a new trial was not made. *Vide* Eq. Ca. Abr., 9; 2 P. Wil., 582; 1 Wils., 134; Plow., 368 to 372; Stra., 556; 3 Bac. Ab., 655; L. Ray., 289; Co. Litt., 246 a, 259 a; 8 Rep., 100 b; Litt., 441; Cro. Jac., 101; 4 Term Rep., 310; Shep. Touch., 30; 4 Term 306, in a note; 2 Atk., 333; Co. Litt., 353 b.

NOTE.—The position that the number of the patents or grants, when they bear date on the same day, may be considered in ascertaining their priority, seems to have been doubted by WILLIAMS, J., in *Foreman v. Tyson, post*, 496, though HAYWOOD, J., still continued of the opinion that the number should have some weight in the absence of other evidence of priority. This opinion of HAYWOOD, J., appears to have been approved in *Riddick v. Legget*, 7 N. C., 539, though in that case the grant of the lowest number was made to yield to a strong circumstance against it, to wit, that the grant called for the lands mentioned in the other grant. Upon the question, what kind of possession is necessary to give title under the act of limitations, see the note to *Strudwick v. Shaw, ante*, 5, and the case there referred to; and particularly, as to the commencement of the possession being *bona fide*, see *Riddick v. Legget* cited above, and *McRee v. Alexander*, 10 N. C., 322. That where the statute of limitations once begins to run, nothing will impede its progress, is now well settled. See *Anonymous, post*, 416; *Cobham v. Niel*, 3 N. C., 5; *Pearce v. House*, 4 N. C., 722.

Cited: Tyrrell v. Mooney, 5 N. C., 402; *Green v. Harman*, 15 N. C., 161; *Burton v. Carruth*, 18 N. C., 3; *Loftin v. Cobb*, 46 N. C., 410, 411; *Morris v. Hayes*, 47 N. C., 96; *Williams v. Wallace*, 78 N. C., 357; *Frisbie v. Marshall*, 122 N. C., 764; *Dobbins v. Dobbins*, 141 N. C., 219.

DEN ON THE DEMISE OF HENRY YOUNG v. JAMES ERWIN.

Where the demise in an ejectment is about to expire before a trial can be had, the plaintiff will be permitted to amend, by extending the term.

EJECTMENT, brought several years ago, and hath depended so long that the demise laid in the declarations will expire before the next term, there being a continuance at this.

Mr. Taylor moved a few days ago, on the Court granting the continuance, to be at liberty to enlarge the demise so as to extend it beyond the next term, or to the time when a trial will probably be had; and the Court were about to allow the motion, when the counsel for the defendant insisted that the enlargement moved for could not be admitted, and prayed time for a few days to prepare himself to show it. Where-

upon the Court delayed a decision upon the motion for a few days; and now on the day appointed for the further consideration of Mr. Taylor's motion, Moore, counsel for the defendant, showed cause against it.

E contra, argued by Mr. Taylor.

The history of amendments at the common law, alluded to by *Chief Justice Holt* in one of the Reports cited on the other side, proves the influence a particular cause may have in forming the decisions of the day. He refused a motion not because it was unreasonable, but as it tended to the alteration of a record, and "because he had no mind to build a new clock-house." Edward I, after he had been some time in the French dominions, returned to England and, as it is supposed, wanting money, found it convenient to prosecute his judges. His pretext was that they had altered their records. They were ruined by the enormous fines set upon them, and *Chief Justice Hingham* among the rest; and it was afterwards a tradition that with this fine a clock-house was built, from which the clock might be heard into Westminster (328) Hall. This gave such a shock to the succeeding judges that though formerly the judges would alter their records so as to make them speak truth, they would now no longer touch a record after it was made up; and this rule, really contrary to the common law, was so strictly adhered to that it has been the work of many Parliaments and ages, by a great variety of statutes allowing amendments and authorizing judges to get over nice exceptions, to get the better of it, although it had its origin not in any principle of the common law, but in the arbitrary exercise of royal power, actuated by the avidity of the princely office. Can any example more strongly evince the propriety of reëxamining former decisions, and trying them by common-law maxims? Can any example more satisfactorily prove that the modern decisions, where variant from the old, are worthy of our consideration? Neither the old nor the modern decisions are the very common law itself; they only profess to ascertain what it is. It is more reasonable to be governed by decisions made upon an examination of all the prior cases, and of their reasons and grounds, compared with the maxims of the common law, the general principles of reason and justice, and assisted with all the new lights that are furnished in modern times, than adhere implicitly to the old decisions, as if they were the very common law itself—although, in fact, they are directly opposed to it.

PER CURIAM. Formerly, demises in declarations in ejectment were enlarged only by consent, and not otherwise. A different practice began

to prevail in the English courts in the latter part of the reign of George II, and hath continued hitherto. It very probably prevailed here, also. The first instance was in 21 George II., reported in Strange, 1272. A distinction was made about this time between the cases where judgment had been given and where not. If it had been given, the record was made up and could not be altered. Afterwards, a distinction was made between the cases where the motion to enlarge was made pending the ejectment, and where after. In the latter case it could not be altered, for that would be to make a new term, and not to enlarge the old. These distinctions seem to have been adopted to get at an (330) amendment without infringing former decisions, some of which had decided that the enlargement could not be made where the motion was after the term expired. However, since these distinctions prevailed, there have been other decisions in favor of enlarging the demise without regarding the former rules. In the first of George III., the demise was laid to be in 33 George III. After verdict, the Court, upon argument, allowed the demise to be amended. There the term was not commenced at the time of the trial. There was another case, Cowp., 841, where the demise was enlarged after judgment. In 14 George III., the term was expired and allowed to be enlarged. 2 Bl. Rep., 940, 941. The Court there said an ejectment is the creature of the Court, and open to every equitable regulation for expediting the true justice of the case. These decisions were declarations of what the common law was long before our Revolution. They were most probably received here, and if only such decisions as took place before the Revolution are evidences of the common law under the act of 1778, still the amendment may be made. It seems highly proper, upon the reason of the thing, that amendments of this kind should be made. The demise is but a fiction; it is not real. The only question in ejectment is, Has the lessor such a title as can enable him to make such a lease as that stated in the declaration? If he has, he ought to recover. The term of the demise is immaterial. Whether the demise be for a longer or a shorter time, the party's title is in no wise altered or affected by that circumstance; and if in general such alterations ought to be made for expediting justice, there are very ample reasons why it should be made in the case now before the Court. This demise was laid to be of five years continuance, and by the delays of the Court that time is expired, or is likely to expire before the cause can be tried. The plaintiff had reason to expect his cause would be tried before the expiration of five years. He has been in no fault. It is not owing to him that the cause has not been tried. Shall he then be

turned round to begin his cause again? Surely, it would be the excess of injustice to say so. There are cases enough to warrant the amendment, and it will operate no hardship upon any one. Wherefore, let the demise be enlarged; and it was enlarged.

See *Faircloth v. Ingram, post*, 501.

Cited: Baxter v. Baxter, 48 N. C., 305.

(331)

McNAUGHTON'S EXECUTORS v. MOSELEY.

Quere. Whether nonsuit may be taken after verdict if moved for before verdict is recorded.

THE jury returned to give their verdict, and said they found for the defendant.

Mr. Hay, for the plaintiff, prayed, before the verdict was entered, that the plaintiff might be called and nonsuited.

Mr. Moore, for the defendant, said it could not be done after the jury had delivered their verdict, though before it was recorded.

HAYWOOD, J. I am very clear it may be done at any time before the verdict is recorded.

Mr. Moore, I am as clear it cannot be done, and I pray time to argue it and produce authorities.

PER CURIAM. Let the verdict be recorded, subject to be set aside if the defendant's counsel do not show that a nonsuit cannot be taken after the jury have said for whom they find.

The verdict was entered, and afterwards a new trial was moved for and granted for another cause.

NOTE BY REPORTER.—The plaintiff is demandable when a verdict is to be given. Co. Litt., 139, a; 3 Bl. Com., 376; in which latter book it is said: When the jury returned back to the bar, and before they deliver their verdict, the plaintiff in person, or by attorney, is bound to appear to answer the amercement; and if he does not appear, no verdict can be given. 5 Mo., 208. After a general verdict the Court will not suffer the plaintiff to discontinue his action. 2 H. 4, ch. 7, provides that plaintiff shall not be nonsuited after a verdict, though he might at the common law, if he did not like his damages.

2 H. P. C., 184, says it is the opinion of some books that the plaintiff may be nonsuited at the common law at any day of continuance before judgment, though that is altered by 2 H. 4, *ideo quaere*—What is the meaning of the words, "after verdict given?" Whether it can be said to be given before it is received by the Court and entered of record, previous to which stage the jury may retract or alter it; neither is it complete till the record of it be read over to them, and assented to as recorded.

ANONYMOUS.

Articles for the conveyance of land upon the payment of money will not create such a trust on the part of the plaintiff (at least before the money is paid) as to prevent his recovering in ejectment from the person to whom the articles were made.

EJECTMENT, upon the trial of which the plaintiff produced his deeds, and proved a clear title in himself. On the side of the defendant were produced articles for a sale of the land, signed by the plaintiff, in which it was agreed that the defendant, on payment of so much money, should receive a title from the plaintiff; and defendant's counsel said he could prove payment of the money.

It was denied on the side of the plaintiff that payment had been made, and the defendant's counsel stopped here without attempting to prove the payment. He argued that the plaintiff ought not to recover, for no man can recover against his own solemn deed, covenanting for further assurances or quiet enjoyment; and this agreement being under
(332) seal, is tantamount to such a deed. He cited Cowp., 597; *Edwards v. Bailey.*

E contra. It was argued that the only question now before the Court is whether or not the plaintiff has the legal title. He has shown his title at law, and what is shown on the part of defendant is not such a conveyance as will pass it out of him. It is not pretended that the writing produced can be brought under the denomination of any of those deeds that the law recognizes as a conveyance of title. Whether the defendant has an equitable title is not now necessary to be considered. This Court will not inquire into the equitable title of the defendant upon a trial in ejectment.

PER CURIAM. Let the jury give a verdict for the plaintiff, subject to the opinion of the Court upon a statement of the facts proved on the case.

This was consented to by the counsel on both sides; a verdict was given accordingly, and a statement made *ut supra.* Three or four days afterwards the Court gave judgment.

PER CURIAM. We have considered of this case, and the authorities relative to the point that was stirred in it. *Green v. Proctor,* 4 Burr., 2208, and Cowp., 597, cited at the bar upon the argument, go upon this ground: Where there is an absolute unconditional agreement by deed on the part of the plaintiff that the defendant shall enjoy the premises, he shall not be permitted to invalidate that deed by recovering against it. It is unreasonable that he should. When the deed is fairly executed, and cannot be impeached for fraud, it is evidence of good consideration passing from the defendant to the plaintiff, which makes the plaintiff a trustee of the legal title for the defendant, at least (333) during the time the contract is to last. In the present case there is no absolute unconditional agreement that the defendant shall have and enjoy the possession. He is to have a conveyance when he pays the money. This implies most strongly that he is not to have it before. There is another class of cases, however, into which those before cited seem to enter. They decide that a trustee shall not be permitted to recover in ejectment against his *cestui que trust,* and that a vendor of lands is a trustee for the vendee. One of these cases is reported in Cowp., 473. The reason the Court gives why they will not permit the plaintiff to recover is because to do that would only be to give the court of equity an opportunity of undoing all again by setting it right. Courts of law now take notice of these trusts to prevent delay and expense to the suitors by sending them to equity. Others of these cases reported in Doug., 776; *Durnford v. East.,* 735; but in these cases the rule is laid down to apply where the plaintiff is clearly a trustee, so circumstanced that a court of equity would decree a specific execution of the agreement. There he shall not recover; but if it be not clear, but doubtful, whether he be such a trustee or not, a court of law leaves that inquiry to the court that has proper cognizance of trusts, and will not take any notice of it upon a trial in ejectment. To say in a court of law that a trustee shall not recover in ejectment against his *cestui que trust* is going perhaps full far enough—perhaps further than the rules of the ancient common law would warrant. Had this rule, indeed, prevailed formerly at law, it is probable the court of equity would not now have been in possession of that jurisdiction, to which the delay and expense of an application has latterly induced courts of law to adopt the rule established by those decisions; and though perhaps were this a clear trust,

this Court, for the same reasons that weighed in these cases, might now adopt the same rule, yet we are of opinion this is not a case of a clear and undoubted trust. The vendor only becomes a trustee where the vendee has actually paid him the money. Here he has not paid the money; the nonpayment of the money is the cause of this action; the vendor by the express terms of the agreement is not obliged to make a conveyance until payment of the money. This is so far from being the case of a clear trust that it is rather clear the other way; and upon principles of common justice, we should not be warranted in saying the possession should be taken from the plaintiff, or denied to him,
(334) when his agreement evidently implies the contrary. Wherefore, let the plaintiff have judgment.

Judgment was entered for the plaintiff accordingly.

EXECUTORS OF DAVIS v. WILKINSON ET AL.

By the act of 1789, Rev., ch. 314, sec. 4, the surviving obligor and executors of the deceased may be sued jointly.

THIS suit was brought against the executors of a deceased joint undertaker to pay, and the survivor. There were several other suits on the docket of this Court thus circumstanced, being suspended by motions in arrest of judgment, and special cases, until a decision could be had upon some one of them.

The doubt arose upon the construction of the act of 1789, ch. 57, sec. 5: "And whereas it is a rule of common law that in case of the death of the joint obligor the debt can never survive against his heirs, executors or administrators, which rule frequently is injurious and oppressive to the surviving obligor or obligors; to remedy which, *Be it enacted,* That from and after the passing of this act, in case of the death of one or more joint obligor or obligors, the joint debt or contract shall and may survive against the heirs, executors or administrators of the deceased obligor or obligors, as well as against the survivor or survivors; and when all the obligors shall die, the debt or contract shall survive against the heirs, executors and administrators of all the said joint obligors.

Jones for the defendant: This act was made for the benefit of the obligee or creditor, as well as for that of the debtor. It was for the

benefit of the obligee that he should not be confined to the survivor, as he perhaps might be insolvent or not to be come at, but that he might resort also, if he chose to the executors of the deceased, who perhaps were solvent and within the reach of process. The old rule was frequently injurious to the surviving obligor where he was only a surety. The creditor was obliged in the first instance to take his remedy against him. The act meant to remedy these mischiefs by enabling the creditor to sue either the one or the other, at his election.

E contra. It was urged that the point now in controversy had (336) been settled at Salisbury, upon argument in *Brown v. Daniel Clary, ante,* 107, September Term, 1794.

Curia advisari. After a few days taken to consider, they gave judgment.

PER CURIAM. We have looked into the case cited at the bar the other day, decided at SALISBURY. It was a case decided upon argument by ASHE and WILLIAMS, JJ. We are satisfied with the reasons of that decision as given by WILLIAMS, J. Wherefore, let judgment be entered for the plaintiff; and it was entered accordingly.

Then the plaintiffs in all the other suits depending upon the decision of this point entered up their judgment also.

See *Brown v. Clary, ante,* 107.

Cited: Smith v. Fagan, 13 N. C., 302.

GLISSON v. EXECUTORS OF NEWTON.

Defendant had been awarded to pay plaintiff a certain sum, but at the day of payment, not having the money, he agreed with plaintiff to give more than 6 per cent for indulgence, and a bond was given for the principal sum, and the amount above the legal interest was paid partly in money and a note given for the balance. Upon an action on the bond, it was held that the transaction was usurious and the bond void.

DEBT upon bond, and the statute of usury pleaded.

Upon evidence it appeared that disputes existed between the plaintiff and defendant relative to a tract of land; that they agreed to submit these disputes to arbitration; that the arbitrators awarded Glisson to give possession of the land to Newton at a prefixed day, and that on the

same day Newton should pay £90 to Glisson. On the day appointed, Newton being unable to pay the money, proposed that Glisson should give time for payment, about eleven months longer; for that forbearance he would give a premium of $25, and, moreover, pay the legal interest. This proposal was accepted by Glisson. Whereupon, the bond in question was drawn, payable at a day about eleven months from the date, and Newton paid down $15, and gave a separate note for the balance of the $25.

Slade for the plaintiff: This was not usury to avoid the bond; usury could only be committed on the loan of money; and this was not a loan, but a giving a further day of payment for a sum already due from the defendant.

Sampson e contra: Where a man has my money in his hands,
(337) and I agree to give him day of payment for it, that is as much a loan, within the meaning of the act, as if I had actually advanced him that much money, and this seems to be admitted in one of the cases cited from Cowper.

PER CURIAM. We wish for time to consider of this question, and that a special verdict or statement of facts in some form may be made that will put it in our power to pass judgment hereafter, when we shall have had time to look over the authorities cited, as well as any others that may tend to throw light upon the subject. This was agreed to by the counsel, and a special verdict found, which stated the above facts. After some days taken to consider, the Court gave judgment.

PER CURIAM. We have considered of this case with attention, and have looked over the authorities upon the subject, as well those cited at the bar as also a case in 3 Term, 353, and other cases found in the different Reporters. We have, in fact, been averse to declaring this to be a case of usury within the act, because in that event the principal sum secured by this bond, which is a just debt, will be lost as well as the unlawful interest secured by the note; but the authorities in the books are too strong to be surmounted. Any shift or device whatsoever to take more than the interest allowed, and particularly the device of securing the principal and interest by distinct assurances, is incompetent
(338) to the purpose of taking the case out of the operation of the act.

If the contract itself is upon the whole face of it a contract to have a greater premium than the law allows, it is void, whether it remains a parol contract or becomes clothed with legal solemnities; as is also every security or assurance founded upon it, whether one only, or

more. This is the true meaning of the act. Without any adjudged case, we should be bound to decide in the same manner. Were the act to be evaded by so simple a contrivance as that of taking two securities, the one for principal, the other for the unlawful premium, it would answer no purpose whatever. The $13 received is above the rate allowed by law; and should we decide that the contract is not usurious, so as to avoid the bond, immediately the defendant may sue for the double value, upon the last clause of the act. Wherefore let judgment be for the defendant; and it was entered accordingly.

See *Carter v. Brand*, 1 N. C., 255.

EXECUTORS OF CRUDEN v. NEALE.

Plaintiff sued on a bond, and the plea, which was founded on section 101 of the act of 1777, ch. 2, stated in substance that plaintiff had removed from the State to avoid assisting in the war of the Revolution; that he had attached himself to the enemy, etc: *Held*, that if plaintiff was a citizen of this country, section 101, before referred to, is repealed as to him, by several acts of the State Legislature; and if he was not a citizen, but a British subject, then by article 4 of the treaty of peace, he is considered as an alien friend, and entitled to sue in our Courts.

THE plea, in substance, stated that the plaintiff in the year ..... removed himself from this State to avoid giving his assistance in the then war, carried on against the King of Great Britain, and attached himself to the enemy, etc., and the plea concluded with praying judgment whether he should be answered, etc. To this there was a demurrer and joinder.

Counsel for the plaintiff: It will not be denied, and is admitted by the pleadings, that the plaintiff previous to the Revolution resided in this country. After the establishment of the present form of government he can be considered but in one of these two lights: as one who refused to become a member of the new government, continuing his allegiance to the King of Great Britain, or as a citizen. When a change of government takes place, from a monarchial to a republican government, the old form is dissolved. Those who lived under it, and did not choose to become members of the new, had a right to refuse their allegiance to it, and to retire elsewhere. By being a part of the society

subject to the old government, they had not entered into any engagement to become subject to any new form the majority might think proper to adopt. That the majority shall prevail is a rule posterior to the formation of government, and results from it. It is not a rule binding upon mankind in their natural state. There, every man is independent of all laws, except those prescribed by nature. He is not (339) bound by any institutions formed by his fellowmen without his consent. The plaintiff here is not stated by the plea ever to have become a citizen or member of North Carolina. The fact is that he never was a citizen. Had that fact been stated, we should have replied to it. As he still remained a subject of the King of Great Britain, then although the intervention of war suspended his right to commence an action in our courts, that was but a temporary obstacle, ceasing with the war which caused it. His right revived when the war ended.

E contra. It was argued that section 101, Laws 1777, ch. 2, was intended to reach farther than the law of nations would of itself have extended. The disability to sue created by that would have ceased with the war. The Legislature intended that persons who had resided here, and been fostered and protected by the country, and who afterwards in the time of its distress ungratefully attached themselves to its enemy, should, as they separated themselves, remain so, unless in such special instances where, at a future day, the Legislature might be induced to make a special interference. With this view, the disabilities are to continue until the Legislature shall otherwise provide. All subsequent Legislatures have been of the same opinion; none of them have ever passed any act of repeal; this act is yet in force, unless repealed by the treaty of peace; but, in truth, the treaty does not repeal, but rather confirms it.

PER CURIAM. It is not stated in the plea, nor clearly admitted at the bar, whether the plaintiff was ever a citizen of this country, or only resided here, in the time of the formation of the new government. If he only resided here, and never became a citizen, he is to be considered as a British subject; and that perhaps may make his case very different from that of a citizen who attached himself to an enemy and took up arms against the country.

Counsel for the plaintiff: He never was a citizen; the counsel on the other side cannot say he was; the plea does not state him to have been a citizen at the time of his departure.

PER CURIAM. We will take time to consider of the plea, and give judgment some time before the end of the term.

After a few days they gave judgment: All persons in gen- (344) eral, as well foreigners as citizens, may come into this Court to recover rights withheld, and to obtain satisfaction for injuries done, unless where they are subject to some disability the law imposes. Foreigners are in general entitled to sue, unless a war exists between our country and theirs. Section 101, 1777, ch. 2, is certainly repealed as to all British subjects, by article 4 of the treaty, which is to be regarded as law paramount, the acts of any State Legislature to the contrary, until that treaty shall become suspended by the sovereign authority entrusted with the power to suspend it. Each department of Government empowered to do a sovereign act relative to the affairs of the Government must in doing that act establish what the whole people, and every State, must be bound by as done by competent authority. It is also repealed by 1787, ch. 1, declaring this article to be a part of the law of the land. As to British subjects, it is very much to be doubted whether the mere act of terminating the war by a treaty of peace did not repeal this clause. That restores them with regard to this country, to the condition of alien friends, and to all the rights belonging to that character, one of which is the right of commencing a prosecution. It is incompatible with a state of national friendship, and is a cause for war, if the citizens of another country are not allowed to sue for and obtain redress of wrongs in our courts. But however this may be, British subjects, by article 4 of the treaty, are to be entitled to recover their debts, and this they cannot do without instituting suits. *Quando aliquid conceditur, conceditur ut id, sine qua non pervenitur ad illud.* The plaintiff is not stated by the plea to have been a citizen; we cannot say he was, but say he was a citizen, the laws may suspend the right of suing for a certain time, or until a certain period, either to all the citizens with respect to certain cases, as was done in 1783, or to a description of citizens coming under particular circumstances, as citizens, for instance, who had notoriously joined the enemies of the country. It would have been equally impolitic to have suffered them to recover in the time of war, although they could not be arrested so as to be convicted of treason, as to have suffered a British subject to recover. The reason for excluding the latter applied with equal force to the exclusion of the former. The fact of joining the enemy, upon a plea in disability, might be ascertained by a jury as well as any other fact. This would not be ascertaining a fact for the purpose of punishing the party for his treason, but for the pur- (345) pose of excluding him for the present from our courts of justice,

in the same manner as the fact of being an alien enemy is found, and operates when found. This clause seems to have been made with a view to the war then carrying on, to prevent those inimical to us from getting into their possession any of the wealth of the country, which might enable them to fight us with more advantage. Considering it in this light, it would seem as if the clause itself should expire with the war, the terminating that being a providing otherwise within the words of the act, and that termination effected by those who were vested with power to do that act of sovereignty that was absolutely binding upon every State, notwithstanding any particular act of the State Legislature to the contrary remaining unrepealed by the State Legislature. But there are sundry acts of the Legislature which have repealed this clause with respect to the greater number of citizens who had fallen under its operation. By 1783, ch. 6, all manner of treasons, misprisions of treason, felony or misdemeanor, committed since 4 July, 1776, are pardoned and put in total oblivion; but that act is not to pardon or discharge, or give any benefit to persons who have taken commissions, or have been denominated officers, or acted as such, or to such as have attached themselves to the British and continued without the limits of the State, and returned within twelve months before the passing the act; and nothing in that act is to be so construed as to bar any citizen from his civil action for the recovery of debt or damages. By this act all the citizens of the State are pardoned all treasons and misdemeanors, except those who have borne offices in the enemy's service, or, having been in their service as private men, had not returned within twelve months before the passing the act. Now, if a disability to sue is inflicted as a punishment for attaching himself to the enemy, then the pardoning of that must of course take away the disability. *Quando subtollitur causa, subtollitur etiam effectus.* Then section 101 is repealed as to all citizens but those of the two descriptions mentioned in the act. By 1784, ch. 20, all persons who attached themselves to the enemy, or aided them in the prosecution of the war, are disabled to hold sundry offices specified in the act; and there is a proviso annexed that that act shall not be so construed as to permit the return to the State of any person who acted as an officer after being a resident of the State, or who had not submitted to the laws of
(346) the State before the ratification of the definitive treaty. The Legislature supposed, and therefore probably intended, that the general implication arising from this act would be that all persons therein described would be entitled to all the rights of citizens except those denied them in the act, and of course the right to return to this State, unless hindered by an express clause, which they have made as to officers only. If such general implication was intended, and is restrained only as to

officers, it follows that all other persons are restored to all the rights of citizenship except the right of being elected to certain offices; and then section 101 of 1777, ch. 2, is repealed as to all but those who had borne commissions in the enemy's service, and particularly as to one description of persons who were continued subjects to it by the act of 1783, namely, those who had attached themselves to the enemy and remained without the limits of the State, and had not returned twelve months before 18 April, 1783. To the same effect with the act of 1784 is the act of 1785, ch. 11. Supposing the plaintiff to have been a citizen who attached himself to the enemy, without having borne a commission in their service, or having borne a commission, to have submitted to the laws of the State before the ratification of the definitive treaty, he is entitled, upon the construction of all these acts, now to institute his suit; and this plea does not state either that he bore a commission or that he did not submit to the laws of the State before the ratification of the definitive treaty. It is unnecessary to consider how far the section in question is repealed by the termination of the war, independent of any particular acts of the Legislature, for if the plaintiff was a citizen, then make the worst of the case, and by the acts mentioned section 101 is repealed as to him, it not being pretended that he is to be distinguished by either of the disqualifying characters before mentioned. If he was a British subject, then his right to sue for antecedent debts is revived by article 4 of the treaty, and this is such a debt. Let the plea in abatement be overruled, and the defendant answer over.

There were several cases depending in this Court upon the same pleas, and upon this opinion of the Court being given, the pleas were withdrawn and the defendants pleaded in chief.

At Hillsboro, October, 1796, the first three causes on the argument docket were standing upon pleas in abatement, and demurrer thereto for the same cause, and the pleas were overruled (WILLIAMS and HAYWOOD, JJ.), without argument, upon the authority of the (347) foregoing decision. Also at Fayetteville, 1796, a client of Mr. Williams, who had joined the enemy in the time of the late war, and who had given notice of moving for a writ of error, was suspended by a plea in disability. That plea was now overruled, and he was set at liberty to proceed.

ANONYMOUS.

In a bill by a wife for alimony, it is most proper that the husband be held to bail at first; but if that has not been done, upon proper affidavits by the wife, the husband's property may be sequestered until he gives security for the performance of the decree.

A BILL for alimony was filed by the wife, and no security had been required of the husband. The bill had been served on him, and now an affidavit was made on the part of the wife, setting forth divers circumstances tending to show that he was preparing to remove himself and his property; and it was moved on her behalf that some person be appointed to take into possession so much of the property as would be sufficient to satisfy the decree the court would probably make, to be released on his giving security to perform the decree. This was urged upon the probability there was, as made out by the affidavit, that should the court only issue process to arrest him and hold him to bail, that he would keep out of the way till he had disposed of his property, and then abscond.

The plaintiff's counsel said that this was no new action; that the same had been done at Halifax, in *Barrow v. Barrow,* some years ago, where the Court ordered the property to be sequestered under that part of the act of 1782, ch. 11, where it is provided that during the dependence of the suit, at any time, the Court may require further security from a defendant, or, in failure thereof, make use of such personal process as was formerly used by the court of chancery held in this State, and incident to the chancery jurisdiction, and shall in all cases have power to order such process to enforce their sentences or decrees as have usually belonged to courts of chancery.

E contra. It was argued that the act empowers the court to require new security, or to issue a *ne exeat,* but not to interfere with his property, which is not to be touched until after the plaintiff hath established her claim and obtained a decree.

PER CURIAM. It would have been much better had he been held to bail at first. The answer denies, but faintly, some of the material charges in the bill. It is possible she may be entitled to a decree. The affidavit shows he is probably devising means to defeat the decree when it shall be given, and that he is about to abscond. Shall we sit still and see him take his measures to defeat the decree, if any should be given, and not take any steps to prevent it? The Court will surely do something to secure the complainant the benefit of any decree that may hereafter be given in her favor. The common process of a *ne exeat* or *capias* to arrest and hold to bail, it is said, and indeed it is very prob-

able, will not answer the purpose. Should his property be seized under the order moved for, he may be restored to the possession of it again by giving security to perform the decree. All the difference between this sequestration and that used in the English courts is that this is more speedy than theirs, where there must first be a sergeant at arms, and a return, etc., a practice not always competent here to effect the purpose of justice, because of our local situation. The practice of this Court was decided to be according to the present motion, two or three years ago at Halifax, in *Barrow v. Barrow,* by ASHE and WILLIAMS, JJ. They knew what the practice was in our court of chancery before the Revolution, and probably grounded that order upon the clause cited from the act of 1782. We think, therefore, that upon the strength of that precedent the present motion should be allowed.

The Court then inquired into the amount of the defendant's fortune, and ordered him to give security for the performance of the decree, in the sum of £1,000, and, until he did this, that his property to that amount should be sequestered by a person named by them for that purpose, and ordered a writ to issue accordingly.

NOTE.—*Aliter* where there is only a suggestion that the husband is wasting his property. *Spiller v. Spiller, post,* 482.

SMITH AND OTHERS v. ESTES.

Practice in taking references by master in equity.

THIS cause had been referred to the master to report upon and state the amount; he had given notice to Estes of the time of taking the report, but had not actually given any notice to Smith. A time (349) had been talked of by the master, which Smith said did not suit him, he being then obliged to attend the General Assembly on public business. However, in his absence, the master proceeded *ex parte,* and made a report. All this was disclosed to the court by affidavit, in support of a motion for setting aside the report. It was insisted in opposition to the motion that Smith should have made his exceptions to it in due time, and not at this late period, by way of affidavit, taken *ex parte,* and introduced suddenly.

PER CURIAM. By the practice established here since the creation of courts of equity, in 1782, when it is referred to the master to take an

account, he, at the instance of either party, must issue a notice appointing a day for attendance. This notice must be served by the party procuring it. If the party cited does not appear on the day appointed, he shall not proceed to take the account in his absence; for perhaps he is sick or prevented by some unavoidable accident, or has not been able to prepare himself to take the account. But, then, a second notice appointing another day shall be issued and served in like manner; and then, if the party noticed fail to appear, the account shall be taken *ex parte*. In the present instance this practice was not observed, and therefore the report must be set aside; and this is the more proper as the time appointed by the master was known to be inconvenient for Mr. Smith, and as he had not been actually noticed at all. Where a report is regularly taken, but the items of the account are improperly allowed or disallowed by the master, exceptions filed to the report are proper, but where the master proceeds irregularly to take the account, as in the present instance, the objection goes to the whole report, and may be made out and supported by affidavit, as has been done in the present case.

NOTE.—Upon the subject of "reference to master and report," see *Nash v. Taylor*, 3 N. C., 125; *Anonymous, ibid.*, 157; *Smith v. Estes, ibid.*, 156; *Smith v. Mallet, ibid.*, 182; *Thompson v. O'Daniel*, and *Jeffreys v. Yarborough*, 9 N. C., 307.

RULE AS TO TAKING DEPOSITIONS.

PER CURIAM. It is ordered that the following hereafter be the rule with respect to depositions:

When either party has filed his depositions, he shall apply to the master for a notice, who shall issue one which shall be served a convenient time before the day appointed by the notice, on the opposite party; and on that day the master shall examine the sufficiency of the notices upon which the depositions were taken, and the regularity
(350) of taking them; and such objections against the reading the depositions at the hearing as the party can make shall be considered by the master, and either allowed and overruled by him, subject, however, by appeal of either party to be brought before the Court at the ensuing term. In case of overruling the objection, and no appeal, the depositions shall be considered to have been properly taken, and shall be read at the hearing, and no objection shall be then allowed. If the objection

shall be allowed by the master, and no appeal, the deposition shall be suppressed and not allowed to be offered at the hearing. If these precautions, however, are not taken, then the depositions are liable to objection at the hearing, as before the making of this order.

KENON'S EXECUTORS v. WILLIAMSON, MORRIS ET AL.

An injunction against a judgment at law had been dissolved, and upon the coming out of the execution, the defendants at law exhibited their bill, praying a reconsideration of the sentence of dissolution, and an injunction in the meantime, against the execution. This injunction was granted by a judge in vacation, and the bill was filed and an answer was put in. This is not a bill of review, but the Court will support it as a petition for a rehearing.

ONE question in this case was whether the proceeding upon which an injunction had been issued was to be considered as a bill of review or not. The plaintiffs at law had obtained judgment upon the bond of the defendants for a large sum of money, conditioned to indemnify them against the creditors of the company of which the testator had been a partner. The defendants had obtained an injunction against that judgment, and there had been a dissolution of the injunction as to part of the judgment, upon coming in of the answer, and a report made by the master. In this report it was stated that two debts, one in Virginia, the other in this State, not yet recovered by the creditors, were debs to which that company were liable. As to them the injunction was continued. At a following term the plaintiffs at law produced the records of recoveries in these two suits, and moved for a further dissolution to the amount of those judgments, being about £1,104. Upon the motion, the Court took time to advise, and afterwards dissolved the injunction as to the amount of these judgments. This dissolution took place in the vacation, to be entered as of the preceding term; and afterwards, in the same vacation, upon coming out of the execution, the defendants at law exhibited the bill in question, stating their nonliability to indemnify the plaintiffs at law against these debts by the terms of the contract, these being debts not contracted by that company, but by the deceased as partner of a company under another firm, of which company Williamson was also a partner, praying a reconsideration of the latter sentence of dissolution, and an injunction in the meantime

(351) against the execution at law. This injunction was granted as prayed for, by a judge in vacation, and the bill filed and an answer put in.

The counsel for the plaintiffs at law now moved for a dissolution of the latter injunction, and that the bill upon which it was granted might be now taken into consideration and disposed of. As a bill of review, he said, it was certainly improper and without precedent. A bill of review could not be granted without the leave of the Court, and when granted, it did not operate as a suspension of the former decree.

E contra. It was argued that no objection could lie to this bill as a bill of review, except that of the former cause being not yet decided, as to which the practice here had not been precisely settled, and he wished the opinion of the Court upon it. It seemed upon principles to be extremely proper, where an interlocutory decree had been hastily or improvidently made, injurious to either party, especially in a case where it was to be attended with a seizure and sale of property, as in the present case, where the execution is to issue immediately for so large a sum, there should be some way of setting it right. He (352) could not see why an injunction to stop proceedings till a reëxamination of the mistake complained of took place, should not be as proper as any other mode. But it is immaterial by what name this instrument may be called. Let it have some other name than that of a bill of review. We know the object of it; it is to be relieved against the injustice resulting to the defendants at law by the last dissolution. In whatever way we can arrive at a reconsideration of the sentence, we shall be satisfied.

PER CURIAM. A bill of review lies only upon a final decree enrolled. Before it is finally pronounced and recorded, any mistakes may be rectified by a rehearing granted upon a petition for that purpose, stating wherein the injustice is likely to happen. A bill of review is always granted by the permission of the Court, given either in one form or another. If it be grounded upon new matter discovered since the hearing, that is exhibited to the Court by way of petition for a bill of review; and the allegations of the petition are supported by affi- (353) davits; and upon these the Court decides whether it be proper to allow a bill of review. If it be grounded upon error apparent in the proceedings, then the bill is filed without any petition; but the defendant pleads the decree in bar, and demurs to the opening the enrollment of it; and then the Court, before they can dispose of the demurrer, are necessarily obliged to look into the decree and see whether there is any such error as makes it proper to overrule the demurrer. If

there is no such error, they allow the demurrer; if othewise, they overrule it, and open the enrollment. Here is the consent of the Court before it can be laid open. When a bill of review is allowed, it does not operate as a supersedeas to the decree, and nothing in the nature of a supersedeas should issue. This was so decided at Fayetteville, as the counsel has mentioned, in April, 1795, upon consideration.

The bill of review must be grounded either upon new matter discovered since the hearing, which the party therefore could not use at the time of hearing, and which in the judgment of the Court would have caused a different decree from what is made, or for error apparent. In the present case the objection now urged might have been urged at the hearing. The objection is that these debts are not the debts of the company against which the defendants at law were bound to indemnify the plaintiffs at law; and for proof of this they refer to a comparison of the bonds with the words of the agreement. What was to hinder them from urging this matter at the time when the latter dissolution took place? Why did they not long ago except to that part of the report which states these bonds to be a part of the partnership debts not yet recovered by the creditors? That report was made up in their presence many terms ago; it was never excepted or objected against till this bill was filed. This, therefore, is not any new matter proper for a bill of review, even were the Court now to decide upon the propriety of granting a bill of review. The counsel, however, is willing to consider it as a petition for a rehearing, and, should it now be disallowed, that the injunction granted upon it shall stand dismissed. It must be in substance a petition for a rehearing, though it differs in form, and upon that ground we will hear it read, and decide upon it. It was then read, and the answer of the defendants also, by consent; and the Court directed the injunction granted upon it to be dissolved, the answer having stated precisely that these were debts due by the company; the defendants at law were bound to indemnify.

(354)

ANONYMOUS.

Practice as to judgment in an action for debt, when the obligation is made payable in a foreign or a depreciated currency.

THIS was a single bill for the payment of so many dollars. Plea, *Non est factum,* etc.

PER CURIAM (in their charge to the jury): In an action of debt, two things are recoverable, the numerical sum mentioned in the bond and damages for the detention of the debt. Where the currency in which judgment is to be given is equal sum for sum the money mentioned in the bond, the jury assess damages usually for the detention to the amount of the interest accrued, but they are not obliged to assess damages to the amount only. If upon inquiry, for instance, they find that one pound of the present currency of this country is not equal to one pound of the money payable by the obligation, whether this inequality be occasioned by depreciation or any other cause, and though the money mentioned in the obligation be not foreign money, they may in the assessment of damages increase them beyond the amount of the interest, so as to make the damages and principal equal in value to the principal and interest of the money mentioned in the bond.

The jury gave a verdict accordingly, and there was judgment accordingly.

NOTE BY REPORTER.—In another case occurring this same term, where the money mentioned in the bond was Spanish milled dollars, secured by a penalty and condition, the Court directed the value of the condition to be assessed, and gave judgment for the penalty, leaving the plaintiff to take out execution for the value assessed, if he thought proper, and the interest. There were several cases also of assumpsits for currency, more depreciated at the time of the contract than it is now; and according to the direction of the Court, the plaintiffs recovered only the real value in the present currency, the sums demanded being reduced one-sixth, twelve shillings having been equal to a dollar when the contracts were made, which is now only equal to ten. The practice for the two last circuits has been uniformly upon the same rules, and the cases have not been collected separately, because they are numerous, and the practice is now generally acknowledged and acquiesced in. It was urged in one of these cases that the jury cannot give a greater value to any coin specified in the act of 1783, ch. 4, sec. 3, than is there stated. But the Court denied that doctrine, and said the jury might assess the value of such coins by the act of 1777, ch. 2, sec. 24. The reason of fixing a value by 1783 was for the purpose of ascertaining how many pounds, according to the then ideal currency of North Carolina, were contained in any given contract for coined money; for want of which ascertainment, they were likely to bear different values in different parts of the State, and the creditor be liable to recover less at one place than another, when judgment was to be rendered in pounds, shillings, and pence in this ideal currency; for there was not actually any currency of North Carolina at that time, and it had not then changed, nor was it expected to change. A new currency of less value, however, has since appeared with which for the purposes of justice it becomes frequently necessary to compare those coins, and with the ideal currency before mentioned; and between this last currency and the other two, the
(355) act of 1783 has established no rule of exchange. We can readily know by the act of 1783 how many shillings of the old North Carolina currency a dollar is equal to, but it will not inform us how many shillings of the

new currency it represents; and of necessity the jury must ascertain this under the act of 1777. Were this construction not put upon the act, this absurdity would follow, that a contract for so much sterling would be left to the jury to assess the value of in our currency, upon evidence of the real difference of exchange; whereas, if the contract only mentioned so many guineas as were of the value of that sterling, the act of 1783 would decide the value, and allow a much less sum in currency than the sum in sterling money was equal to; and thus two sums precisely equal in value in all other countries, and dischargeable by the same number of guineas, would be dischargeable in this country by different sums of our currency. The like may be said of French, Spanish, or any other foreign money; and this could not be the meaning of the act of 1783.

See *Winslow v. Bloom*, *ante*, 217.

ANONYMOUS.

An administration granted in another State will not authorize the administrator to sue in the courts of this State.

IT was said in this case, by Mr. Moore, and not denied by any of the bar, that it had been decided in this Court a few terms ago that letters of administration granted in another state could not entitle the administrator to maintain a suit here. Though he said this question was reserved, and yet depended in Salisbury, in *Hillary Butts's Administrators v. Isaac Price*, 1 N. C., 289.

HAYWOOD, J. I was concerned in the case at Salisbury to support the affirmative of the proposition, and have taken much pains to inform myself of the law, and I think it is as the Court decided here.

Cited: Leake v. Gilchrist, 13 N. C., 81; *Morefield v. Harris*, 126 N. C., 627; *Hall v. R. R.*, 146 N. C., 346.

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MORGANTON—SEPTEMBER TERM, 1796

ENGLISH v. CAMP.

A deposition certified to have been taken on the day and in the county in South Carolina, as specified in the notice, but without stating the particular place, cannot be read.

THE counsel for the defendant offered to read a deposition, and proved the notice, which was that the deposition would be taken at a certain day and place, in a certain county in South Carolina. The deposition was certified to have been taken in the county, and on the day mentioned in the notice, but said nothing of the place where.

PER CURIAM. The deposition, though certified to have been taken in the proper county, might not have been taken at the place appointed by the notice, and for aught we know to the contrary, the adverse party may have gone to the place appointed on that day. Were we to allow of the reading of this deposition, we should establish a precedent which would put it in the power of a man to deprive his adversary of the benefit of cross-examination whenever he pleased. As to what the counsel urges, that we ought to presume the deposition to have been taken at the proper place unless the adverse party will show the contrary: how is he to get his witnesses from South Carolina to prove him to have been present on the day and place appointed by the notice? Or how is he to know, after having been at the place appointed where no deposition was taken, that the deposition had been taken at another place? He may not know of this until the deposition is produced on the trial, and then it is too late to prepare the necessary proof.

The deposition was rejected.

See *Alston v. Taylor, post,* 394; *McNaughton v. Lester, post,* 421.

Cited: Pursell v. Long, 52 N. C., 106.

DICKEY v. HOODENPILE.

In an ejectment, the first grant is the only thing to be inquired into, without any regard to the entry or survey.

EJECTMENT for 240 acres of land. Dickey claimed under a grant from the State, dated 10 September, 1778, and proved the land surveyed at the place mentioned in his declaration. Hoodenpile claimed under McDowell, who obtained a grant from the State, dated 7 August, 1787, which included the same land. McDowell had first entered this land. Dickey some time after entered his 250 acres on the middle fork of Cain River, but surveyed this tract of 240 acres on another prong of that river upon McDowell's entry; and the question was whether this grant was valid. It was argued for Hoodenpile that the act of 1777, ch. 1, sec. 9, declares void all grants otherwise obtained than that act directs, and that the entry-taker had not by his warrant, nor indeed could he, authorize the surveyor to survey those lands for Dickey, which he had not entered, to the prejudice of McDowell, who had entered them; and, consequently, that whatever the surveyor had done (359) in surveying these lands, and returning plats of them to the Secretary's office, had been done without authority, and otherwise than the act directs, and so was void, as were also all the proceedings subsequent to that period, the grant inclusive.

WILLIAMS, J. When a grant once issues for a tract of vacant land, it becomes the only evidence of title, and we cannot afterwards look further back than the grant. We must admit all antecedent proceedings to have been regular; otherwise we should introduce the practice of invalidating grants by parol testimony. The grant may be suspended and a trial had, where a claimant proceeds to survey and return plats of other land than those he has entered, to the prejudice of another who has entered them; and McDowell should have proceeded this way. As he has not done it, he has slipped his time, and cannot now object to the grant. It seems unjust that he should lose his land by the mistake of the surveyor, who has surveyed the lands entered by him for the lands entered at another place by Dickey, but Dickey by that mistake has lost the land he entered; for it is said that another person has since obtained a grant for it. It is possible that Mr. McDowell might obtain redress in a court of equity, but I am clearly of opinion he has no remedy in this Court. Our courts of law have uniformly decided that whoever obtains the first grant shall be the legal proprietor, with-

out any regard had to the first entry or survey, and, indeed, without regarding whether there was any entry or not. The Court will not go back to these circumstances.

HAYWOOD, J., was silent, having been concerned in the cause whilst at the bar. The plaintiff had a verdict and judgment.

See *Reynolds v. Flinn, ante,* 106.

ELLMORE v. MILLS.

A copy of a registered deed certified by the clerk of the county court in Virginia, who was certified by the Governor to be the clerk of that court, is admissible. Acts of the General Assembly of Virginia must be certified by the Secretary and not by the clerk of the House of Delegates. Notice to take a deposition at the house of John Archelaus Ellmore, but the deposition certified to have been taken at the house of John Ellmore: *Held,* good, as they will be presumed to be the names of the same person. The statute of limitations begins to run from the time the negroes came in the possession of the defendant, unless entrusted with them by the plaintiff for an indefinite time (for then the act will not begin to run till demand made), or unless the defendant removed himself so that the plaintiff could not find him to bring suit, or had the negroes without the knowledge of the plaintiff.

THE plaintiff offered to produce a registered copy of the deed which he said disposed of the negroes in question and limited them to the plaintiff. The copy was certified by the clerk of a county court in Virginia, and the Governor had certified that he was the clerk of that court.

PER CURIAM. This is well certified, though not in the mode prescribed by the act of Congress. That act is only affirmative, and does not abolish such modes of authentication as were used here before it passed, and this was the usual mode before that act; but the plaintiff must swear that he has not the original in his possession or power
(360) before he can give the copy in evidence.

In the further progress of the cause the plaintiff offered in evidence some acts of the General Assembly of Virginia, copies of which were certified by the clerk of the House of Delegates, and he was certified by the Governor to be the clerk of that House, and the proper officer to certify the proceedings of the Legislature.

PER CURIAM. The Secretary is the officer who has the keeping and is entrusted to make out copies of the acts of the Legislature. The clerk of the House of Delegates can only certify such proceedings as take place in the House of Delegates.

In the further progress of this cause the counsel for the plaintiff offered to read a deposition. The notice was that it would be taken in a certain county in the State of South Carolina, at the house of John Archelaus Ellmore; and the deposition was certified to have been taken in that State and county at the house of John Ellmore, and it was objected that the deposition was not taken at the place appointed by the notice, and so that the defendant had lost the benefit of cross-examination.

PER CURIAM. We will presume John Archelaus Ellmore and John Ellmore to be intended for the same person.

Another point in this case was whether the plaintiff was barred by the act of limitations. The negroes had been in possession of one Jordan, who claimed them as his own, from Christmas, 1785, when he brought them to this State and sold them to Mills, against whom no action was commenced till March, 1793.

PER CURIAM. The act of limitations began to run from the time the negroes came into the possession of the defendant, unless he was entrusted with them by the plaintiff for an indefinite time; for then the act will not begin to run till demand made, or unless the plaintiff can show that the defendant removed himself to such places where the plaintiff could not find him to institute his suit, or had the negroes without the knowledge of the plaintiff.

So defendant had a verdict, and there was judgment for him.

See *Berry v. Pullam, ante,* 16.

Cited: Pursell v. Long, 52 N. C., 106.

PORTER v. McCLURE.

The wife of a person interested in the event of the question, but not of the cause, is admissible as a witness.

THE defendant offered Mrs. Greenwood to prove that Hagar, the wench in question, was a sound and sensible negro. The point (361) in controversy was whether she was so or not, when McClure sold her to Porter and warranted her to be so. The husband of this witness had purchased the same negro of Porter and since sold her. It was objected that Mrs. Greenwood was incompetent, being interested in the event of the question; for if the negro was really an idiot, then the vendee of Greenwood may resort to him for selling an unsound negro. She is interested in maintaining the negro to have been a sensible one.

PER CURIAM. The true rule is, if the verdict in this cause may be given in evidence in another cause for or against the witness, then her testimony should not be received; otherwise, it may. Now, the verdict in this cause, to which Greenwood is no party, cannot possibly ever come to be given in evidence for or against him in any other cause to which he shall be a party; and, therefore, she is clearly a competent witness. Formerly there were some doubts whether a witness interested in the question could be received, and for some time the decisions were both ways; but it is lately settled in our courts that no interest but that in the event of the cause shall render a witness incompetent.

She was sworn and gave evidence.

See *Farrell v. Perry, ante,* 2.

MUSHROW & CO. v. GRAHAM.

Depositions of public officers may be taken and read when their absence is caused by official duty.

ENOCH SAWYER was the subscribing witness to the bond, and he was the collector of imposts for the district of Camden, and his deposition had been taken, and was now offered to be read.

PER CURIAM. It is the common practice to receive the depositions of all such public officers, the duties of whose offices oblige them to attend at a particular place for the discharge thereof. Let the deposition be read.

He proved the execution of the bond by Graham, but did not say that Graham, the defendant in this action, was the person who executed it.

PER CURIAM. You may identify the defendant by proof of his handwriting.

The plaintiff then proved the handwriting in which the obligor's name was subscribed to be the handwriting of Graham, the defendant, and he had a verdict and judgment.

ENGLAND v. WITHERSPOON.

A tender of a specific article (as a negro boy), where no particular place is appointed for delivery, is not sufficient, if only made at the house of the person who is bound to make it.

TENDER and refusal pleaded. The note when produced was for £100, payable or to be discharged by delivery of a likely negro of the age of 11 years, by a day certain. The evidence was that on (362) that day an agent of Witherspoon, by his direction, attended at his (Witherspoon's) house, with a likely negro of the age of 12 or 13.

PER CURIAM. It is not a good tender. When a specific article is to be delivered and no place appointed, the debtor must give notice of his readiness to pay on the day, and request the creditor to appoint a place where he will receive it; and on the day he must attend at the place appointed until sunset, to make the delivery, unless the creditor refuses or accepts before. Here no such request was made, nor was there any appointment of place; and the creditor could not know that he was ready to make the delivery at his own house; and, besides, had that been the place appointed, it does not appear that he attended till sunset, and that the creditor did not come.

The jury found against the plea, and the plaintiff had judgment.

NOTE 1 BY REPORTER.—In this case, Jones, Solicitor-General, alleged there had been many decisions in the lower courts establishing it as incumbent upon the creditor on the day appointed by the contract, where no place was mentioned, to demand the article at the house of the debtor; otherwise, he should not be allowed to support his action—the consequence of which is that the debtor need not request a place to be appointed, but a being ready at his own house would be sufficient. WILLIAMS, J., said there had been

such decisions founded upon proof that such was the general course of that species of trade that the contract concerned, and that the general practice of the country was such with respect to contracts of that nature; but that the general rule of law was as laid down *at supra.*

NOTE 2 BY REPORTER.—Mr. Jones is supported in what he said by *Armstead v. Abbalson*, 1 N. C., 29, decided at Edenton, 1791. There the plaintiff declared on a covenant to deliver tar and other articles to a certain amount; the defendant pleaded always ready, and the plaintiff was nonsuited for not proving a demand and refusal or neglect in the defendant. This decision may have been founded on such evidence as WILLIAMS, J., spoke of. If it was not, it seems to be directly against the rule laid down in Co. Litt., 210, b, and which is recognized as the true one in many other books.

See *Thompson v. Gaylord*, 3 N. C., 150.

AVERY v. MOORE'S EXECUTORS.

The action of trover will lie against executors for a conversion, in the lifetime of their testator, although the estate may not have been benefited by such conversion.

TROVER, and upon not guilty pleaded, a special verdict had been found, which now came on to be argued. It stated that Avery left the horse in question in the possession of James McCay; that two men came with a bill of sale and claimed him; that McCay refused to deliver him; that they then applied to Moore, who was a justice of the peace, to cause the horse to be delivered to them; that he swore them as to the horse being their property, and gave a written order for his delivery, which McCay disregarded; upon which Moore, in a passion, took hold of the bridle and delivered the horse to them himself, and they led him away. (363) Moore died, and Avery instituted this action against his executors.

WILLIAMS, J. We have decided in many instances that an action of trover will lie against executors, but that was in cases where it appeared the estate of the testator had been benefited by the conversion of the thing that was the subject of contest; as if a man take my horse and sell him, or kill my bullock or my sheep and eat him; here the estate of the testator is benefited; it is saved the expense of the purchase. But the decisions have never gone so far as to make the action supportable against executors in a case like the present, where the testator disposed of the property without receiving any benefit from it; yet no case has ever negatived the position that trover will lie even in such a case as this.

HAYWOOD, J. *Trott v. Hamlin* decides that an action will not lie against executors where the plea is not guilty. I am inclined to think that where it is a part of the judgment as formerly rendered, *quod defendens capiatur,* the action will not lie against executors. Judgments formerly concluded that the defendant either should be in *misericordia* or that he should be fined, *et quod capiatur pro fine;* and this was in the nature of a punishment to which executors were never liable. They succeed to the estate and become subject to such actions only as demand a satisfaction from that, not to the offenses and punishments due to their testators; and the judgment in the action of trover is not *quod capiatur.* 8 Re., 59 b. It was in substance only an action of property. If this position be true, the reason why an action will not lie against executors will not apply to this case. There have been many decisions in this country that the action of trover will lie against executors; and the reason they have gone upon is generally stated to be that the estate of the testator ought to be liable where it has been benefited by the conversion. The example is usually put of killing my bullock and eating him, or taking my bullock and selling him; but I can see no difference, in point of justice, between these examples and that of taking my bullock and giving him away so that the owner loses him. The injury to the owner is as great in the latter instance as in the former.

At the last Wilmington term the Court had such a case under consideration, and decided against the executors, and against *Hamly v. Trott,* upon the authority of the cases formerly decided in this country. One great reason of that decision was to prevent a (364) defect of justice; for where the property is tortiously taken and disposed of, or given away, as here, the action upon the case for an assumpsit will not lie against the executors, trespass will not lie against the executors, and if trover will not, the injured party is without redress, although it is evident some action of property should be maintainable. We will consider further of this case.

Afterwards, at Salisbury, during the sitting of the Court there the next term, WILLIAMS and HAYWOOD, JJ., certified that this action was maintainable against the executors, and directed the clerk to enter up judgment, and to issue execution thereupon.

See *McKinnie v. Oliphant, ante,* 4.

DAVISON v. MULL.

The plea of "surrender" by bail must state whether the surrender was made to the court or to the sheriff out of court, or it will be bad in form. Under our act of 1777, Rev., ch. 115, secs. 19, 20, the bail may surrender at any time before final judgment against him. The plea *puis darrein continuance* of the surrender may be refused by the Court in cases of hardship, unless the defendant will submit to the terms of paying costs. An appeal from the county to the Superior Court nullifies the judgment of the county court.

PLEA and demurrer, which stated that Mull, as sheriff, arrested a man upon a *capias ad respondendum,* and took no bail. Davison obtained judgment against the person arrested, and took out a *capias ad satisfaciendum,* which was returned *non est inventus;* he then took out a *sci. fa.* against Mull, as bail, in the county court; and after judgment upon the *sci. fa.* in the county court, Mull appealed to this Court; and after the suit had depended here some time, there was a plea *puis darrein continuance* put in by the defendant, which stated that the defendant in the original action had been surrendered, with an averment that he had lain in prison twelve months. The demurrer was special, and stated for cause that the plea did not set forth to whom the surrender was made, whether to the court or to the sheriff.

PER CURIAM. It is insisted by the plaintiff's counsel that our act intended to put bail upon the same footing here as in England by the rules of the common law, and there the condition of the recognizance was forfeited by a *non est inventus* returned to the *capias ad satisfaciendum;* for upon that return it appeared the defendant had neither paid the money nor surrendered himself to prison; but by the favor of the court the bail are dischargeable if they surrender before the return of the second *sci. fa.,* but that surrender must be made to the court.

It is very evident that our Legislature intended to allow to bail greater privileges than were allowed by the common law in English practice. Our law allows a surrender to the sheriff, and a surrender at any time before final judgment against the bail shall discharge them. 1777, ch. 2, secs. 19, 20, 79.

As to the judgment of the county court which has been rendered, that was not a final judgment. It was suspended, or rather nullified, by the appeal—so much so that there can never afterwards be any
(365) proceedings upon such judgment after it is appealed from.

Wherefore, as to the general question, whether bail may surrender under such circumstances, we are of opinion for the defendant.

It may, indeed, operate hardship in the case stated by the counsel, where a defendant comes in and is surrendered after the plaintiff has prosecuted the bail through the county court, at a great expense, into this Court; but then it is in the discretion of the Court whether they will receive a plea *puis darrein continuance;* and they may receive it upon the terms of the defendants paying all costs to that time, and the injustice spoken of by that means be avoided.

As to the form of the plea. Every plea should disclose all such circumstances as the law requires to make up a valid defense against the plaintiff's action, and the omission of any material circumstance, without which the matter pleaded would not be a good discharge in law, makes the plea invalid. Now the law requires the surrender to be made either in court or to the sheriff in the recess of the court; and this is material to be set forth, that the plaintiff may know how to reply, if false; for if it be alleged as a surrender in court, the replication is *nul tiel* record. If out of court, the fact is denied and referred to the decision of a jury. Unless it be set forth to whom the surrender was, it is impossible to know how to reply. Therefore, the plea is bad as to the form in which it is pleaded. The demurrer does not, as is contended, admit the fact of a surrender. A general demurrer admits the fact, and insists it is not sufficient in law for the purpose to which it is adduced; but where a fact if well pleaded might have been sufficient, but it is so pleaded that the other party cannot know how to controvert it, or, in other words, where the fact is improperly and informally pleaded, and the demurrer specially sets forth the cause thereof, it does not admit the fact, but refers the plea to the Court for illegality and informality. However, as the substance of this plea shows a good discharge, it is hard the party should be charged by mispleading. We will delay giving judgment for the present, and recommend to the parties an amendment of the pleadings, so that judgment may be given upon the merits. As to the two cases not yet pleaded to in this Court, the defendant may now plead, paying the costs up to this time.

Cited: Huggins v. Fonville, 14 N. C., 394.

O'NEAL v. OWENS.

An attachment bond is good without attestation. An attachment must issue, if the plaintiff makes the proper affidavit, whether it be true or not.

ATTACHMENT, and plea in abatement, that the attachment bond was unattested, and no suit could be brought upon it. Second, that
(366) the defendant was not about to remove, nor had shewn any symptoms of such disposition, but was at home at the time when the attachment was levied.

PER CURIAM. Although the defendant was not about to remove, if the plaintiff suspected it, so that in conscience he could swear the defendant was about to do so, he may take the oath, and it is the duty of the justice of peace to issue the attachment. If the defendant sustains damage thereby, he has remedy upon the attachment bond, or if the oath be false and malicious, he may indict for perjury; but the proceedings shall go on. This has been often decided. As to the bond being unattested, it was decided lately at Fayetteville that an action of debt will lie on an unattested bond; and as to the condition being only to pay, in case of failure, such costs and damages as shall accrue thereon: these are not the words prescribed by the act, but this variance is not pleaded. The only defect alleged by the plea is nonattestation; but had it pointed out the variance, it would not have been fatal, because the act allows all forms agreeing in substance with that prescribed in the act to be valid. Then what is the meaning of the words used in the condition, "damages thereon"? Surely, damages to accrue in or by this attachment; and for such damages relief may be had by a suit on this bond. But it is not necessary to give any opinion upon this point. Let the pleas be overruled.

A *respondeas ouster* was awarded.

See *Ingram v. Hall, ante*, 193.

CHAMBERS v. SMITH.

Any omission, neglect, or delay of the clerk, or any contrivance of the adverse party, or the improper conduct of the county court in granting an appeal where properly applied for, is sufficient to entitle the party to a *certiorari*, and a new trial will be immediately granted in the Court above.

Certiorari.

PER CURIAM. It is stated in the affidavit of Chambers that after the trial of the issue in this action in the county court he moved for an appeal, and afterwards, during the sitting of the court, he offered sufficient sureties for prosecuting the appeal with effect, but that the clerk being not ready with the bond, and telling him it would do as well to give the bond at the next county court, which happened before the sitting of the Superior Court, he retired; and at the next court he applied again, and was then told by the clerk it was too late. If this be a true statement he is entitled to a new trial in this Court, in the same manner as if the appeal had been regularly brought up.

The decisions have been uniform that after the party prays an appeal, and offers or gives sufficient sureties, and he is defeated of his appeal by the neglect, omission, or delay of the clerk, or by any contrivance of the adverse party, or by any improper conduct of the county court, as if they adjourn after the trial to prevent the party from applying for the appeal—in all such cases this Court will grant a *certiorari,* and order a trial here, without inquiring into the motives of the party (367) praying the appeal, or into the merits of his cause; for by the laws of the country he is entitled to his appeal whenever he thinks proper to crave it, and he ought not to be defeated of his privilege by the conduct of others; and we would now order the new trial his counsel prays for, but for the contrary affidavits which render it doubtful whether he did offer the sureties as stated in the affidavit. Wherefore let this cause lie over till the first day of next term, that the plaintiff may produce the affidavits of the sureties themselves who were offered, or such other affidavits as he may think proper.

See *Anonymous, ante,* 302.

Cited: Robertson v. Stone, post, 402; *Collins v. Nall,* 14 N. C., 226; *Elliott v. Holliday, id.,* 377; *McConnell v. Caldwell,* 51 N. C., 470; *Smith v. Abrams,* 90 N. C., 24.

ANONYMOUS.

Practice as to trial term when a *certiorari* has been granted.

Certiorari. This cause stood on the docket of causes for trial, and was said by the counsel for the plaintiff in the *certiorari* to have been obtained in open court; and he insisted that where a *certiorari* is so obtained the cause may be set down for trial without any further argument.

PER CURIAM. Writs of *certiorari* are granted either by a judge out of court or upon affidavit and rule to show cause in court, and sometimes, though irregularly, upon affidavit only in court. In the first instance the cause should be set down on the argument docket, and does not stand for trial until the court have expressly ordered a new trial to be had; and whilst on the argument docket it may be opposed by counter affidavits. Where granted upon affidavits and rule to show cause in court, it stands for trial without further argument. But when granted upon affidavits only, without a rule to show cause, it is in the same situation with a *certiorari* granted by a judge out of court. The adverse party must have an opportunity to show cause against it, and no new trial is to be had till after he has had a day in court, and fails to appear, or appears to it without effect.

NOTE.—*Vide Dawsey v. Davis, ante*, 280; *Reardon v. Guy*, 3 N. C., 245.

PERKINS v. BULLINGER.

Where a matter is properly determinable at law, and the law can give complete redress, equity will not interfere. Execution upon a judgment after a year and a day, and after death of the defendant, without any *scire facias* is irregular, and, if in the county court, may be avoided by writ of error, or, if it was in the Superior Court, by evidence in ejectment, if land was sold under it.

THE bill stated that Perkins, in 1784, purchased a tract of land of one Griffham, and had it regularly, conveyed to him and paid the pur-
(368) chase money; and seven or eight years afterwards, Bullinger having discovered that one Michael Delaney had a judgment against Griffham, purchased the same of him; that Griffham died, and that Bullinger, in the name of Delaney, without any *sci. fa.* against the heirs or executors, took out a *fi. fa.* and levied it on the lands purchased by Perkins, and caused them to be sold, and purchased them of the sheriff himself, and had them conveyed to him. And as to this part of the case, the bill prayed that the conveyance might be set aside and the deed decreed to be given up and canceled. It then stated the materiality of the testimony of some witnesses, and prayed that that testimony might be perpetuated. There was a demurrer to the first part of this bill, for that the matters therein set forth are properly determinable at law.

PER CURIAM. Where a matter is properly determinable at law, and the law can give complete relief, a court of equity will not interfere. It is not stated in this bill when Delaney's judgment was obtained. Suppose it to have been obtained before the sale to Perkins: the execution issued after a year and a day, and after the death of Griffham, without any *sci. fa.*, and therefore the execution is irregular and voidable, and may be avoided, if the judgment was in the county court, by writ of error, or, if in the Superior Court by taking advantage thereof in an ejectment, either as plaintiff or by way of defense. If Delaney's judgment was after the sale to Perkins, then the land could not be affected by any execution issued upon it, and the sheriff's sale is void. Indeed, it has been decided that a *fi. fa.* affects lands in this country but from the *teste*, and not from the judgment, and that the judgment only prevents a sale by the owner. According to that decision, it may be doubtful whether if this judgment of Delaney's had been regularly revived by *sci. fa.* against the heirs and terretenants, the lands in the hands of Perkins were liable to be affected, as the *fi. fa.* would then issue in consequence of a new judgment. However this may be, it is evident, as the present case is stated, that the complainant has remedy at law, and that there is no occasion for him to come into equity for any relief. Wherefore let the demurrer be allowed; and as to the other part of the bill, which seeks to perpetuate his testimony, as there is no objection made thereto, let the plaintiff have commissions to take depositions.

See *Glasgow v. Flowers, ante*, 233.

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WELCH v. WATKINS AND PICKETT.

A note was given by the plaintiff to Watkins for lands, which, it turned out, Watkins never had. Watkins cannot recover on the note, and as the note (being for the delivery of specific articles) was unnegotiable, Pickett is subject to the same objection.

THE bill stated that Watkins pretended to be possessed of lands on the Cumberland River, of good quality, and enticed the complainant to purchase 1,000 acres, for which the complainant gave a note to deliver a good wagon and team by such a day, Watkins at the same time giving his bond to make a title. Afterwards, Watkins was applied to for the title, but did not make it, and in fact was found to possess no land, and confessed he had not any there; but before this he had endorsed the note

to Pickett. Watkins failed to answer, and the bill was taken *pro confesso* as to him. Pickett answered, and insisted he had purchased the note for a valuable consideration. The bill further set forth that Pickett, in the name of Watkins, had obtained judgment upon the note for ——— pounds, and had received £180 and had afterwards taken out execution for the full amount of the judgment.

PER CURIAM. The bill states, and it is not denied, that the note was given for lands sold, to which the vendor cannot make a title. He cannot, therefore, in equity, demand payment of the money, and is not entitled to a recovery of it. In the next place, this note is not negotiable, and, therefore, Pickett stands in the same place as Watkins himself did with respect to the note, and all equitable defenses that might have been set up against it. It is immaterial to Welch whether he gave a valuable consideration for it or not to Watkins. Wherefore let the injunction be made perpetual.

Had the prayer of this bill extended far enough, we would have made Pickett refund the money he has received.

See *Jordan v. Black*, 6 N. C., 30.

Cited: King v. Lindsay, 38 N. C., 81.

MARTIN v. SPIER AND MONTGOMERY.

A and B settled accounts, and a balance of £47 was found due to B, and A signed a writing to that effect, which B assigned to a third person, who sued A and recovered judgment. A filed a bill for an injunction, setting forth errors in calculation, and stating that by the agreement of the parties the paper which he had signed was not to be deemed a promissory note. The answer denied all the parts of the bill but the errors. HAYWOOD, J., consented with WILLIAMS, J., that the injunction should be dissolved as to all but the errors. But HAYWOOD, J., said that it should be dissolved *in toto*, for the law would have admitted every defense which could be made on the instrument, as that it either was unnegotiable in its nature or the assignee had notice of the defense previous to the assignment. And if the assignee had not such notice, there could be no defense either at law or equity, where the instrument was negotiable.

INJUNCTION BILL, which stated that there had been mutual dealings between Martin and Spier, which they adjusted in 1780, at which time there was a balance of £10, and no more, due to Spier. That some

time afterwards, their dealings still continuing, they came to (370) another settlement, at which time Spier exhibited the articles which composed his former account, and did not make the last balance the first article in the new account, and that Spier promised, upon this latter settlement, if any errors, omissions, or miscalculations should appear on either side, the same should be rectified. The bill then stated several misentries in the account of Spier, making the sums charged amount to more than they were stated at in former accounts exhibited; and it also pointed out several errors by miscalculations, and stated several sums of money with which he ought to have been credited—all which errors, when rectified, changed the balance of accounts in his favor. The bill further stated that upon the last settlement there was a balance struck of £47 in favor of Spier, and a writing was drawn purporting that a settlement was made and that the balance appeared to be £47, and was signed by Martin; but it was not intended as a promissory note, and the parties agreed it should not be so considered. That the mistakes aforesaid were discovered after the signature of the writing, and that Montgomery, the other defendant, had notice of them previous to the assignment of the said writing to him. That afterwards Spier assigned the said writing to Montgomery, who sued Martin for the money mentioned in the note, and recovered a judgment, etc.

The answer denied all parts of the bill, except the errors in charging the sums of several articles higher than was stated in the account kept before the last settlement; as to which no answer was given.

WILLIAMS, J. I am of opinion the injunction should be dissolved as to all except the errors unanswered, and that the account should be referred to the master, who should report to next Court.

HAYWOOD, J. I am for dissolving *in toto,* not because I think the answer has denied all parts of the bill, but because the bill itself shows no sufficient cause for coming into this Court. After a verdict at law, a man may apply for relief; but then the case where it is proper for him to do so must be an uncommon one, and must be specially stated so as to show the cause there is for the interference of this Court; but the rule as to cases in general under which this comes, being not distinguished by any peculiarity of circumstances, is that where the complainant has complete relief at law, equity will not take any cognizance of his cause. This is the case of the complainant. If, as he states it, (371) the writing assigned to Montgomery was not a negotiable one, then it was liable in the hands of Montgomery, notwithstanding the assignment to every defense and objection that it was in the hands of Spier;

and at law he might have set up these defenses, and have lessened the damages by proving the errors and mistakes stated in the bill; or if the writing was negotiable, and passed into the hands of Montgomery with notice of the defense Martin intended to make against it, then, notwithstanding its negotiability, he might at law have defended himself by proving the notice Montgomery had of the defense intended, previous to his taking an assignment of the note; or, if the writing was a negotiable one, and passed to Montgomery without notice of the defense intended to be set up, then it was free from any such defense both in law and equity, and the bill ought not to be entertained.

It is true, a court of equity has a jurisdiction, in cases of account, concurrent with the courts of common law, even where at law the party complainant may have complete redress; yet the complainant must apply to the one or the other of these courts, and be content with the sentence they pass. He is not at liberty, first to sue or defend in a court of law, and after trying his fate there, apply to a court of equity. If he could not have completely defended himself without the aid of a court of equity, as if he wanted a discovery, he should have filed a bill for a discovery before the verdict had passed against him, and not have waited till after the trial, and then delayed the plaintiff at law by an application to this Court for an injunction. Were this allowable, every defendant would delay the plaintiff at law, and fend off his cause as long as possible, and afterwards have the benefit of his defense by getting an injunction and still longer delaying the plaintiff. I am not for going one step further in granting injunctions against verdicts at law than are prescribed by the rules of a court of equity as laid down in the books. Injunctions are a source of great delay to the plaintiffs, and of great expense to defendants, who are generally charged with the heavy expenses of a suit in equity, for no other purpose than that of obtaining a short respite for a few months from execution. I am for dissolving *in toto,* but as the Court are divided, I am willing, rather than no dissolution should take place, to dissolve except as to the errors in overcharging the articles mentioned in the bill.

It was dissolved accordingly, except as to those articles, and the account referred to the master to report upon at next term.

See *Black v. Bird, ante,* 273; *Welch v. Watkins, ante,* 369.

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AVERY v. BRUNCE.

After an injunction is dissolved, if plaintiff does not prosecute his action for two terms, the bill will be dismissed.

PER CURIAM. The rule is, where an injunction hath been obtained, and dissolved on hearing the answer of the defendant, and the plaintiff retains the bill, if he takes no steps towards preparing his cause for hearing in two terms after, the bill shall be dismissed for want of prosecution. In the present case, two terms have intervened since the dissolution of the injunction, and the complainant hath taken no steps by referring the cause, taking depositions, or otherwise, and therefore must be dismissed.

It was dismissed accordingly.

See *Anonymous, ante,* 162; *Anonymous, post,* 451; *Dawson v.* ———, 3 N. C., 296.

SALISBURY—SEPTEMBER TERM, 1796

HUGHES'S ADMINISTRATOR v. STOKES'S ADMINISTRATORS.

Where the wife acts as agent or servant of the husband, her admissions against his interest are admissible.

ASSUMPSIT for board and lodging of the intestate. It was proved that he had boarded with Hughes from August, 1785, to May, 1788, at which time Hughes became insane and incapable of managing his affairs. The keeping of the tavern and tavern books was, however, continued by Mrs. Hughes and in her name, and Stokes continued to board there till after May, 1788. On the part of the defendant it was offered in evidence that Mrs. Hughes had acknowledged these accounts to have been discharged, or nearly so. It was objected that the wife shall not be a witness for or against her husband, and her declarations against her husband's interest cannot be recited. To this rule there had been but one exception, and that was in a case where a wife had hired a nurse for her child, and agreed to pay so much per week. This was allowed to be given in evidence to charge the husband, because it was the proper business of the wife to make such kind of contracts for the husband. Strange, 527.

PER CURIAM. The wife in the present case acted as the agent or servant of the husband, and received his moneys. The business was carried

on by her, and her declarations should be admitted to discharge Stokes, upon the same principle it was admitted in the case cited from Strange.

The evidence was received.

TINDALL'S EXECUTORS v. JOHNSTON.

A note payable in tobacco is not negotiable, and being unnegotiable in its creation, it cannot be made so by any *ex post facto* circumstance.

CASE. Upon a note assigned to the testator in his lifetime, for £150 to be paid in tobacco inspected at the Cheraws, in South Carolina, at the market price.

PER CURIAM. Where the contract is such that it may be discharged in specific articles, it is not negotiable under the act of 1786, ch. 4, which makes such bonds negotiable as are for money only. It has been argued that the bond being for money, to be discharged by the delivery of tobacco at a certain day, and the tobacco being not then delivered, it thereby became a money bond only; the condition annexed, of its being dischargeable in tobacco, being for the benefit of the obligor. This is true;
(373) but, then, at the making of the bond, and until the day of payment, it was not negotiable; and when an instrument is not negotiable at the time of its creation, no *ex post facto* circumstance can make it otherwise—the obligor having not originally contracted to be liable to an assignment and its consequences.

The plaintiff was nonsuited.

See *Jamieson v. Farr, ante,* 182.

Cited: Peace v. Nailing, 16 N. C., 295.

UNIVERSITY OF NORTH CAROLINA v. JOHNSTON.

HAYWOOD, J., was of opinion that a State grant of lands which had been granted by Lord Granville, and which had escheated to the State, was void as not being unappropriated lands, and that this fact might be shown in the action of ejectment. But he reserved the question. A claimant by escheat may enter, and therefore may sustain ejectment. A corporation must make its leases under seal, but the lease which is stated in an ejectment by a corporation is not to be proved, and will be presumed a legal one.

EJECTMENT. Counsel for the University produced the registered copy of a grant from Lord Granville, dated some time in 1763, to one Mucklehenny, and proved that he left this country within a year or two after the date of the grant, intending to go to Ireland, and that he has not since been heard of, nor any heir of his. He also produced the act of 1789, ch. 21, sec. 2: "That all the property that has heretofore or shall hereafter escheat to the State shall be and is hereby vested in the said trustees for the use and benefit of the said university." On the other side was produced a grant from the State for the same lands, dated in 1780.

It was argued for the university that it would probably be objected on the part of the defendant that there were no escheat lands in North Carolina, escheat being a consequence of feudal tenure, one of the conditions of which was that when the heritable blood of the tenant failed through want of relations, or by corruption of blood, that the feud should fall back to the lord. It must be admitted that was the correct idea of escheat, yet it is to be observed that this word having been used by the Legislature so late as 1789, where they speak, too, of lands thereafter to escheat, must have been understood by them to represent some other idea than that of escheat according to its strict technical meaning. They intended the act should have some effect; and one sense in which this word is sometimes used even in the old books, is this: the accidental and unexpected falling of lands to the lord for want of heirs. Another sense is, when those who held of the king (or public) die leaving no heir, and the lands relapse *in fiscum*. Co. Litt., 13, a. In this sense it is used in the act, and signifies that the university shall be entitled to all such lands as have been once appropriated, but by some accident have been left without any legal proprietor—no matter by what means they came into this situation, whether by a dying without heirs or by becoming an alien to the Gov- (374) ernment, as was the case with many upon the adoption of a new form. If this interpretation be correct, it will lead us to another question, whether Mucklehenny be dead without heirs, or became an alien upon the declaration of independence. There is no positive evidence with respect to the first of these points, but the presumtive evidence is strong enough to warrant the jury in drawing such a conclusion. Where a man is absent a long time from the country, after going from it with an intention of returning, as if he go to sea and is not heard of in the course of six or seven years, it is usual in such cases to take probate of his will, grant letters of administration upon his estate, etc. He may be dead, and yet in such cases it may be utterly impossible to adduce any direct proof of his death, as suppose

the whole crew to be shipwrecked and drowned in the ocean. In the present case the owner has been absent upwards of thirty years, and no person claiming to be heir has appeared in all that time. This, also, is presumptive evidence sufficiently strong upon which to infer the fact that there are no heirs. It is proper here to remark that he was absent nine years or thereabout, from this country, before the commencement of the war; and if a space of six or seven years will raise these presumptions, then prior to 1776, when the declaration of independence took place, he was dead without heirs, and the land had escheated to Lord Granville, all whose proprietary rights came to this State by the State Constitution. In this view of the case it is apparent that the State was entitled to the land in question immediately upon the formation of the State Constitution, not as vacant lands, but as lands once appropriated, and of course never since subject to the laws and regulations respecting unappropriated land; and though the State may have granted these lands in 1780 to the defendants, yet that was a grant in which the State was deceived, or, more properly speaking, a grant issued by the officers of Government which they were not empowered by any law to issue. The officers are but the servants of the public, appointed for special ends, whose acts are only binding when within the limits prescribed to them by law. The grant is, therefore, void. It will be contended that the defendant has been in possession ever since 1780, a space of more than seven years; and this must be admitted. But does it not follow from thence that the *jus possessionis* which the State had was barred?

Nullum tempus occurrit populo has been a good general rule, (375) without exception till the act of 1791, ch. 15. From 1780, then, to the time of grant to the university in 1789, this act had not run; and since 1789, when the title of the university accrued, until the commencement of this action, seven years have not elapsed. So that there is no bar, and as the State grant of 1780 is void, there is nothing to hinder the plaintiff's recovery.

It was argued, *e contra,* that the State grant of 1780 was good, and had been so decided in a great number of cases, though granted for lands not strictly vacant within the meaning of the entry laws; for the State, having once granted, shall not be permitted in ejectment to say, nor shall any one claiming under the State be permitted to say, the grant issued erroneously or fraudulently or surreptitously, and is therefore void.

HAYWOOD, J. (WILLIAMS, J., absent): I am of opinion for the university as to all the points agitated at the bar, and for the reasons stated in the argument of the plaintiff's counsel. As to the grant of 1780, there have been many decisions that such grants shall be good until

avoided in a court of equity. I am of opinion, for my own part, that the grant is absolutely void *ab initio,* and that its invalidity may be shown upon a trial in ejectment. It was issued by the officers of the State without any authority for so doing, and is no more binding upon the State than if issued by any other person or persons not called Governor and Secretary. But let this point undergo further consideration and a decision that may settle the law. I will not oppose my opinion to that of adjudged cases.

The jury found for the university, subject to the opinion of the Court upon the question whether the grant of 1780, under the circumstances above stated, was a valid deed or not.

NOTE BY REPORTER.—Upon the trial of this cause it was objected that the action was not maintainable by the university, for two reasons: First, because the plaintiff in the ejectment must have the right of possession or right of entry, which is the same thing, and he who claims by escheat has not the *jus intrandi.* The keeping of possession by the defendant is a deforcement (3 Bl. Com., 173), and is not to be overturned by the mere entry of another, but only by the demandant's showing a better right in a course of law (3 Bl. Com., 179), and in such case he shall have a writ of escheat. 3 Bl. Com., 179. Second, the university being a corporation, can make no lease to try the title but under their corporate seal, by deed duly executed; and here there is no such lease.

HAYWOOD, J. (WILLIAMS absent): The same objections were made a few terms ago at New Bern, in a cause tried there. The objections, as I understood, were made by Mr. Wood, and the Court doubted, and took time till the next term, and then overruled them; and I concur with them in the propriety of doing so. The lord by escheat, according to circumstances, might sometimes enter, and sometimes was compelled to bring his writ of escheat; he was not always driven to a writ of escheat, as may be seen in 2 Bl. Com., (376) 245. When the possession was vacant, he might enter; but when the deceased had leased for life or otherwise, or conveyed in fee tail, and the reversion only escheated, then he could not enter, for the right of possession was in another, but must bring his writ of escheat. This observation reconciles all the books, and seems to me to be the true doctrine; and then there is no ground for the objection, as this case is circumstanced. *Vide* 3 Burr., 1301, 1303. As to the second objection, the general rule of law is that every lease by a corporation must be under seal, and must be set forth to be so; but then when a corporation brings an ejectment in its corporate capacity, and its lessee sets forth a demise, an ouster, etc., we will presume that lease to have been legally made, and no proof of it is necessary any more than in common cases; and that presumption extends to its being done by deed under seal, and therefore good. So that that objection fails, also. *Vide* 1 L. Ray., 136, *Partridge v. Ball;* Carth., 390; Esp. Term, 199; *Canterbury v. Wood.*

See *Reynolds v. Flinn, ante,* 106.

Cited: Strother v. Cathey, 5 N. C., 165.

Doubted: University v. Harrison, 90 N. C., 390.

——— v. BEATTY.

If a course and distance be called for in a deed, terminating at a natural boundary, *there* the line must terminate, whether it exceed or fall short of the distance mentioned in the deed. If a course and distance be called for, and there is no natural boundary, nor marked line, the course and distance will prevail; but if there be a marked line and corner variant from the course and distance, the marked line and corner must be pursued.

THIS action was brought to ascertain the boundary of the plaintiff's land. The question depended upon the true termination of the last line but one in the patent, that being the point from which the last line was drawn to the beginning. The last line but one from the maple, south 60, east ——— pole, to a hickory standing on the point of the island. The last line ran a certain course to the beginning. If the last line but one terminated where it intersects the bank of the island, the course from thence to the beginning was exactly the course of the last line as described in the patent; but then the distance of the last line but one would not be completed; there would be a considerable deficiency; neither is there any marked hickory at that place. If the last line but one be extended to the completion of the distance mentioned in the patent, it will run considerably into the island, which at the time of the survey for the plaintiff was appropriated land; but the distance mentioned in the patent would not extend to the termination of the marked line found in the island, and the last line drawn from the point where that distance was completed to the beginning would have intersected the small island in the river which the plaintiff claimed; but if from the termination of the marked line, then that island is included within the plaintiff's boundaries, and the last line in its course would touch the place where the hickory, marked as the corner at the point of the island, was said formerly to stand.

PER CURIAM (HAYWOOD, J., present). The beginning of the last line is not disputed. The only question is where it terminates, and where was the corner made for it. It is proven to have been
(377) made at the point of the island, very considerably out of the course of this line, and nearer to the beginning than any part of this line is. We must, in the first place, attend to the rules established by judicial determinations for the settlement of boundary cases, which are, that if a course and distance be called for, terminating at a natural boundary, as a swamp, island, mountain, or the like, there the line must terminate, whether it exceed or fall short of the distance expressed in the patent. If a course and distance be called for, and there is no marked

line nor natural boundary, that course and distance must be pursued, and the line must terminate where that distance in the course called for is completed: but if a course and distance be called for, and there be a marked line and corner variant from that course which is proven to be the line made by the surveyor as a boundary, then that marked line shall be pursued.

To examine the present case by these rules: This marked line will intersect the bank of the island before the distance be completed, and a line drawn from thence will exactly agree with the course of the last line mentioned in the patent, which will not be true with respect to any line drawn from either of the other two terminations; yet that line disagrees with the description in these particulars: it is not at the point of the island, there is no hickory, and the distance is not completed. If we pursue the marked line into the island, and stop at the completion of the distance mentioned in the patent, that point disagrees with the description in these particulars: it is not at the bank of the island, nor at any hickory, nor on the point of the island; neither will the last line drawn from thence be in the course mentioned in the patent. If we go to the end of the marked line, we enter upon appropriated land, and a line drawn from thence to the beginning will include many acres of this appropriated land; but if vacant land adjoin land appropriated, and the patentee by mistake include part of the appropriated land, he shall hold all the land within his boundaries that was not previously appropriated. Moreover, that point agrees with the description of the patent in more particulars than any of the other points will—the distance of the line leading to that point exceeds the length mentioned in the patent but a little; a line drawn from thence to the beginning will touch the place where the hickory stood; that place will be on the bank of the island, and also at the point of the island. The only circumstance in which it disagrees with the patent is that a line continued from thence to the beginning will not be in the course called for. By throwing away the appropriated land in the island, contained within the (378) angle formed by the intersection of the two last lines, or by drawing a line along the edge of the island from its point of intersection by the last line but one, to the point of the island where the hickory stood, we avoid what probably the surveyor intended to avoid, an interference with the appropriated land, and allow to the patentee all and no more than he was intended to have. Should we run from the beginning of the last line but one directly to the hickory at the point of the island, we leave the marked line, proven to be marked as a boundary, and leave out a part of the land intended for the patentee.

The Court, therefore, is of opinion that the marked line should be pursued till it strikes the island, and that from thence to the hickory, along the edge of the island, should be deemed another boundary, and the last line be drawn from thence to the beginning.

The jury found accordingly for the plaintiff.

NOTE BY REPORTER.—That the marked line really made as the boundary is to be followed rather than the course mentioned in the patent, where they happen to disagree, is a rule established by several cases formed upon the case of *Person v. Roundtree*, which is a leading case, and was thus: Roundtree entered a tract of land, lying in Granville County, on Shocco Creek, and ran the said tract out in following manner: Beginning at a tree on the bank of Shocco Creek, running south ——— poles to a corner, thence east ——— poles, to a corner, thence north ——— poles to a corner on the creek, thence up the creek to the beginning. By a mistake, either in the surveyor or in the Secretary who filled up the grant, the courses were reversed: Beginning at the creek at a tree, running north ——— poles to a corner, thence east, etc., placing the lands on the opposite side of the creek from that on which it was really surveyed, so that the grant did not cover any of the land surveyed. Roundtree settled on the land surveyed, which was afterwards entered by Person, who obtained a deed from Earl Granville and brought an ejectment against Roundtree for the premises. On the trial Roundtree proved the lines of the survey, and his having been in possession for some time, claiming the same under his grant. This case, after being several times argued by the counsel on both sides, was at length finally determined by the unanimous opinion of the Court, who decided that the mistake of the surveyor or Secretary who filled up the grant should not prejudice the defendant; and that the defendant was well entitled to the lands intended to be granted and which had been surveyed. And there was judgment for the defendant.

See *Bradford v. Hill, ante*, 22.

Cited: Cherry v. Slade, 7 N. C., 88; *Gause v. Perkins*, 47 N. C., 226; *Ernull v. Whitford*, 48 N. C., 477; *Tucker v. Satterthwaite*, 123 N. C., 529.

BROWN, MESSRS. CAMPBELL & CO. v. THE ADMINISTRATORS OF CRAIG AND CLEARY.

WILLIAMS, J.: When a person receives evidences of debt from his debtor for the purpose of collecting the money, and applying it to the credit of his debtor, he is bound to the same degree of diligence, in attempting to procure payment, and in giving notice of nonpayment, though such evidences of debt be not negotiable, as if they were negotiable, and had been en-

dorsed. But per HAYWOOD, J., the creditor would not be liable for any loss in such case unless the debtor could show that the loss happened by his (the creditor's) negligence.

CASE. For goods, wares and merchandise sold and delivered.

Upon the trial the plaintiffs proved their case sufficiently. On the part of the defendants it was proven that they delivered to Brown some bonds and accounts due to them, the defendants, from per- (379) sons resident in South Carolina, where Brown lived; and he gave them a writing purporting that these debts, when collected, should be passed to their credit. Some of the accounts were returned, but one account and some of the bonds had been sued upon in South Carolina, and judgments obtained, and *nulla bona* returned to the executions. One of them had been sued upon, and the record proved it to have been proceeded upon for some time, and up to the time when by another record it was proven that the defendant had been attainted of a capital offense and hanged; but none of these suits had been instituted till after the expiration of a year from the receipt of the papers by Brown. None of these bonds or accounts were endorsed.

WILLIAMS, J. (after argument by Duffy for the plaintiffs, and Henderson for the defendants): Where a creditor receives papers that are evidences of debts due to the debtor, to be passed to the credit of the debtor when the money due upon them shall be received, the creditor is bound to use all the same diligence to procure payment, and in giving notice to his debtor of nonpayment, as if the papers received were actually negotiable in their nature, and endorsed. This is proved by *Chamberlyn v. Delarive,* cited at the bar from 2 Wils., 353. And as it has been determined in our courts that a year shall be the longest time allowed for the giving of this notice, in a case decided at Morganton, there is great reason why a person who receives instruments not negotiable should be bound to give notice in reasonable time, and return the papers, since until the notice given, and the papers returned, the person who passed them has it not in his power to institute suits for the recovery of the moneys due upon them; and for want of such notice and return of papers he may lose his debt entirely.

HAYWOOD, J. I do not like to give my opinion in this cause, having been concerned in it whilst at the bar; but I cannot agree with WILLIAMS, J., respecting the law of this case. The rules respecting negotiable instruments are the creatures of commerce. They depend entirely on the custom of merchants, which has applied them for the convenience of commerce to certain commercial instruments only. None but such instruments as are the subject of this custom are liable to these rules.

(380) With respect to bills of exchange or the like, the holder of the paper must give notice in reasonable time of nonpayment to the endorser, or he must prove on the trial that the endorser or drawer had suffered no loss for want of notice; because when a man takes a negotiable paper by endorsement, the custom raises a contract on his part to give reasonable notice of nonpayment; but if the paper he takes is not negotiable, the custom, being not made to govern such transactions, raises no contract at all concerning it, and there it is regulated by the principles of common justice only. The papers may be returned to the passer of them at any time. The receiving of them by the creditor is not any discharge of the debtor. Salk., 286. But if he has been so negligent after receiving the papers as that thereby a loss has happened, which by using common and ordinary diligence he might have prevented, and which must fall either upon himself or the passer of the paper, then the passer of the paper by proving that circumstance shall throw the loss upon the receiver of them, justice requiring that he by whose negligence the loss has happened, shall bear it; but in this case the defendants have not proved that the debtors in these papers were solvent at the time of the reception of them, and for some time after, and are now insolvent, nor any other circumstance to exempt them from taking back the papers. They have not proven any loss in consequence of any neglect in the holder, without which, or the proof of some equivalent circumstance, I am of opinion they cannot compel Brown to take them in payment. (*Vide* Salk., 131; 6 Mo., 81.)

The jury found for the plaintiffs, and assessed damages to £900.

Henderson, for the defendants, moved for a new trial on account of the misdirection of HAYWOOD, J., and had a rule to show cause.

And upon the argument for the new trial he cited 1 Term Rep., 405, 714; 4 Term Rep., 713, where it is laid down that in case of bills of exchange the payee must give notice of nonacceptance to the drawer in reasonable time, or must prove that no loss could happen to the drawer for want of notice, by proving there were no effects of his in the hands of the drawee. These authorities were cited to overturn that part of the charge to the jury which stated that the defendants were bound to take back the papers, unless he could prove a loss to have happened by the negligence of Brown, the holder, and were intended to establish the reverse of that proposition, namely, that Brown must keep the papers as payment, unless he could prove the insolvency of the debtors at the time of their reception, or before he could possibly recover of them.

Counsel for the defendants argued that though the papers (381) in question were not endorsed nor negotiable, yet, having been

received by Brown for the purpose of collecting the moneys due upon them, which were when collected to be applied to his own use, and credited to the defendants, that they were in all respects subject to the same rules of law as if they actually were bills of exchange and negotiable by endorsement. And of this opinion was WILLIAMS, J., clearly; and he was for granting a new trial. HAYWOOD, J., continued to be still of his former opinion, but declined opposing the new trial, having been formerly concerned as counsel for the plaintiffs. A new trial was granted accordingly; and at the next term, in March, 1797, the plaintiff's witness being not in court when the cause was called, he suffered a nonsuit.

See the next case, *Alston v. Taylor*.

HILLSBORO—OCTOBER TERM, 1796

ALSTON v. TAYLOR.

WILLIAMS, J., inclined to change the opinion expressed in the preceding case of *Brown v. Clary*, and to hold that unnegotiable paper, though endorsed, does not bind to the same diligence as negotiable instruments. Bonds made in Virginia and assignable by the laws of that State, but not assignable by our laws, must be subject to our laws when the contract of assignment is made in this State. A deposition expressed to have been taken at the house of Manning, at Halifax (Va.) courthouse, when the notice was to take it at Halifax Courthouse, was rejected, although it was proved that Manning's house stood only about 80 yards from the courthouse. The receipt of an attorney, now deceased, is admissible to prove the time when bonds were put into his hands for collection. A record of a court, certified properly, except a want of the seal of the court, is not admissible, unless it be certified that the court had no seal.

THE declaration stated a count for money had and received to the use of the plaintiff; another for money laid out and expended for the use of the defendant; another for goods, wares and merchandise sold and delivered; and another special count as follows, to wit: And whereas, also, the said Edmund (Taylor) was indebted to one John Henderson in the sum of £1,650, the said Edmund, the day and year aforesaid, in the county and district aforesaid, did undertake and promise the said Lemuel (Alston) that if the said Lemuel would pay and satisfy the said John

the sum of money last aforesaid, so that he, the said Edmund, should be exonerated and discharged of and from the same debts by him so owing to said John, that he, the said Edmund, in consideration thereof, would well and truly repay him, the said Lemuel, the sums of money so by him to be paid to the said John, and would for that purpose empower and authorize him, the said Lemuel, to ask, demand, and sue for at law, in the name of him, the said Edmund, sundry debts due and owing to him, Edmund by one John Lewis, Jr., at the costs of him, Edmund; and the money when obtained by him, Lemuel, to be applied towards the repayment and satisfaction of him, Lemuel; and the said Lemuel avers that he hath paid the said Henderson the sum of £1,650 for and on account of said Edmund, and hath procured him, Edmund, to be
(382) discharged and exonerated from the same, and hath in fact used due diligence to recover the moneys due and owing by the said John Lewis, Jr., to the said Edmund; and hath for that purpose brought suits at law, and hath expended in the necessary support thereof, and for his necessary expenses in attending thereon, and in endeavoring to procure payment as aforesaid from said Lewis, the sum of £200, but hath not been able to obtain any payment or satisfaction from said Lewis: all of which the said Edmund afterwards, to wit, on 20 October, 1792, in Granville County aforesaid, had notice; and was then and there, to wit, the day and place last aforesaid, requested by the said Lemuel to pay and satisfy him the money paid to said Henderson by him, Lemuel, at the request of him, Edmund, as aforesaid, and for the costs and expenses aforesaid of him, Lemuel, laid out and expended as aforesaid in endeavoring to recover and collect the debts due to said Edmund by John Lewis as aforesaid. Nevertheless, etc.

To this declaration the defendant pleaded *non assumpsit,* and the cause now came on to be tried.

The plaintiff produced three several bonds, payable in December, 1779, 1780, 1781, by Lewis to Taylor; each of them endorsed with an assignment from Taylor to Alston, the plaintiff on 10 December, 1782; and he proved on his part that he agreed to take them upon condition that if he could not get the money of Lewis, he should have recourse to Taylor; upon which Taylor assigned them. He proved, also, that within two months or less from the date of the assignment he applied to Lewis, and procured some negroes in part discharge of the debts, and that on 8 January, 1784, he put the bonds into the hands of an attorney in Virginia, to bring suits upon, which were brought accordingly on 27 April, 1785. That on 10 December, 1784, he received seventeen thousand weight of tobacco as a further payment, and that in April, 1791 (the defendant in the meantime having died), the suits were called

and dismissed. That on 19 July, 1790, he caused writs to be issued against the executors, and at July Term, 1791, in Caswell County Court he obtained judgment. That previous to this the executors removed to South Carolina, and that on 26 April, 1791, he sued them upon these judgments in South Carolina. That in October, 1792, the judgments were reversed in this Court for error in the proceedings, and that in November following, the jury were impaneled upon his suits in South Carolina, and found against him; and that on 13 October, 1792, he gave notice of these proceedings to Taylor, and that he intended to resort to him. (383)

On the part of the defendant it was proven that when the contract was made, it was insisted on by Alston that the bonds should be assigned by Taylor, to the end that if he failed to get the money of Lewis, he might then resort to Taylor; and that Taylor upon this made the assignment, saying, "the circumstances of Lewis are good, and if he does not pay you, come to me, and I will go with you and see you paid." That not long afterwards, within two months, Alston bought some negroes from Lewis, and said he could have had more, but the price was rather too high; he thought it most proper to wait till some future time, when he might have it in his power to make a better bargain; and said to Taylor, "You are clear; he has property enough." It was further proven that the bonds endorsed were made in Virginia, and there payable.

Wythe for the defendant.
Davie for the plaintiff.

WILLIAMS, J. HAYWOOD, J., was concerned in this cause, and has left the bench. I am sorry for it, as a cause similar to the present came on at Salisbury at the last term, and his opinion was that the rules respecting negotiable instruments did not apply to unnegotiable ones, though in fact passed by a debtor to his creditor. I mention this opinion now because, though I then differed, I am not now sure but it was the right one. These bonds were not negotiable in this State, and the assignment made here according to the case cited from Bl. Rep., must be governed by the laws of this country, and is to be considered as the endorsement of paper not negotiable, and may confer on the assignee only the powers attributed to such assignments in the argument for the plaintiff; and if notice of nonpayment by the obligor is not necessary, the plaintiff may probably be entitled to recover on the special contract laid in the declaration, which is, that the endorsee should sue in the name of the obligee, and in case of his not being able to obtain satisfaction, should resort to Taylor. The greater part of the time elapsed since the en-

dorsement has been employed by the endorsee in pursuing the obligor; he sued within thirteen or fourteen months, and has continued to sue ever since.

The jury found for the plaintiff, and he had judgment.

NOTE BY REPORTER.—On the trial of this cause the following points occurred and were decided: The defendant offered a deposition, the notice for
(395) which was that it would be taken on a certain day named, at Halifax Courthouse, in Virginia; the caption expressed a taking on that day, at the house of Manning, at Halifax Courthouse; and a witness sworn in court proved that Manning's house stood about 80 yards from the courthouse.

Per Curiam. It cannot be received. The receiving of evidence by depositions is only adopted from necessity. It is subject to many abuses. If we begin to say it may be taken at a place near that fixed upon by the notice, it will open a door to fraud. The party may cause it to be taken near the place, whilst the adverse party may be waiting at the place appointed, in order to cross-examine. Besides, if we once say that to take it near the place will do, we shall never know where to stop; it may be taken at a greater distance than 80 yards, 100 yards for instance, or a quarter of a mile, and yet be said to be near. The deposition was rejected.

The plaintiff offered the receipt of Mr. German Baker, late a counsel in Virginia, to fix the time when the bonds were put into his hands to be sued upon; and it was urged that he was now dead, so that his deposition cannot be had, and that the receipt is the best evidence of that fact we can offer. That it was the course of business for counsel to give receipts when they receive bonds to sue upon, and that therefore the evidence offered should be received. Courts had done the like on other occasions, when the course of business rendered it proper, as in the case of the merchant's clerk who made the entries and died, and the merchant had no other means of proof but his handwriting; it was admitted, as the course of business allowed of no better proof.

Per Curiam. Let the receipt be read. The course of business admits of no other proof.

A record from one of the county courts of Virginia was offered; it was certified by the clerk and presiding justice, but no seal affixed, nor any certificate that there was no seal of the court.

Per Curiam. Where there is no seal, it should be certified there was none. We cannot know that there is no seal, unless it be certified; and if there be a seal, a record thus certified cannot be received, inasmuch as it is not attested in the most authentic way of which it is capable. In order to its admissibility, therefore, it must appear there is no seal by which it can be attested.

So it was rejected.

Cited: Pursell v. Long, 52 N. C., 105.

LUTTERLOH v. POWELL.

A warrant that does not state that the sum demanded is over £5, but only that it is under £20, will not authorize an arrest, and if the officer makes an arrest under such warrant and afterwards permits the person arrested to go at large, he will not be liable for an escape.

CASE for an escape. The declaration stated that Lassiter was indebted to the plaintiff in a sum under £20; that he took out a warrant against Lassiter, the tenor whereof was inserted in the declaration, and was expressed to be for a sum under £20; that Powell, the constable, received the warrant, arrested Lassiter, and suffered him to escape. The warrant, when produced, commanded the officer to summon Lassiter, to answer Lutterloh for a debt under £20.

PER CURIAM (after argument by Williams for the plaintiff and Davie for the defendant): If Powell was not authorized to arrest, and did arrest, and then suffered him to go at large, the action will not lie. If he had any authority to arrest, it must be by force of the warrant. This is plain from considering the reason why the law requires a warrant in writing at all. It requires it that the officer may be directed precisely what to do, that he may know how far he ought to go, (396) and that he may produce it in his justification when questioned for what he has done under it. The law will not permit that an officer shall proceed to arrest a man, and deprive him of his liberty, unless pursuant to an authority given him for that purpose. If he was permitted to act without a warrant in writing, he might mistake the verbal precept of the magistrate, and do either more or less than he was commanded. From the uncertainty of verbal directions, and owing to the not recollecting the precise terms of them, he might easily act otherwise than intended. For the benefit of the citizen, therefore, that he may at all times be able to call upon the officer to produce his authority, and to see precisely what it was, the law established the necessity of a written warrant. Anything contained in the directions of the magistrate or of the plaintiff that is not contained in the warrant is no authority upon which the officer can act. This warrant, in the present case, is not such an one as can in law justify the arrest. The act of 1786 directs that where the sum is over £5 pounds the constable shall arrest and hold to bail. It should appear in the warrant that the sum is over £5; otherwise he cannot arrest. This warrant does not state that the sum demanded was over £5, but only that it was under £20. It might be also

under £5, and therefore the arrest was illegal, and releasing the defendant in the warrant was proper and what he ought to have done.

The plaintiff was nonsuited.

See *Ellis v. Gee*, 5 N. C., 445.

ARNOLD v. BELL.

A debtor cannot dispose of his property to avoid an execution after it is issued. A disposition of any part of his property to a child by a father indebted more than he is worth will be presumed fraudulent, unless the child can prove the purchase to have been made for a full and fair value actually paid. The declarations of the father that his conveyance to his child was fraudulent are not admissible against the child.

DETINUE for negroes, Tom, Jane, and Anaky. The plaintiff produced a bill of sale from his father, John Arnold, dated 27 February, 1795, for Tom, and another bill of sale, dated 25 December, 1794, for the two other negroes. The defendant proved a purchase of these negroes at the sale of a sheriff, who sold them to satisfy an execution issued for the State from Hillsboro Superior Court, April Term, 1794, for £900. He also produced a judgment rendered at October Term, 1794, and an execution thereupon, returnable to April Term, 1795, which was satisfied. The plaintiff then proved an actual payment for Tom of £100, on the day of the date of the bill of sale, and that this money was acquired by a sale of his own property, and that it was applied by the father in payments to his creditors—part of it
(397) towards the discharge of the execution of £100. As to the other negroes, he proved that before the date of the bill of sale for them he had advanced money to the father to pay his creditors, and that money was due from the father to him for articles purchased for the old man, and delivered to him in the beginning of 1792, to the amount of £80. The father had not property enough to satisfy the execution for £900.

PER CURIAM. If when an execution is out, and in the sheriff's hands, a man sells any part of his property, and the execution cannot be satisfied without selling that property, it may be sold by the sheriff, and the previous sale will be invalid and void. Here the £100 execution was satisfied. Also, if a man be indebted to a larger amount than his property is worth, and he disposes of any part of his property to a child,

although there be no execution issued, nor any judgment, it is void as to creditors unless the child can prove the actual payment of a fair and full consideration; by which latter term is meant a consideration so near the value that it may reasonably be supposed the father would have taken the same from a stranger; and it must be left to the jury to determine whether the consideration were a full one in that sense, or not. If they find in the affirmative, and that it was actually paid, *bona fide,* they will then find for the purchaser; otherwise, not.

The jury found for the plaintiff, and he had judgment.

NOTE BY REPORTER.—The defendant at the trial of the issue in this action offered a witness to prove certain declarations on the part of the father, under whom the plaintiff claimed, tending to show the conveyance made to the son was fraudulent, and made to defeat creditors. It was stated that these declarations were a short time after the date of the bill of sale. On the part of the plaintiff it was objected that the father had given the bill of sale, and were he now present could not be admitted as a witness to impeach it for fraud. The law will allow no man to give evidence to invalidate an instrument which he himself has given. 1 D. and E., 296; 5 Term, 579; 3 Term, 36; 4 and 5 Burr.

E contra. It was argued that the decisions in the case cited apply only to negotiable instruments that the witness offered has passed. It would be attended with great mischiefs and injury to the credit of such papers were they to be invalidated by him who has passed them after going through several hands. And though the maxim, *Nemo allegans turpitudinem suam est audiendus,* seemed to be adopted by some of the judges in deciding these cases, it is evident from the reasons they give that the rule established by these decisions was meant to be particular, and not as general as the maxim.

Per Curiam. The decision to be given by this Court steers clear of the objection raised from the cases cited. The question here is, not whether the father shall be sworn to impeach a writing he has signed and delivered, but whether his confession may be given in evidence to affect a third person, his son. A man's confession may be given in evidence to affect himself, but cannot to affect any other person. That evidence, were it allowed, would affect the plaintiff, and not the father, who does not pretend to any (398) interest in the negroes. Therefore, it cannot be received. It would be of dangerous consequence to allow such after declarations of a man who had passed property by the proper legal ceremonies; he might always overturn his conveyances.

The evidence was rejected.

See *Bell v. Hill, ante,* 72.

Cited: Dozier v. Dozier, 21 N. C., 100; *Headen v. Womack,* 88 N. C., 471.

ANONYMOUS.

A writ of false judgment was sustained when it appeared that the justice of the peace had fixed no place nor time within thirty days for defendant to appear as required by act 1794.

WRIT of a false judgment for reversing the judgment of a justice of peace given on a warrant. The plaintiff in this writ had issued a *sci. fa.* to the defendant to appear and oppose the reversal if he thought proper; and now Mr. Potter moved that as the defendant had not come in, and so remained undefended, that he might be permitted to enter judgment of reversal.

PER CURIAM. If you have assigned matters of fact only, you may enter your judgment of reversal; if you have assigned matters of law, we must look into them. We cannot reverse the judgment merely because you have assigned instances of false judgment, if the matters assigned do not appear to warrant a reversal.

The assignment was read, and the principal matter was that no time or place was appointed within thirty days, by the justice, for defendant's appearance.

PER CURIAM. That is necessary by the act of 1794, ch. 13, secs. 3 and 6.

The judgment was reversed.

SOLOMON WALKER'S ADMINISTRATORS v. MATTHEW HAWKINS.

Detinue will not lie against executors for detainer of their intestate.

DETINUE for negroes, brought against the intestate in his lifetime; upon whose death the defendants, his representatives, were called in and made parties, and there was a verdict against them, subject to the opinion of the court upon this question, whether an action of detinue will lie against executors for the detainer of their intestate; and now General Davie, for the defendant, moved for leave to enter upon the argument, saying he had prepared himself for it.

PER CURIAM. This point has been already decided in the negative, upon this circuit, in the case of ———— *v. Hughes' Administrators,* and formerly at Edenton.

So the judgment was arrested.

CAMPBELL, ASSIGNEE, v. MUMFORD.

A bond, upon which is an endorsement purporting that it may be discharged by the payment of so much tobacco, is not negotiable under the act of 1786, Rev., ch. 248.

ACTION upon a bond for £92 Virginia money, conditioned for the payment of £46. Upon the back of the bond there was an endorsement purporting that the £46 should be dischargeable in tobacco, delivered at a certain place. The defendant objected to the plaintiff's re- (399) covery upon the ground that this bond was not assignable by the act of 1786, ch. 4, and he cited a decision at Fayetteville, in the case of *Jamieson v. Farr, ante,* 182.

PER CURIAM. The endorsement made at the same time with the bond is to be taken as a part of the condition (*Vide* 2 Term, 641; Salk., 498; 6 Mod., 37), and the bond is not assignable. A bond for any specific article is not assignable. Such a bond in the hands of the assignee cannot be sued upon by him. Suppose at the day appointed for payment the defendant had tendered the tobacco, would it not have been a good tender? It certainly would, and would have discharged the debt. Until the day of payment, then, the defendant may consider it as a bond for tobacco only. These bonds do not answer the purpose of commerce as money, inasmuch as their value at the day of payment, is not easily ascertained, but is liable to be disputed between the parties and to produce delay. They were not rendered negotiable by the act of 1786, as money bonds were. It is true, if no tender be made at the day, the obligee may consider it as a bond for money only; but then if the bond is not originally negotiable, it cannot afterwards become so, for at the time of its creation the obligor did not mean to subject himself to the action of an assignee.

Judgment for the defendants.

See *Jamieson v. Farr, ante,* 182.

Cited: Peace v. Nailing, 16 N. C., 295.

PETTIFORD v. SANDERS.

An execution cannot issue till adjournment upon a judgment rendered at that term.

A VERDICT had been obtained at this term against the defendant, and now Mr. Potter, for the plaintiff, moved that he might have execution against the defendant, he being about to remove himself immediately out of the State.

PER CURIAM. How do we know but a motion may be made to arrest judgment, or for a new trial, for some cause we know nothing of at present? All the proceedings of the Court are *in fieri*, and in the breast of the Court till the term be ended, and subject till that time to be altered and vacated. This cause may be accompanied by some of those many circumstances that may render it proper to alter, vacate, or set aside the proceedings which have already taken place at this term.

The motion was refused.

BURTON v. SHEPPARD.

In an appeal from the court below, upon exceptions filed to the award of arbitrators, a new trial is not to be had in the Superior Court, but it will examine into the errors of law in the court below.

(400) APPEAL from the County Court of PERSON. The general issue had been pleaded, and after depending in that court for some time, the parties agreed to refer it to arbitrators; and it was referred by a rule of court. The arbitrators met in the presence of the parties and took the case into consideration, and made up their award. Exceptions were taken to it by the plaintiff's counsel, one of which was that the arbitrators had calculated interest upon the whole sum from the time of payment, and had given no interest upon the amount of the verdict which accrued and became due some time before the arbitration.

The cause being now moved by Mr. Burton, it was urged by Mr. Whyte that according to the former decisions this cause must now be tried upon the issue. The law requires, whenever an appeal takes place from a trial below upon an issue joined to the country, that there shall be a trial *de novo* here; and in that predicament is this cause precisely.

PER CURIAM. If we should decide as the defendant's counsel contends for, it would take away at one blow all references to arbitration in

the county courts. Either party dissatisfied would file exceptions to the award and appeal upon their being overruled. In such case, if this Court proceed upon the issue, the award would be forever excluded from consideration, and become a mere nullity, whether in point of law it were good or bad. The meaning of the law adverted to by Mr. Whyte is that when the party appeals from what he supposes to be the injustice or mistake of a jury, in their conclusions of facts from evidence, then that evidence shall be reconsidered by a jury here; but when he appeals from what he supposes to be injustice or error in the judgment of the court, that then the Court here shall reconsider what the court below has done. Were we to have new trials before a jury whenever the court below gives a wrong judgment in point of law, the inconvenience would be great. The parties must then summon all their witnesses on both sides to establish a verdict which is not complained of, nor sought to be rectified, and nothing is aimed at but correcting the judgment of the court, to the doing of which no witness is necessary. We are therefore of opinion that the points in which the county court is supposed to have erred shall be considered here in order to be corrected if wrong. A trial of the issue is entirely out of the question.

Quaere: If an appeal can be regularly taken but from a verdict, or from a sentence on hearing of any cause, according to the act of 1762, ch. 5, or other similar acts (in both of which cases there must be a reëxamination of testimony), and whether other sentences and opinions upon mere matter of law should not come up by writ (401) of error.

See *Erwin v. Arthur*, 1 N. C., 605.

ANONYMOUS.

A writ cannot be altered from covenant to debt except by consent of parties; but it is usual among practitioners to permit the amendment, when the mistake was occasioned by the clerk.

THIS was an action upon a bond, with condition for the delivery of a specific article. The clerk had issued the writ in covenant instead of debt, and now Mr. Norwood moved to be at liberty to amend the writ.

PER CURIAM. It has been the constant rule amongst all the practitioners in this State to amend writs improperly issued by the clerk; but

there is no rule of law giving us power to amend in such cases without the consent of the party. There is nothing to amend by, and the amendment asked for is a very material one; it is to alter the most substantial part of the writ. There is no preceding act to resort to for proof that the writs were not intended to be issued in covenant. An amendment of this sort was once made by ASHE, J., in Morgan Court, in *McDaniel v. Tate*; but he declared it should not be drawn into precedent, but that he allowed the amendment to attain the justice which seemed in that instance most powerfully to demand it. A similar motion was made at Halifax, some terms ago, in the case of ———— *v. Executors of Webb*, and MACAY, J., said he could not permit the amendment to be made. The motion was to alter the word "executor" in the writ, and to substitute "administrator of all," etc.; and he said if the rule prevailed that writs might be altered in this manner, it might tend to entrap the bail, who perhaps agreed to become bail from the circumstance of being apprised that the writ in that form was not maintainable. We cannot allow of the motion in the present case, but we recommend it to the opposite counsel to agree to the amendment, as it is agreeable to the course of practice for the defendant's counsel to agree to such amendments, and as the amendment proposed will put the defendant under no difficulties with respect to his defense, it being the very same after the amendment as now. Prior to the late decision on sealed instruments without a witness many actions had been brought in case upon them, and upon the recommendation of the Court they were altered by consent to debt.

The defendant's counsel would not consent to the amendment, and the suits were dismissed.

See *Cowper v. Edwards, ante,* 19.

ROBERTSON v. STONE.

The appellant applied in time to the clerk for the papers, but could not procure them. The papers were, however, brought up after the fifteenth day before the term, and a motion was made to have them filed. Upon the motion being opposed by the appellee, it was refused upon the ground that the party had his remedy against the clerk. It seems if there had been no remedy against the clerk the papers might have been filed.

(402) APPEAL from a verdict in PERSON County Court. The appellant applied in time to the clerk of the county court for the papers, but could not procure them. The papers, however, were

brought up after the fifteenth day before the term, and the appellant moved to have them filed and the cause placed on the trial docket. And now, at this term, the appellee came in to show cause against the motion. He insisted that if the appellant could not procure the papers from the clerk of the county court, as he alleged, that was no reason for setting the cause now down for trial, as the act of 1777, ch. 2, sec. 87, had expressly provided for such a case, namely, that the clerk should forfeit £50 to the appellant, and also all damages sustained by reason of such delay or refusal.

PER CURIAM. A case hapened some time ago at Edenton which has been cited as the ground of this application. In that case the appellant offered his appeal papers to the clerk of the Superior Court in the streets, not at his office, and the clerk for that reason refused to receive them, apprehending he was not bound to receive them but in his office; and the Court ordered the appeal papers to be filed, being of opinion the appellant had no remedy against the clerk. In this case, as he has a remedy prescribed by law, it is proper he shall pursue that. Were his case such as showed him to have been guilty of no neglect, and at the same time that he had no remedy against the officer, the Court would sustain his appeal to prevent a failure of justice, but that is not the present case.

The motion was overruled. It might, perhaps, have been improper to allow of filing the papers by way of appeal, for the appellee might have been at the office on the 15th day before term, to know whether they were filed or not; but *quere,* if they might not have been brought up by *certiorari, Chambers v. Smith, ante,* 366.

Cited: Hood v. Orr, 4 N. C., 584.

ANONYMOUS.

The *fifteen* days before the term in which appeals must be filed in the Superior Court must be clear of the day of filing the papers and of the first day of the term; at all events, of the first day of the term.

IN this case it was moved by General Davie that the appeal should not be received, there not being fifteen days between the filing of the appeal papers and the first day of the next term, and he cited 2 Bl. Rep.,

922; 1 Stra., 407, as a similar case being founded upon a rule of court which had the words "at least" in the same manner as the act of 1777, ch. 2, sec. 84, where the expression is that the record of the suit shall be delivered to the clerk of the Superior Court at least fifteen days before the sitting of the term. In the case in Strange one day was held to be inclusive and the other exclusive; and if that computation prevail in the present instance, the record was brought up too late, for (403) there are not fifteen days before the term, unless the day of filing and the first day of the term are both included.

E contra. Williams cited Salk., 599 pl. 7; 2 Stra., 765.

PER CURIAM (WILLIAMS, J., absent): Whether the fifteen days are to be accounted inclusive or exclusive depends not upon any practice of the British courts, but upon the meaning and design of our own act, which seems to have been that the appellee after coming to the clerk's office, and finding the appeal lodged there, might have fifteen days for traveling to the most distant part of the State to procure attendance of witnesses, and returning to the court, and in otherwise preparing for the trial; but if the fifteen days are to be accounted inclusively, he will have but thirteen days allowed for those purposes. The fifteenth day is employed in traveling to the office and getting process, and the first day of the term he must be present in court ready for his trial. If we allow one of them to be inclusive, and the other exclusive, there will remain but fourteen days. There should be fifteen clear days—at all events, the first day of the term must be excluded.

The case was adjourned to search for precedents on the application of the appellant's counsel.

Overruled: Anonymous, post, 462.

STATE v. BRADLEY.

Semble: In a trial for perjury, the words proven must be clearly and evidently of same import as those laid in the indictment.

THE indictment stated that Gatling sued Herndon, a constable, and others, for selling his cattle, upon an execution, at a different place from that advertised; and that upon the trial of this action in the county court it was a material question whether Gatling interrupted the constable in

driving the cattle to Gatling's house to be sold; and that the defendant Bradley was introduced as a witness and was sworn, and upon his oath deposed that Gatling did not interrupt the constable in driving the cattle to Gatling's house. The evidence was that defendant swore Gatling did not assist in driving the cattle from the officer. The falsity of this oath was sufficiently established.

HAYWOOD, J. I doubt whether we have power to say the oath sworn by the witness is tantamount to that imputed him in the indictment. We cannot imply that one thing is tantamount or equivalent to another, in indictments. Were the judges allowed this power of implication they might, whenever they thought proper, construe the offense proven to be tantamount or equivalent to that laid in the in- (404) dictment, when according to strict propriety and common acceptance it was essentially different, and a defendant who had prepared himself to falsify the charge as laid might find himself surprised with evidence constructively tantamount, though not properly and strictly applicable to that charge. I do not recollect any cases upon this head at present; none have been cited; but this case seems to fall under the operation of a general principle of vast magnitude in a free country where the law is to govern—a sacred principle never to be evaded, nor ever to be thought of but with reverence. It is the best security the citizen has against judicial tyranny. I hope, therefore, the verdict may be so taken as to bring this point before the Court. In all other respects I agree that the defendant ought to be found guilty.

He was found guilty but the verdict was made subject to this point, *et adjournatur.* Decided *post,* 463.

Cited: S. v. Groves, 44 N. C., 405.

KENNEDY & CO. v. FAIRMAN.

WILLIAMS, J. A notice to take a deposition ought to be served upon the person of the other party. HAYWOOD, J.: Leaving the notice at the residence of the adverse party is a sufficient service.

THE plaintiff offered to read depositions, and proved the notice of taking them to have been left at the place of abode of Fairman, he being, as it was said by the family with whom he lived, then absent; and that

at another time a notice was left at a house in Hillsboro, where the deponent saw a man through the window whom he believed to be Fairman.

Williams for the plaintiff.
Davie for the defendant.

WILLIAMS, J. The notice ought to be personally served upon the defendant; otherwise, a man might contrive to leave notice at the house of his adversary after he was gone upon a journey, and take the deposition either before his return or so soon after as would put it out of his power to repair to the place appointed, and thus deprive him of the benefit of cross-examining the witness. The instance given at the bar is a proof that we should hold a strict hand over this kind of evidence. The person intending to take the deposition waited till he saw his opponent on his journey to New York, where he had very important business to transact, which necessarily must detain him beyond the time specified in the notice.

HAYWOOD, J. I am of opinion the deposition should be read. What is sufficient service of notice in other cases should be deemed so in this.

(405) The law supposes in other cases that the notice left at his place of abode actually comes to his knowledge, and proceeds against him upon that supposition. If notice to a juror be left at his place of abode, and he does not attend, he shall be fined, 1779, ch. 6, sec. 6. So of a witness, 1777, ch. 2, sec. 36. Such notice of a declaration in ejectment is sufficient. So of a subpœna in chancery to answer. 1 Harrison, 251. So of a notice in chancery to take depositions, if it be left at the place of abode of the opposite party, the other party may proceed to take his depositions, and they will be good. 2 Harrison, 29. It may indeed sometimes happen that the notice may not actually come to the party's knowledge (see 2 Stra., 1044), and the deposition may be taken *ex parte*. This may be obviated by his moving the court to postpone the cause, upon an affidavit of the notice having not come to his knowledge, till he can have an opportunity of taking the deposition of the same witness himself, and by that means to have the benefit of a cross-examination. It is better to adopt this mode than to require a notice to be personally served, and to throw a temptation in the way of the party to conceal himself; for then as long as he can keep out of the way of personal service he defeats his antagonist of a trial; whereas by allowing a service at the house to be good, he has no such temptation, as a concealment of his person will not hinder the taking of the depo-

sition, and they will be read when the trial comes on in course unless upon affidavit he can show a fair cause to the court for a continuance. If we require personal notice in all cases, many persons will be tempted to adopt measures to prevent the service of it, and to hinder the course of law by their own dexterity.

The Court differing, the deposition could not be read, and the plaintiff was nonsuited.

ANONYMOUS.

A motion to dismiss a cause brought up by a *certiorari* was made upon the ground that the notice which had been ordered at the last term to be given to the defendant had not been given; but it appearing that the defendant had entered an appearance by the initials of his attorney's name, being placed on the docket, the motion was refused.

CERTIORARI had been obtained for the removal of the records of a cause from a county court into this Court, returnable the term before last, and no notice of this *certiorari* having been served on the adverse party, the Court at the last term, ordered such notice to issue, and at this term no notice having been served, the defendant in the *certiorari,* by Mr. Duffy, his attorney, entered an appearance in the usual form, namely, by writing the initials of the attorney's name to the suit on the docket; and now Mr. Duffy moved for a dismission of the *certiorari* for want of notice to the defendant, according to the rule of the last term; and he urged that as no process was issued to give notice from the last term, that was of itself a discontinuance of the whole cause. (406)

PER CURIAM. When a *certiorari* is obtained to remove a cause from a court below, the adverse party should have notice, to the end he may appear and oppose the motion for a new trial if he thinks proper. As the Court at the last term ordered process to issue from that term, it must now be taken that the cause was not then discontinued. Had it been, no such process would have been ordered, but a discontinuance would have been entered, or a *procedendo.* Then notice should have issued from the last term; and it appears now that no process for that purpose has actually been served since, but the defendant's attorney has entered his appearance and moved on behalf of the defendant for a dismission, and this is proof that the defendant had notice. It is always so taken. *Vide* 1 Stran., 261; 2 Stran., 1072; Salk., 59. The

object of process is to give notice to the defendant, and to bring him into court; but if he chooses to come in voluntarily, that supersedes the necessity of process. The entering the initials of the attorney's name on the docket is the usual mode of appearing here practiced, and is looked upon as equivalent to his having a power of attorney for that purpose, signed by his client, as practiced in the English courts. Such a power, and an appearance in consequence thereof, is a waiver of all objections for irregularity or want of process, if the adverse party chooses so to consider it.

The motion to dismiss was refused.

Cited: Worthington v. Arnold, 13 N. C., 364; *Jones v. Penland,* 19 N. C., 359; *Miller v. Heart,* 26 N. C., 26.

STATE v. DICKENS.

In an indictment for extortion in taking more than the legal fee, it is no excuse that the defendant did the act through mistake, or under improper advice. An indictment for extortion in the county court, stating the day on which the offense was committed in *figures*, and also omitting the word *extorsively* in charging the taking the unlawful fee, may be supported under the act of 1784, Rev., ch. 210. It is not necessary to state what the lawful fee is, in an indictment of this kind.

INDICTMENT for extortion, on taking 8 shillings for a guardian bond; and not guilty pleaded.

On the trial the defendant's counsel insisted that according to the rate of fees in the fee bill published by the Secretary, the clerk is entitled for every order foreign to a cause in court to 2 shillings; and for every guardian bond 6 shillings, although in the act from whence the extract is taken he is entitled for every guardian bond, including all services thereon, to 6 shillings only. The latter words were omitted by the Secretary out of the rate of fees published by him, and as the clerk might have been misled by the rates published by public authority it cannot be said he took the excess corruptly. Also, it was proven in this case

(407) he was advised by an old practitioner that he might demand 8 shillings, before which advice he only took 6. This proves him to have been mistaken in the fee allowed by law, and it shows the innocence of the mistake; and if the jury cannot say from the evidence they hear that he did it extorsively, or with a corrupt or oppressive motive, they cannot pronounce him guilty.

PER CURIAM (WILLIAMS, J., absent). As to the rate of fees published by authority, and collected from different acts of the Legislature, that was for the benefit of the people at large, that any one might know at once, by inspecting the rates, when an officer demands more than was his legal fee. It was not intended to change the law; every officer is bound to know what the law is upon the subject of fees to be taken by himself. He cannot excuse himself from taking more than the legal fee by saying he was misled by the rates published, or by the advice of an attorney, nor by any other excuse he can make. If such or the like excuses were admitted, it would hardly ever be possible to convict an officer of extortion; he might always contrive to ground his conduct upon misapprehension or improper advice.

The jury found him guilty. Afterwards his counsel moved in arrest of judgment, and assigned several reasons, the principal of which were that the day on which the offense is said to have been committed is stated in figures; secondly, that the receipt of the 8 shillings is not laid to have been committed extorsively; thirdly, that it is not stated in the indictment what was the legal fee.

PER CURIAM (WILLIAMS absent and the counsel agreeing to submit it to the decision of the judge in Court): This is an indictment originally found in the county court, and brought hither by appeal. It is therefore entitled to the aid of the act of 1784, ch. 31, sec. 3, which directs that in all criminal prosecutions thereafter to be had by indictment or presentment in the county courts it shall be sufficient to all intents and purposes that the bill shall contain the charge against the criminal, expressed in a plain, simple, intelligible and explicit manner; and that no bill of indictment shall be quashed or judgment arrested for or by reason of any informalities or refinements, where there appears to the county court sufficient in the face of the indictment to induce them to proceed to judgment. The first fault pointed at is certainly cured by this act—the meaning, though expressed in figures, is as well known to the Court as if it had been expressed by letters, though perhaps an indictment drawn in this Court originally might have been vitiated by stating the day in figures. As to the second exception, had the indictment been originally found in this Court, the omitting to charge it to have been taken extorsively would have been (408) fatal, the precedents all being that way; but having been drawn in the county court, we have only to consider whether enough appears upon the fact of the indictment to point decidedly and substantially at the same circumstances as is expressed by the word extorsively.

It is stated that he took 8 shillings for a certain service by color of his office, and for wicked gain sake. Now, it is known to the judges here, as being part of a public act, that 8 shillings is above the legal fee for that service. It can, therefore, appear to them in no other light than that of an extorsive taking; and we cannot say, under the act referred to, that there is not enough of substance to enable us to pronounce the offense charged to be that of extortion. As to the other exception, it is not necessary to state what is the lawful fee, even in an indictment preferred originally in this Court. If no fee was due, the indictment says, "Whereas no fee whatever was due to the said A on that account." If not so much is due, the indictment states, "Whereas no such fee was due to the said A on that account, or for that service." And this has always, in times of the greatest strictness, been held well.

But the attorney for the defendant pressing to have time to search for authorities, and this being consented to by the Solicitor-General, the case was adjourned.

Cited: S. v. Moses, 13 N. C., 464; *S. v. Dickens,* 26 N. C., 121; *S. v. Boyett,* 32 N. C., 345; *S. v. McBrayer,* 98 N. C., 623, 628; *S. v. Williams,* 106 N. C., 649; *S. v. Pritchard,* 107 N. C., 929, 930; *S. v. Kittelle,* 110 N. C., 567, 587; *S. v. Downs,* 116 N. C., 1066; *S. v. McLean,* 121 N. C., 601; *S. v. R. R.,* 122 N. C., 1062; *S. v. Simmons,* 143 N. C., 616.

KENNEDY & CO. v. FAIRMAN.

Ten days notice must be given to the creditors before taking the insolvent debtor's oath. An insolvent debtor shall not be discharged if he will not account for property proved to have been in his possession shortly before, and sold to one who had acted as his partner in trade.

GENERAL DAVIE presented a petition to this Court stating the imprisonment of Fairman at the suit of the plaintiff for the space of twenty days, and prayed that he might be admitted to the oath of an insolvent debtor and discharged, and the Court appointed a day for him to be brought up; and now on this day, being the last of the term, he was brought into court accordingly, and prayed by his counsel to be sworn and discharged.

Mr. Williams objected, because he had not given notice to the plaintiff's agent, who lives in this place, ten days before the present, but one

or two days notice only. It will be contended, on the other side, that ten days notice is not required by the act. The first clause directs notice in general to be given, without specifying for what length of time; a subsequent part says the creditor or creditors being noticed according to the directions of this act. Then in the latter part of the act, speaking of notice to be given when a schedule of effects is to be rendered by the debtor, it directs ten days notice to be given, and this is the part of the act referred to by the words (according to the directions of the act) in the foregoing part; by which the Legislature meant to express ten days notice. (409)

General Davie, e contra.

PER CURIAM. Notice must be given that is expressly required. If there is no length of time prescribed in the act, it ought to be a reasonable time; and what is a reasonable time cannot be better ascertained than by referring to the time the Legislature has appointed in a similar case. The latter part of this act appoints ten days notice to creditors, whose debtor is about to deliver a schedule of his effects. The preparation for these creditors to make, is no greater than the preparation to be made by those of the other class, and, therefore, as long time should be given in the one case as the other. But, in truth, this act does provide that ten days shall be given in the case now before the Court. The true meaning of any written instrument is best collected from a view of the whole, *et antecedentibus et consequentibus.* Notice is required in the first part of the same clause; in a subsequent part of the same clause it is required again, with the addition of the words, "according to the directions of this act"; and by the latter part of the act, notice of ten days must be given to the creditor of a debtor about to deliver a schedule. We are, if possible, to give every word some operative meaning, but we should give no meaning at all to the words, "according to the directions of this act," if we say they mean nothing more than the preceding words had expressed, or notice in general. Indeed, according to the construction of the petitioner's counsel, the whole of this sentence, so far as it relates to notice, is nugatory—notice having been directed before. Something more, therefore, must be meant by the additional words, "according to the directions of this act." It has reference to what is expressed in some other part of the act, having another meaning than that part of the sentence to which the words are additional; and that must necessarily be the term of ten days expressed in the latter part, by a reference to which these words have an effect and meaning, and

complete the sense of the first clause directing notice, which otherwise would be incomplete and uncertain for want of defining the time. Therefore, the act provides ten days notice to be given. It has not been given in the present case, and the petitioner cannot be discharged.

So he was remanded.

At April Term, 1797, another person presented his petition to the Court by Robert Bell, his attorney, to be admitted to the oath of
(410) an insolvent debtor and discharged, but he had not given ten days notice.

HAYWOOD and STONE, JJ. That is necessary by the spirit of the act. And they remanded him.

NOTE BY REPORTER.—Fairman petitioned HAYWOOD, J., in the vacation following this term, who granted an *habeas corpus*, and Fairman was brought before him and the notices were admitted; but it being proved that not long before these judgments obtained, for which he was imprisoned, he had sold property to the amount of £1,100 to one Coghlin, who it was proven had subscribed receipts and taken notes as the partner of Fairman, and it being also proven that Fairman was present when money was lent by Coghlin, and a note taken in the name of Fairman and Coghlin, the judge required him to show the application of that money; and he being not able to do so, nor willing to attempt it, though a month's time was offered him for that purpose, and that he should be again brought up at the end of the month he was remanded.

NOTE.—The act of 1822, ch. 3, prescribes that no person shall be imprisoned upon any *ca. sa.* for any debt contracted after 1 May, 1823, who will comply with the requisites of the act, without fraud or concealment.

FAYETTEVILLE—OCTOBER TERM, 1796

WILCOX v. RAY.

A copy of a record should be *verbatim*, and not be certified by the clerk that such things appeared to him from the record. The loss of a record must be proved by the oath of some person, and not by the certificate of the clerk.

EJECTMENT. The plaintiff stated his title to be derived under Simpson, the patentee, against whom the State recovered a judgment, upon which execution issued, and the land in question was sold to him to satisfy it, on 25 November, 1768. He produced the patent to Simpson,

and offered what he called a copy of the record of the judgment and execution. It was a certificate of the clerk, setting forth that it appeared to him from the docket that a judgment had been entered for so much, and that an execution had issued and that the rest of the record, except what appeared upon the docket, was lost. Mr. Moore objected that as to that part of the record which was lost, if it were a fact, it should be proven by some person on oath. The clerk not being appointed by law to certify the loss of a record, his certificate upon the subject was of no consequence; and as to those parts of the record which he had certified, they could not be received, for he had only given a history of the record as it appeared to him, whereas the very words should be copied, that the Court might judge of the true import of it. The clerk may mistake the meaning of the entries, and draw improper conclusions from them. And of that opinion was the Court, and refused to receive the certificate, and the plaintiff was nonsuited.

See *S. v. Norman*, 13 N. C., 222.

PARK v. COCHRAN ET AL.

Copy of deed cannot be read in evidence till plaintiff proves he cannot procure the original.

EJECTMENT. The plaintiff stated his title to have been derived under a patent to Newberry, who conveyed to Carrol and Dyer, who conveyed to the plaintiff. He offered to produce an office copy (411) of the deed from Carroll and Dyer. Mr. Williams objected to the reading of it unless the plaintiff would swear he had not the original in his possession or power.

PER CURIAM. The copy cannot be read unless the plaintiff will swear he has not the original nor can procure it.

The plaintiff was nonsuited.

See *Blanton v. Miller, ante*, 4.

Cited: Harper v. Hancock, 28 N. C., 127.

EVANS v. NORRIS' ADMINISTRATORS.

An account against the plaintiff cannot be given in evidence under the plea of payment. A retainer may either be pleaded, or given in evidence, under the plea of *plene administravit.* An administrator is bound to pay debts already due before those not yet payable. An administrator cannot retain against debts of superior dignity. Voluntary payments after the *teste* of the writ are not allowable; they are certainly not if made after plea.

CASE. General issue, payment, and *plene administravit* pleaded. In support of the plea of payment the defendant offered an account which the intestate had against the plaintiff.

PER CURIAM. The account against the plaintiff cannot be admitted to prove the plea of payment. The defendant should have pleaded the general issue, with a notice of set-off; then the plaintiff would have been made acquainted with the particular items, and might have prepared himself with evidence to contest them. If we allow an account to be proved without being pleaded in bar, or notice of set-off given to the plaintiff, he must necessarily be unprepared to contest it, however erroneous it may be. If such accounts by rules of the common law were adducible by the common law to prove the plea of payment, it was unnecessary to have made the acts for setting off mutual debts and accounts against each other. The account was rejected. The defendant then proved the intestate had purchased a house of him, and agreed to give £300 for it, to be paid by three yearly installments, one of which payments was due before the institution of this action, and that he had retained £100 of the intestate's estate in his hands to satisfy it.

Mr. Hay urged that a retainer could not be given in evidence unless it had been pleaded.

Mr. Taylor, *e contra,* insisted that a retainer may be given in evidence under the plea of *plene administravit,* and cited Esp., 249.

PER CURIAM. A retainer may be either pleaded or given in evidence under the plea of *plene administravit.* 3 Burr., 1380. Had the administrator paid a debt of £100 to a third person, he might certainly have given it in evidence under the plea of *plene administravit;* and payment to himself is in the same situation. There is nothing to differ the two cases. The evidence was given as to the other £200 not
(412) yet due.

Mr. Taylor argued that the same was a debt due *in presenti* at the death of the intestate, and that the administrator immediately upon the death of the intestate was entitled to pay himself in preference to another creditor.

PER CURIAM. An executor or administrator is bound to pay those debts that are already due, in preference to those not yet payable. Off. of Exrs., 142, 143.

The defendant next proved several payments made after the date of the leading process in this suit, and several after the plea filed.

Hay: As to the £100 due at the time of the intestate's death, I admit the administrator may retain that sum to satisfy his own demand, in preference to any other creditor of the same degree with himself, or of an inferior degree. By the act of 1786, ch. 4, sec. 2, notes of hand, and liquidated and settled accounts signed by the debtor, are put upon the same footing with respect to payment by executors or administrators, as debts due by specialty, and our demand is grounded on a note of hand. Bond creditors have always been entitled to be paid in preference to simple contract creditors.

Mr. Taylor in reply: If an executor has no notice of a bond debt, he may pay a simple contract creditor; and that notice must be given by an action actually commenced. He may pay himself before such notice, as well as he may pay another creditor; otherwise, the executor would be in a worse situation than another creditor, and in that situation the law means not to place him. No notice of the note now sued upon was given to the administrator before his retainer of this (413) £100. As to the payments made after the teste of the writ and before the plea pleaded, they are surely to be allowed to the administrator, for the writ may be taken out and lie in the sheriff's hands many months before any notice of it be had by the administrator.

PER CURIAM. An executor or administrator can only retain to satisfy his own demand when it is of equal dignity with that of the creditors to whose disadvantage it is retained. As the executor cannot sue himself, he is allowed to pay himself by retainer. The law in his favor presumes that had he not been executor, he would have used equal diligence with any other creditor to procure payment, and places him, with respect to paying himself, in the same situation as if he had used the most expeditious diligence; but he cannot retain to satisfy himself whilst there are debts of a superior dignity to his. By the act of 1786 notes are put upon the same footing with bonds, and are made superior to any simple contract debt, where the debt is not liquidated and settled and signed by the party to be charged. Of course, the debt due in the present case to the administrator cannot be satisfied by retainer in preference to the debt of the plaintiff, which is by note of hand. As to the voluntary payments made since the teste of the writ, and before the plea pleaded, in

strictness they are not allowable; though, indeed, it seems to be a hardship that payments made before notice of the writs, and with no design to prejudice the plaintiff, should not be allowed. As to the payments made after the plea pleaded, they are clearly not allowable.

NOTE BY REPORTER.—That part of the Court's opinion relative to the payments made after the teste and before the plea seems not to be correct; the law as laid down in the Off. of Exrs., 145, 146, is that the executor may pay another creditor after suit commenced before he have notice, and may then plead that he was not summoned till such a day, before which he had fully administered.

PEARLE v. FOLSOM.

A discharge under the insolvent debtor's act, ordered by the proper officers, will be presumed to have been regularly done until the contrary be shown. Under the first insolvent act the defendant was discharged only as to those who had commenced suits against him, and had notice given them of the debtor's petition.

COVENANT, for certificates which defendant borrowed and agreed to return or pay for in money at the rate of 4 shillings in the pound.

(414) Amongst other pleas, the defendant pleaded that he had been discharged of the action under the insolvent debtor's act. He produced a petition setting forth his imprisonment at the suit of another creditor, and praying the benefit of that act, 1773, ch. 4. He also produced the return of the gaoler, by which it appears he was in also at the suit of the present plaintiff. He also produced the subsequent proceedings, showing his having taken the oath prescribed in that act, and his having been discharged.

It was argued on the other side that he ought also to produce the notice served on the present plaintiff, of his being about to take the benefit of the act. The evidence offered did not amount to a proof of notice.

It was answered that the giving of notice is a circumstance incident to the business of his discharge, and must have been proved to the justices of the peace before they proceeded. Since they have discharged him, the Court here will presume that all things preparatory to his discharge were rightly and legally transacted; and they cited Bull. *Nisi. Pri.*, 173.

PER CURIAM. Since there is a discharge ordered by the proper officers of justice, we will presume all circumstances required by law to precede

the discharge to have been regularly observed; otherwise, we must presume that the justices have acted illegally, which is a presumption never entertained against the proceedings of officers of justice. If in fact they have proceeded to discharge without notice, and the creditor will show that, it will vitiate the proceedings. The presumption of *omnia recte acta* lasts only until proof of the contrary appear; but we will not require the defendant to prove notice to have been given, the plaintiff not being able to show any irregularity in the proceedings.

There was a verdict for the defendant.

One other point was moved in this cause, namely, whether the defendant by a discharge under the first branch of the act was discharged as to all creditors, or as to such only who had instituted suits against him at the time of his imprisonment.

PER CURIAM. Clearly, before the late act which has made some alteration, he was discharged only as to such creditors who had commenced their suits and had notice given them of the debtor's petition.

See *Burton v. Dickens*, 7 N. C., 103; *Howard v. Pasteur*, *ibid.*, 270; *Jordan v. James*, 10 N. C., 110.

HODGES v. BLOUNT.

Property sold remaining in the possession of the vendor where there is an absolute bill of sale is evidence of fraud; so is the not registering the bill of sale till long after it is made, coupled with an offer on the part of the vendor to antedate.

ON 16 May, 1789, Lassiter sold to the plaintiff the negro in question. Lassiter derived his title under Lucas, who made a bill of sale to Rayford on 10 August, 1788. The defendant Blount, who in (415) fact acted for Worseley, who was the real defendant, produced a bill of sale from the same Lucas to Worseley, dated 5 March, 1788. It was proved Rayford gave a valuable consideration. No consideration on the part of Worseley was proven, and the negro was in possession of Lucas on 5 March, 1788. Lucas having been sued and given bail, they were about to surrender him, and that he offered to give them a bill of sale for the negro, and to antedate it so as to give it a preference to Rayford's.

PER CURIAM. It is alleged that the bill of sale to Worseley is fraudulent, and if it is, the law says it is void. It is not sufficient, however, to

allege fraud; it must be proven either positively and directly or by circumstances, which is the most usual way, there seldom being any direct proof of fraud to be had. There is no positive proof of fraud on the part of Worseley, but circumstances tend that way. He did not take the negro into possession; he remained with Lucas, though the sale purports to be an absolute one. No other evidence offers any substantial reason in explanation of this circumstance. Lucas also kept possession after the bill of sale to Rayford, but the cause of this is explained. It is not proved that Worseley gave any valuable consideration, though it is proved on the part of Rayford. Worseley's deed, though purporting to be dated so long before Rayford's, is not admitted to registration till after, which circumstance added to the proof of Lucas' offering to antedate if his bail would not surrender him, weighs something.

The jury found for the plaintiff, and there was a motion for a new trial; but the Court being satisfied with the verdict, refused it.

ANONYMOUS.

Amercement of sheriff for failure to sell.

MR. HAY produced several executions which had been delivered to the late sheriff of Anson, who had returned levied and not sold for want of bidders. Also, several writs of *venditioni exponas* issued upon these returns, and stated that these latter writs were put into the hands of the late sheriff before his going out of office, and to the present sheriff he had not pointed out any property which he could sell according to the exigence of the writs. He moved that the late sheriff should be amerced, under the act of 1777, ch. 8, sec. 5.

PER CURIAM. Let him be amerced; he ought to have made a return to the writs of *venditioni exponas;* he ought to have sold the prop-
(416) erty, though no writs of *venditioni exponas* had issued; and having once taken it, he cannot afterwards put it upon the new sheriff to execute these writs. Let there also issue writs of *distringas* to the new sheriff to compel the late sheriff by distress to levy the moneys, and deliver them to the new sheriff, to be brought into court.

Cited: Governor v. Eastwood, 12 N. C., 159.

ANONYMOUS.

Where the act of limitations begins to run against a *feme sole*, her marrying will not suspend its operation.

SPECIAL VERDICT, in which the question was stated to be whether a *feme sole* against whom the act of limitations had begun to run could by marrying suspend the operation thereof, or whether it would run on, notwithstanding the coverture.

WILLIAMS and HAYWOOD, JJ. This is a plain question. It is clear law when the act once begins to run, no incapacity to sue, as coverture or the like, intervening before the three years are completed, will prevent its running on so as to form a bar.

Mr. Moore, however, urged that there never had been any decision in any court to that effect, either in England or here. He said such an opinion was intimated at Wilmington, at the last term, by HAYWOOD, J., alone on the bench. That he had heard of such a doctrine before, at the time Mr. Iredell was at the bar, and had been furnished by him with a list of authorities upon which Mr. Iredell had formed such an opinion; but upon examining them attentively, they are found to be *dictums,* grounded on the case of *Touch v.* ————, Plowden, 368, which was a case adjudged upon the statute of fines.

HAYWOOD, J. After the opinion I gave at Wilmington, last spring, I searched the authorities, when I went home, with great diligence. Many of the instances are but *dictums,* but everywhere it seems to be held as law, and not to be disputed where the point occurs. It is so held in 4 Term, 310, and 306, in the notes. Wils., 134, was decided upon that principle, and 1 Strange, 556. I am very sure that the law is so, but let the case lie over till tomorrow, that Mr. Moore may have time to look into authorities.

WILLIAMS, J., assented.

Next morning, the Court having looked into authorities, mentioned the case again, and asked the counsel whether they would argue it; and they declining an argument, the Court gave judgment for the defendant.

See *Andrews v. Mulford, ante,* 311.

Cited: Copeland v. Collins, 122 N. C., 622; *Dobbins v. Dobbins,* 141 N. C., 219.

(417)

THE SURVIVING PARTNERS OF AULEY McNAUGHTON & CO. v. BLOCKER'S ADMINISTRATORS.

A payment made after the *teste* of the writ, is not good in support of the plea of *plene administravit*. Judgments obtained against an administrator after the *teste* of the writ and before the time of pleading, may be plead at the proper time. Debts assumed by the administrator before the *teste* of the writ, must be allowed him to the amount of his assumptions.

CASE upon assumpsit, for goods, wares and merchandise sold and delivered; and the plaintiffs proved their case sufficiently, and established a demand to the amount of £324. The defendants had pleaded *plene administravit*. They proved effects came to his hands to the amount of £1,072. The administrator gave in evidence sundry debts paid before the institution of this suit; also divers debts paid after the teste of the leading process (which in this case was a *sci. fa.* against the administrator, to make him a party to the suit) and before the plea pleaded. He had also pleaded judgments had against him as administrator previous to the time of his pleading; and he proved several judgments had against him after the teste of the writ, and before he had notice thereof, and before plea pleaded. He also proved assumptions made by himself to buy several debts of the intestate to a large amount prior to the teste of the writ.

Mr. Moore and Mr. Hay, for the plaintiffs, argued that the common law of England, with respect to executors and administrators, is the law here, unless where it has been altered by acts of the Legislature passed since 1778, where the common law of England was enforced here by act of Assembly; and although the judges may be inclined to think some part of that law, as it respects executors and administrators, more strict than is perfectly consistent with equity, yet as they are to expound, not make, the law, and as the Legislature have never altered these seemingly exceptionable parts, it is the business and duty of the judiciary to declare it as it really is.

Taylor in reply: The law cannot be as stated by the plaintiff's counsel, that payments made by the administrator after the teste, and before notice of the writ, are not allowable as evidence in support of the plea of *plene administravit*. Common sense and common justice require that the administrator shall have notice from the creditor of his demand before he is bound to attend to it, or can commit a *devastavit* or
(419) misapplication of the assets by paying other creditors.

PER CURIAM (WILLIAMS, J., absent): The plea of fully administered, as to its form, is as stated by the plaintiff's counsel; and in strictness, a

payment made after the teste is not good in support of *plene administravit*. As to judgments obtained after the teste, they may be pleaded by the administrator, if obtained before the plea pleaded at its proper time. As to debts assumed by the administrator before the teste of the writ, such assumption obliges him to pay the debt as effectually as if he had given a bond. He must, therefore, be allowed to the amount of his assumptions.

NOTE BY REPORTER.—The first part of this opinion was incorrect. If in fact the payments were made after the teste, and before notice, that should be stated in the plea; and then the payments before notice may be given in evidence by the administrator. Offi. Exrs., 145; Cod. Orp. Leg., 220; Plow. Com., 277.

See *Evans v. Norris, ante*, 411; *Littlejohn v. Underhill*, 4 N. C., 377.

ANONYMOUS.

A *certiorari* is discontinued under the same circumstances of any other writ.

HOLMES had abtained a judgment in the county court, and Butler having stated in an affidavit some causes of complaint against the judgment, had produced a *certiorari* to issue returnable to this term, only two terms having first intervened.

PER CURIAM. When a *certiorari* issues, the adverse party has notice to appear on the return day of the *certiorari*, and if the writ is not then returned, nor any proceedings had to continue it in court, it is like other writs discontinued, and a *procedendo* ought to issue. Here is clearly a discontinuance; therefore, let a discontinuance be entered, and a *procedendo* issue to the court below.

KIDDIE, SURVIVING PARTNER OF RAMSAY & KIDDIE v. GABRIEL DEBRUTZ.

A confession in an answer to a bill in equity may be given in evidence against the defendant in an action by a third person. The giving of a note is no extinguishment of the prior cause of action; and where there is a count upon a note, as well as the general counts, a recovery may be had upon the general counts, although the note is alleged to be lost.

CASE, and the declaration contained a count upon a note of hand, a count for money lent, for work and labor done, and the other usual counts.

Upon the trial, the plaintiff's counsel could not produce the note; they alleged it was lost; but they produced an answer in equity of the defendant to a bill brought against him by a third person, in which answer he stated a schedule of debts owing to him, and amongst others, he stated a debt of £90 due to the plaintiff.

Mr. Spiller objected that this bill and answer, being a suit between other parties, and in which the plaintiffs were no way concerned, the answer could not be read as evidence; it was evidence only be-
(421) tween those who were parties to the suit in equity.

PER CURIAM. Where a verdict is given in evidence, it is to the end that conclusions drawn by a former jury between the same parties, upon the same points, may have some weight with the present jury; and as it is a conclusion upon evidence subject to the cross-examination and contestation of the party against whom it is produced, it is allowed to be given in evidence against him; but a verdict between other parties cannot be given in evidence. However, the confessions of a defendant, though made in private conversation, and to persons no ways concerned in interest, may be given in evidence, and that is the principle the Court goes upon with respect to a confession in an answer. It is equally proper to receive evidence of a confession contained in an answer made upon oath as it is to receive evidence of a confession made in a less solemn manner.

The evidence was received.

Mr. Williams, for the defendant, then objected that there was no evidence to support the general counts; and if there were, yet it having been proved that a note of hand was given, and is now lost, there could be no recovery on the general counts, for that note was a negotiable instrument, and may now be in the hands of some endorsee or holder, who may hereafter resort to the defendant, and will be entitled to recover notwithstanding the judgment the Court may now give. The holder will not be subject to any transactions which may take place between the original parties to the note. It is true, a court of equity, in a case thus circumstanced, would make a decree, but it would do so upon terms; it would require the plaintiff to give security that the note should not afterwards be demanded of the defendants, or if demanded, that he should be indemnified therefrom. This Court cannot impose any such terms; they must give an absolute unconditional judgment, if any. A note of hand may be given in evidence to support a count for money lent, but the proposition will not hold *e converso*. Proof of service done will not maintain a count upon a note. The note in the present case cannot be

produced to support that count. Were it produced here, and filed amongst the Court papers, there would be no danger of its rising up hereafter to charge the defendant; and although, had there been no count upon a note, nor any evidence of a note, the confession contained in the answer might have been competent to the proof of the count for work and labor done; yet when the evidence shows a (422) note, it hinders a recovery upon this count also. My objection is that whilst the note exists there can be no recovery upon the consideration for which it was given, or the cause of it, lest the defendant might be twice charged.

Duffy, e contra: The giving of a note is no extinguishment of the prior cause of action, as a bond or other instrument under seal is. 1 Burr., 352. He said he was unprepared with authorities, not having expected the objection; but if the Court would direct a verdict for the plaintiff, subject to their opinion as to the matter of law, he would produce authorities some time in this term. This was assented to, and the verdict taken accordingly.

The Court having taken time to consider the case, and having seen the authorities produced by Mr. Duffy, viz., Ld. Ray., 1427, and 12 Mod., 309, gave judgment for the plaintiff, the defendant's counsel declining any further argument against these authorities.

ANONYMOUS.

When there is no coroner the writ against the sheriff will issue to the sheriff of an adjoining county.

THE plaintiff in this case had obtained judgment against the sheriff in an action in ejectment in the county of Cumberland, and there was no coroner in the county to whom process could be directed. Mr. Moore, for the plaintiff, moved that process of execution should be directed to the sheriff of Moore County, and read the act of 1779, ch. 5, sec. 3, and upon hearing this act, the Court ordered a writ of possession to issue, directed to the sheriff of Moore accordingly.

NOTE.—Since this act of 1821, ch. 3, makes ample provision for the execution of process by the sheriff of an adjoining county, in all cases where there is no sheriff or coroner, or where they are disqualified from acting.

Cited: Collais v. McLeod, 30 N. C., 224.

EVANS v. KENNEDY.

The action of trespass and false imprisonment is the usual and proper remedy for one who is held in bondage, to try his right of freedom. When the plaintiff in an action of this kind is not ready, and obtains a continuance, the defendant must give bond and sureties for the plaintiff's appearance at the next term, and, in the meantime, to treat him with humanity: and, by HAYWOOD, J., also to allow plaintiff time to procure evidence; but WILLIAMS, J., thought otherwise.

THE plaintiff was a person of color, who claimed his freedom, and was detained in slavery by the defendant. The plaintiff and defendant had agreed that an action should be instituted without process, and an issue made up to try the fact; and some doubt now arising in regard to the proper form of action, and of the issue to be made up, they referred it to the Court to direct the proper form of action and issue.

WILLIAMS and HAYWOOD, JJ. The action used on such occasions for eight or ten years past is the action of trespass and false imprisonment, to which the defendant pleaded that the plaintiff is a slave, and cannot maintain an action; and to this the plaintiff replies he is not a slave;
and an issue is made up upon this point and tried by a jury. The
(423) issue was then made up in the present case accordingly, and the evidence not being competent to prove the plaintiff's freedom, the Court recommended the withdrawing a juror, which was agreed to; and then the plaintiff's counsel moved that defendant might give bond and sureties to permit the plaintiff to appear at next term, and to treat him with humanity in the meantime.

PER CURIAM. This has often been ordered before on similar occasions, and is the usual practice where the trial is delayed till a succeeding term.

It was so ordered accordingly in the present case.

HAYWOOD, J. I think the bond usually given goeth further—to allow the plaintiff time to collect evidence and procure depositions, if necessary.

WILLIAMS, J. I do not recollect the defendant was ever bound to that. It would produce a loss of the plaintiff's service, which in the event of a verdict against him, the owner could not be compensated for.

So the bond was ordered to be taken as above.

See *Gober v. Gober*, 3 N. C., 127; *Parker v.* ————, *ib.*, 345. Negroes are presumed to be slaves till the contrary appears; not so of persons of mixed blood. *Gober v. Gober*, 3 N. C., 170; *Scott v. Williams*, 12 N. C., 376. This last case also decides that, under particular circumstances, substantial damages may be given in actions of this nature.

SURVIVING PARTNERS OF AULEY McNAUGHTON & CO. v. LESTER.

A deposition will be quashed if the house where it is to be taken is not specified in the notice.

THE plaintiff produced a notice of taking a deposition, purporting that the deposition would be taken on a certain day.

PER CURIAM. The deposition cannot be read. The house where it is to be taken must be specified in the notice, not the town only; for then the deposition may be taken at a place in the town which the adverse party may know nothing, and thus be deprived of the benefit of cross-examination.

COX v. JACKSON.

A person who has a chattel in possession, belonging to another, and exchanges it for another article, acquires no property in the article taken in exchange, if the real owner thinks proper to approve of the transaction. Where the possession of a chattel does not follow the conveyance, it is a strong circumstance to show fraud, though it may be explained or rebutted.

TRESPASS to recover the value of a horse sold by the defendant, a constable, to satisfy an execution delivered to him at the suit of *Williams v. John Cox,* the brother of the plaintiff, upon which he took the horse in question as the property of John. The plaintiff alleges the horse was his. The evidence proved John to have been very much indebted to sundry persons; that he had a horse and some other trifling articles; that Collins had a judgment against him, and took out execution and put it into the hands of an officer; that other officers who had executions found it, and levied the execution on the horse and (424) other articles, and sold the smaller articles, and did not sell the horse for some time, leaving him in the possession of John Cox until it began to be rumored that the execution was fraudulent, when Collins ordered the officer to sell, who sold accordingly, and George Cox, the brother of John, as the agent of Collins, became the purchaser, and left the horse in the possession of John for some time, and until the defendant levied Williams' execution on him, and appointed a day of sale; on which day Collins appeared and proved the sale and purchase as above, and had the horse delivered to him, and the next morning sold him to George Cox, without receiving any money, but only taking his

note, part of which Collins said was paid after the trial of this cause in the county court, about eighteen months after the date of the note, by discounting a debt with a creditor of his; the residue he said was retained in the hands of George Cox, to satisfy a debt of Collins due to another creditor, which debt, however, has not yet been paid. A short time after George purchased the horse he was again in the possession of John, and continued in his possession till he exchanged him as his own for another horse with a stranger, receiving some money as the difference of value. Soon after the exchange he brought the horse received from the stranger to George, who approved of the exchange and lent the horse to John, in whose possession he continued for some months and until the defendant seized and sold him to satisfy Williams' execution. It was proven that George had ridden this latter horse once or twice after the exchange took place.

Taylor for plaintiff.
Williams for defendant.

PER CURIAM. The goods are bound from the teste of the writ of execution, but that rule will not apply to the present case. John acted as the agent of his brother, who, having approved of what he did, ratified the transaction *ab initio*; so that the property of the latter horse passed to George Cox, and not to John, if the first horse really was George's. As to that the Court differed.

WILLIAMS, J. The circumstances do not amount to proof of fraud. The possession which John had after the purchase by his brother (429) is not to be taken into consideration, the brother having a right to indulge him with the use of his property as he thought proper. As to the possession he had after the seizure by the constable, and before the sale, that was by the consent of the constable, who was answerable if the property was not afterwards forthcoming. It is the usual practice with officers in this country, who seldom remove the property before the day of sale, unless where they suspect the defendant will remove out of the way. As to the possession he had after the purchase by Collins' agent, that was without the privity of Collins. No part of his possession appears to have been continued by the consent of the creditor, and in that particular differs widely from the possession mentioned in *Twigne's case* and the other subsequent cases grounded upon it.

HAYWOOD, J. All the circumstances subsequent to the sale are to be taken into consideration as explanatory of the real state of the pre-

cedent transactions—the possession of John always continued; George gave nothing for the horse, though a valuable consideration was pretended and held up. The debtor having used the horse as his own, and disposed of him, are visible marks of fraud.

The jury found for the plaintiff.

See *Hodges v. Blount, ante,* 414.

STATE v. NORRIS.

A motion to postpone a trial for murder on account of the great public excitement against the prisoner, was refused. WILLIAMS and HAYWOOD, JJ., differed as to the questions whether a juror could be asked on oath whether he had expressed an opinion unfavorably to the prisoner. The State may discredit its own witness by proving that the witness, on former occasions, had given a different account of the transaction from that which he relates in court. A person who was violently abused and beaten, made his escape, ran to his own house, 80 yards off, got a knife, ran back, and upon meeting, with the deceased, stabbed him. It seems that he is only guilty of manslaughter. If, upon the second meeting, the prisoner had disguised the fact of having a weapon, for the purpose of inducing the deceased to come within his reach, the killing would have been murder.

INDICTMENT for the murder of Nathaniel Daves, and not guilty pleaded.

The prisoner was brought to the bar to take his trial. Mr. Hay read a paragraph from a paper printed in this place, and circulated on Monday last, stating the homicide committed by the prisoner in terms of aggravation, and moved on that account for a postponement of his trial, apprehending that the public mind was too much irritated at present for the prisoner to have a fair trial.

WILLIAMS, J. The people in this country do not take for truth everything that is published in a newspaper. The jury well know they are to be governed only by the evidence and the law. I trust no one will be so much prejudiced against the prisoner as to be led to an unjust condemnation. It will be the duty and the business of the Court to see that he has every advantage the law allows him. It is not to be apprehended that a jury of this country will do him wrong; their humanity is proverbial.

(430) HAYWOOD, J. I disapprove highly of the publication. The cause, however, is in course of trial, and must come on.

The clerk began to call over the jurors, after informing the prisoner these were the men who were to pass upon his trial, and that he must challenge them if he thought proper, as they came to the book to be sworn.

Mr. Hay said the killing of Daves by the prisoner had been a subject of very general conversation; that the fact had been related in a newspaper under aggravating circumstances, and though that publication might not have been made with a view of preoccupying the mind of any one who was to take a part in the trial, yet in reality it may have had the effect of prejudicing the public mind in general against the prisoner; that he had but too much reason to apprehend it had produced such effects. He therefore moved when the prisoner objected to a juror *propter effectum,* or for favor, as it is called, that the juror might be examined upon oath whether he had expressed an opinion unfavorable to the prisoner, as otherwise it would be difficult for him to produce any satisfactory proof of the fact, having been confined and visited only by one friend, and not knowing until the moment the juror is offered whether or not that person would be upon the panel. Great part of the jurors being talesmen, summoned this morning since the sitting of the court, had he ever heard of any man having expressed an unfavorable opinion, not knowing he would be summoned as a talesman, it is not to be expected the prisoner could be prepared to prove his exception, however true it might be, unless it could be supposed he had prepared himself to support his exception against every man who had given such opinion, and that would be unreasonable.

Mr. Jones opposed the motion, saying there was no precedent for such a procedure, and he hoped the Court would not now make one for the first time in favor of this prisoner, who should be tried as all other prisoners have been.

HAYWOOD, J. I do not at present recollect ever to have seen such a practice, and I am induced to think there is no precedent of this kind.

WILLIAMS, J. There is none.

Mr. Taylor then cited 3 Bl. Com., 363. A person about to be sworn as a juror may be challenged for any of the causes there stated; or even where the challenger hath no principal cause of challenge, but only some cause of suspicion, the validity of which must be left to triers. He also cited 3 Bl. Com., 364, where it is laid down from Co. Litt., 158 b,

that a juror may himself be examined on oath of *voire dire* with regard to such causes of challenge as are not to his dishonor or discredit. He also cited 4 Bl. Com., 352, where it is said the (431) prisoner may have the same challenges for cause in a criminal as the plaintiff or defendant may in a civil case, and where a challenge *propter effectum* is mentioned as one of them. He argued that the expressing an opinion by the person offered as a juror, if not a principal cause of challenge, as he thought it was, at least is such a cause as might reasonably induce a suspicion of his not being indifferent and impartial towards the prisoner; and if a prisoner in a criminal case had a right to except to a juror, suspecting him to be unfavorable, there must be some mode of trying and discovering the truth of the exception, and there was no reason in a criminal case for resorting to a different mode of trial from that used in a civil one; and if on a civil case, for the purpose of reaching the disposition of the juror towards the party, the law would suffer a juror to be interrogated on his oath with respect to the truth of the cause alleged, to show him not impartial, it is equally necessary that a prisoner, where life is in danger, and for whom the law professes so much tenderness, should be also entitled to have his exception tried in the same way, and to the same means of investigating it.

HAYWOOD, J. Upon reflection, I am of opinion the motion is (432) proper and the person offered may legally be interrogated on oath, as to any unfavorable opinion he has expressed against the prisoner. I can see no reason why the exception is not allowable as well in a criminal as in a civil case, nor why the juror should be sworn in a civil case and not in a criminal one. It is rather more necessary in the latter, as it is of more importance to the prisoner concerned to have a good opinion of his jury. If a prisoner is at all entitled to the privilege contended for, it is as necessary to allow it in the case before us as in any other. There is reason to suspect that the publication just spoken of may have had some influence upon the public mind, unfavorable to the prisoner. The homicide with which he is charged has taken place in this town but a few days past. It is to be feared some ferments are caused by it, rendering it proper for the Court to be circumspect and careful that the prisoner be not prejudiced by the violence of the current opinion. We should act as counsel for the prisoner so far as to see that he has a fair trial, and that he is not denied the benefits the law has provided for his defense against injustice.

WILLIAMS, J. I cannot think the prisoner is entitled to interrogate a juror on oath as asked for. This man should be tried as all others

have been. Why should we extend privileges to him that were not granted to the man tried yesterday for murder? That man's life was as dear to the public yesterday as this man's is today, and we allowed no such privilege to him. I have never known such a thing even asked for before in any criminal case. The office of a judge is indeed a very arduous one; I feel sensibly how disagreeable it is to sit upon a trial when the life of a fellow-citizen is in jeopardy; but when we once undertake it, we should discharge it faithfully, regardless of those sympathizing feelings for the prisoner which are so apt to be experienced on such occasions. We are not to be influenced in any respect by them. It is not a true position that we are to be the friends of the prisoner. We are to see that he has a fair trial, and this is all that is required of us.

HAYWOOD, J. I am intrusted in some measure by my country with this man's life. He may be a bad man and deserve death; but I will not prejudice him, neither will I for any earthly cause be prevailed upon to deny him any privilege he is entitled to. I think upon consideration he is entitled to that which his counsel ask for him; and were the whole world here present to demand his execution, I would not refuse him an advantage that should be conceded to him. Whilst I sit here, the public cry shall never seduce or impel me into the (433) adoption of a measure my judgment disapproves.

Mr. Hay: In order to get over the embarrassment this motion is likely to produce, and the warmth it has given occasion to, I propose that where a juror is challenged *propter affectum,* or for having expressed his opinion, his name shall be set down and noted as one challenged for cause, and that the clerk then proceed with the panel; and if the panel shall be gone through and the jury not completed, that then we consider of the jurors whose names are noted, and how the exception shall be tried. Perhaps we may get a jury before the panel is gone through, and then it will not be necessary to consider further of the exceptions.

WILLIAMS, J. That proposal is a proper one. I think it should be adopted.

HAYWOOD, J., assented.

The jurors in the panel were then offered to the prisoner, and a jury was completed; and they were sworn and charged with the prisoner.

The evidence on the trial was as follows: On Saturday night Norris

and Young came to the house of Mrs. Ramsay, where were Daves, Dudley, Ramsay, Campbell, and others. Young remained in the piazza, Norris came in and sat talking with Ramsay for some time. Campbell went into the piazza to Young, who was intoxicated. He talked of Daves, saying he understood Daves had said he could whip Norris, and desired Campbell to tell him to come out. Shortly after this Norris came out. They moved towards the door, Campbell went in, leaving Young and Norris in the piazza, and told Daves to come out. Daves and Dudley pulled off their clothes and went into the piazza. Young and Norris had gone off. Dudley and Daves went into the street, and Norris came walking from the upper part of the town, down towards his own house, passing that of Mrs. Ramsay. Daves and Dudley went towards his and met him, and Dudley said to him, "You came here to breed a quarrel." Norris answered he had not. Daves replied, "You did." Norris answered, he did not. Daves said, "You are a damned liar." Norris replied, "Whoever says I came here to breed a riot is a damned liar." Said Daves, "You are a damned liar," and tripped up his heels and threw him on the ground. Norris rose and stepped towards him. Daves struck him. Norris desired Campbell to take notice of that. Dudley said to Daves, "He will make you pay for that; take satisfaction." Daves stepped to him and gave him three or four blows, upon which Norris ran off towards his own house. Daves (434) and Dudley walked down the street, calling for Young, who met them with his coat off. They demanded of him if he meant fighting, and why he had stripped; he answered that he was not for fighting, and that he had stripped to see fair play, hearing the attack upon Norris. At this time the witness heard Norris say, "Damn you! you struck me, did you? Come on; I am now ready for you." Daves said, "You have a stick or some weapon you want to kill me with," and stepped towards him, and he then cried out, "I am stabbed!" The witness ran to the place where he was, and he was stabbed on the left side of the belly, with a wound three or four inches in length. Upon the cross-examination of the witness he said Daves kicked at Norris after he fell in the first combat, near Mrs. Ramsay's, and that Norris' house was about 50 yards from the place where Daves was stabbed; that he had gone some distance below Mrs. Ramsay's towards Norris' before they met the second time, and that Norris was gone three or four minutes before he returned, and that the fighting happened about an hour in the night. This was Campbell's testimony.

The evidence of Young was that he met Norris at the race-ground on Saturday, and rebuked him for quarreling the night before with Daves. Norris answered, "It is all settled; we drank together at the path; it was

occasioned by liquor." "At night we came down by Mrs. Ramsay's. He asked me to go in, but I declined. He desired me to wait a little for him. I waited in the piazza. Campbell came into the piazza. I walked down the street, and got just below Mrs. Thompson's, where I saw Mrs. Thompson standing. Dudley came out hallooing for me. I answered him and pulled off my coat. He came up and caught me by the shoulder, and asked if I had come to breed a riot, to which I answered, I had not. Daves also came up, and immediately afterwards I heard him cry out, he was stabbed, and turning that way I saw Norris run off. I think it was 80 yards from the place where Dudley and Daves came up to me and where Daves was stabbed, to Norris' house. Dudley halloed so loud for me that I think he might have been heard to Norris' house." A physician who attended Daves swore he died of the wounds he received that night.

Dudley deposed that on Friday, himself, Daves, and Norris came together into town from the race-ground; that they stopped by the way at a house in town, and were drinking together. A conversation (435) arose about one McRae. Daves abused and Norris spoke well of him. Some warm words passed. Daves pulled off his clothes and went downstairs, bidding Norris to follow. Norris remained where he was, and Daves came in asking Norris why he had not followed him. Norris answered, "That is not the way I mean to fight; I will burn powder with you." We all went home, and next morning I met Norris, who asked what had been the matter last night, saying he had come to see about it, and seeming to be uneasy at what had happened. He inquired for Daves, who about that time came up. They conversed together. Daves said, "It was your fault, but I don't care; I never bear malice." Norris replied, "It was not me, but rum; let us go to Dick's and drink something." I proposed they should meet at the races and drink together, which they agreed to. At the race-ground he called to Daves and myself to come and drink with him, and we did so. After drinking together we parted. After dark, at Ramsay's, Norris came in and sat down. We sat down to supper, and Norris was asked to sit down, but declined and went out. Campbell was missing, but after supper came in. Daves asked him what Norris came for; Campbell said he supposed to breed a riot. Daves and myself then pulled off our clothes and went into the piazza. Norris and Young were not there. Daves called out for them, saying they were cowards. Norris came up, and Daves met him. I went off, calling for Young; he answered, "I am here." Daves and Norris had some words, and Daves tripped him up. Norris rose and Daves struck him. Norris required Campbell to take notice. It was just at this time I heard Young answer. Daves

struck three or four more blows, and Norris ran off. We went to Young and stood talking with him, when Norris came up. Daves turned and went towards him, saying, "You have got a weapon or a stick," which Norris denied. Mrs. Thompson called out, saying, "Norris has a sword or gun; he will kill you. Do not go to him." Daves, however, and Norris met in the street opposite to where we were. As they met, Norris made a lunge. Daves cried out he has stabbed me, and fell. Young and myself went to him. His bowels were out. We carried him to Mrs. Ramsay's, and in two hours he died. At the last meeting, I did not see Daves strike before the stab. It was 80 or 100 yards from Thompson's place, where the stab was given, to Norris' house. It is about 20 yards from Mrs. Ramsay's, where the first combat was, to Thompson's. When Norris returned, he came running, and (436) immediately after he gave the stab, ran off. I followed him, but did not overtake him, and returned. When Norris came into the house at Mrs. Ramsay's, Daves said to me, "Mrs. Ramsay does not want Norris here. You had better ask him to go out." I replied, "No; he will go presently."

Mrs. Thompson deposed as follows: That on Saturday night she was sitting in an outhouse, and heard a great noise, and a woman's voice, and saw Mrs. Ramsay in the street, and heard very heavy blows, and Mrs. Ramsay saying, "Cousin Ramsay, don't strike, too." Just at this time Young came to her where she was standing in the street; she asked who were making that noise; he answered that Dudley and Daves were beating Norris; requested her to take his coat, saying he could not stand that, alluding, as she supposed, to the heavy blows that were heard. Immediately a man came running, Young asked who he was; he said, "Norris." "What is the matter?" said Young. "Don't run." Norris replied, "I can't stand three or four men." Young said, "You must stand; it is cowardly to run. I will stand by you." Dudley and Daves came running up, and Norris, breaking the hold Young had on him, ran off. Young stepped back, saying to Daves and Dudley, "Stop!" They asked him whether Norris had come by, he said yes—"But what is the matter?" They said, "Do you stop us? Do you want to fight?" He answered, "No." Daves then came to where she was, and said Norris had abused Mrs. Ramsay unmercifully, and that he had resented it. At this time Dudley and Young were in the street in high words, and Norris came back running. Dudley and Young stood some small distance from her and Daves. Norris stepped on the other side of the street and stood a short time. She said to Daves, "Do not go to him; perhaps he has a weapon." Daves replied, "Damn him; I am not afraid of him, weapon or no weapon," and went round the others from her, towards

Norris; and said to Norris, "Have you a weapon?" he answered, "No." "Have you a club?" He answered, "No." Then said Daves, "Do you think you can stand a man now?" "If I can't," said Norris, "I have a man that can." Norris then cried out, "Stand off, Mr. Daves, or the worst is yours." She then heard two or three blows, and Daves cried out, "I am stabbed!" Norris retired a small distance and stood. She saw him no more afterwards, that night. When Norris returned, he did not advance upon Daves, but ordered Daves, when he advanced, to stand back. Two or three blows passed before the stab, and she thinks from the manner of Daves' advancing they were given by him; he (437) went towards Norris as if going to attack him. She heard the blows that first passed near Mrs. Ramsay's; they were very heavy.

Several other witnesses were sworn, but they related nothing material. Mr. Briggs said on Saturday, the day preceding the night when Daves was stabbed, he told him he expected he would have to fight that night, but did not say whom. Mr. Dick recited the quarrel between Daves and Norris on Friday, at which time Dudley said to Daves, "Say what you please to him; if you can't flog him, I can." An old lady swore Daves had obtained a judgment on a warrant against some man, and about three weeks before his death left it with her, telling her to keep it, and if any accident happened to him, and he should die, that she might collect the money, and a day or two after his death Dudley came for it. Another witness said the day before yesterday Dudley was speaking, after coming from court, of a trial for murder which had taken place that day, and of the acquittal of the prisoner, and said upon that occasion, "I will bet £100 Norris will not be acquitted. If he should, the man who clears him ought to be put in his place." Another witness said there were broils between Norris and the family of Dudley, but none that he knew of between Dudley and Norris.

Jones, the Solicitor-General, then moved to have leave to introduce witnesses to prove a variance between what Mrs. Thompson, one of the witnesses, had sworn in court and what she had related in several conversations to others. He admitted the rule in civil cases was that the party producing a witness should not afterwards be permitted to discredit that witness; but the rule had never been adopted as he knew of in criminal cases. In civil cases the party converses with the witness before his introduction, and knows what he will swear, and is generally acquainted with the character of the witness and with the degree of credit he is entitled to. When he produces a witness to the Court, it is an admission on his part that the witness is credible, as he claims a benefit from the testimony. It is proper in such cases he should be bound

by his admission. But the reason of that rule will not apply to criminal cases, where the prosecution is carried on by the officer of the public, not at the instance of any particular prosecutor. That public officer is a stranger to the persons he produces as witnesses; he has, in general, no opportunity of knowing either anything of the character of the witness, or of what it is he will swear, otherwise than as he (438) collects it from others in the course of conversation.

Hay and Taylor objected to the attempt of the Solicitor-General to discredit his own witness. They insisted the rule of not allowing this to be done in civil cases was equally applicable to criminal ones.

PER CURIAM. The rule is so in civil cases. Let authorities be produced to show how it is in criminal ones.

The gentlemen on both sides searched for authorities, but could find none.

WILLIAMS, J. I think the Solicitor should be allowed to discredit the witness, if she has varied from the relation she now gives. Were he not allowed to do this, a prisoner and his friend might tamper with worthless persons to swear for the prisoner, and secure them from any impeachment of their credibility by procuring them to relate in public a story tending to establish the guilt of the prisoner, and by that means cause them to be summoned by the public officer and introduced for the State, and, when sworn, to depose directly against what they had publicly related. Were not the Solicitor allowed to impeach such evidence, a wide door would be opened for the acquittal of the prisoner by false testimony. The prisoner would have nothing more to do than cause his witnesses to be introduced on the part of the State. They might therefore pass for truth any falsities they might think proper to utter. It is a very easy matter to procure them to be introduced for the State, as the Solicitor-General, not being acquainted with the witnesses, would think it his duty to summon and introduce all such persons as he was informed could swear anything against the prisoner.

HAYWOOD, J. No light that can be thrown on this subject should be excluded, nor any means left untried to place the fact in its true point of view. The witness has sworn to some circumstances which are very material in the present case; and if untrue, they should be rectified. If she has related the fact differently to other persons, it is a good reason for giving the less credit to her relation now.

The witnesses to discredit her testimony were called. One of them related the story she told a few days ago, in which several circumstances

now mentioned by her were omitted. Two witnesses were called to support her credit. They said she had told the story in their presence at different times exactly as she now told it in court.

This closed the evidence on both sides, a summary of which stands thus: On Saturday night, Norris and Young returning from the races, Norris went in at Mrs. Ramsay's, whilst Young waited for him (439) in the piazza. In the house, Norris talked with Ramsay, sitting on the bed, and supper coming on, he retired and went up the street, Young going down. Dudley and Daves understanding from Campbell they had come there to quarrel, stripped, went out calling for them and saying they were cowards. Norris at this, going down the street, passed near Mrs. Ramsay's, not far from which they were. Daves accused him of coming there to breed a riot; Norris denied it. Daves insisted upon it, and proceeded to abusive language, which Norris retorted and Daves repeated, tripping up his heels and kicking at him whilst on the ground. Norris rising, Daves struck him, and Norris called to Campbell to take notice. Dudley then advised Daves to take satisfaction, and Daves struck Norris three or four blows. Norris ran off towards his own house, distant from Thompson's, which was 20 yards below Ramsay's, 50, 80, or 100 yards. Daves and Dudley went down the street towards Thompson's, where they found Young stripped. Dudley stood in the street, opposite Thompson's, conversing with Young. Daves also stood in the street, near Thompson's, conversing with Mrs. Thompson. Norris, after an absence of three or four minutes, returned running, and, as Mrs. Thompson says, stopped in the street opposite to them; as the other witness says, he ran up to Daves without stopping. Daves discovered him, and went towards him. Mrs. Thompson and Dudley say Daves inquired whether he had a weapon, club or stick, which Norris denied, and they met. Campbell says Norris cried out, "Come on; I am ready for you." Mrs. Thompson says blows passed upon their meeting, which she believes were given by Daves. Dudley says he did not see Daves strike before the stab; the other witnesses say nothing of blows at this time. Immediately upon the last meeting, the deceased received the mortal wound of which he died.

Jones, Solicitor-General.
Mr. Hay, and then Mr. Taylor, answered the Solicitor.

(445) HAYWOOD, J. The case before us is of awful importance; every circumstance in it is worthy of attention and consideration. I am pleased at the solemn silence which hath prevailed during the progress of this trial. The offense of which the prisoner is indicted is that of the

murder of Nathaniel Daves. If he is guilty upon the evidence, weighed by the law of the country, public justice requires he should not be screened by any misplaced compassion; and if upon the evidence he is not guilty of the crime imputed to him, no influence whatsoever should prevail to hinder his acquittal. Whether he be guilty or not depends upon the law and the fact.

Before we proceed to examine the fact, we should clearly comprehend what is meant by the term murder. To fix the attention only to such circumstances as are material to be considered now, it will be sufficient to say it is a killing with malice prepense. The other parts of the definition have been fully given by the Solicitor-General. Malice prepense is a legal term that needs explanation. It does not signify ill-will or malevolence against an individual; it means, as some authors express it, a disposition to do evil; as others, the symptom of a wicked, depraved, and corrupted heart; as others, the sign of a heart regardless of social duty, and fatally bent upon mischief; by others, it is termed a circumstance attending the fact that cuts off the slayer from all manner of excuse. All of them being only different modes of representing the same idea. By this latter explanation is meant that when the killing is without any justifying, excusing, or alleviating circumstance, it is then murder. There are a great variety of such circumstances; for instance, where the killing is committed by an officer in executing the sentence of a proper tribunal, the killing by such authority and for such a reason is a circumstance that justifies the party. So, also, if a man kill another who is attempting to kill or rob him, or the like; here the killing, being with a design to prevent the perpetration of as great an evil attempted to be brought upon an innocent person, is a circumstance that justifies the deed. If the man doing a lawful act in a proper manner undesignedly kills another: here the killing, being done without any design to kill, and without any negligence in the party killing, is a circumstance which excuses him. So if the party slaying hath been fighting with another, and declines the combat, and the other press him so hard that he is obliged to kill him to prevent his own destruction or great bodily harm: this circumstance of killing to avoid his own destruction, though originally culpable in fighting with the deceased (446) at all, will excuse him from the guilt of felony. And in all other cases where the circumstances attending the fact are such as will justify or excuse the party, he is not guilty of murder, because the circumstances are not such as leave him without excuse. Also, although the killing may not be attended with circumstances of justification or excuse, yet it may be attended with such circumstances as will mitigate his offense, and afford him something to say by way of excusing or exempt-

ing himself from the guilt of murder: as where some great and violent provocation hath been given to him by the person killed, and he in the transport and fury of his passion killeth the other, the law in such case attributes the killing to the frailty of human nature, operated upon by excessive anger, excited by the unworthy treatment of the deceased; and both law and reason says that a killing under such circumstances should not be punished with the same severity as a killing without provocation, or without a very great one, and when the mind is cool and reflecting.

The great distinction between murder and manslaughter is this: manslaughter is committed under the operation of furious anger that suspends for a time the proper exercise of reason and reflection, and which hath been stirred up by some great provocation; for there are some provocations that are not indulged with an allowance of exciting the passions to such excess, and thus a distinction is formed between the different degrees of provocation. If it be by words or gestures only, it will not be sufficient to mitigate homicide into manslaughter; but if it be a provocation by some great indignity offered to the party killing, as by spitting in his face or the like, or by falling out and fighting, so that in either case it may reasonably be presumed the blood is heated, and the passions raised to such a degree as to suspend the proper operation of the reasoning powers, the exercise of judgment and reflection, such provocation will be a sufficient one to extenuate the offense into manslaughter. But although a sufficient provocation be given, and the passions greatly excited, yet if a sufficient time intervenes for the passions to subside and cool, and after that the party provoked killeth the other, the law will deem it murder, as having not been an effect of ungovernable passion and from the frailty of human nature, but upon a principle of revenge after reason had assumed its proper station. What is a sufficient time for this purpose hath never as I know of been precisely ascertained. It hath been adjudged that an hour is more than
(447) sufficient time. It seems to depend greatly upon the nature of the provocation, and must be left to the jury to decide. If in the case before them they think sufficient time did intervene, they should find the prisoner guilty, though he had been greatly provoked before; if otherwise, they should find him not guilty of murder, but of manslaughter only. Also, although the slayer hath been greatly provoked, and was agitated by resentment and anger in the highest degree, and hath not had a sufficient time for cooling before the fatal stroke given, yet if in fact he appears to be possessed of deliberation and reflection, when or just before the time he gives the mortal blow, it will be murder: as where two men quarrel, and agree to fight, and the one observes to the other, he must first change his shoes, as they would render him less

expert with the sword, and they afterwards go out and fight, and he kills the other, it is murder, because the remark he made shows deliberation and reflection; for always it is to be observed, that the law allows the offense to be extenuated only upon the ground that the slayer has not the free and proper exercise of his rational faculties, owing to the fury of resentment not unreasonably conceived.

There are other distinctions between murder and manslaughter not necessary to be now taken notice of, as they have no relation to any such case as is framed by the evidence now before the Court.

It is most proper to state only such parts of the law concerning homicide as, being compressed into a succinct compass, may serve to exhibit a clear view of the distinction between murder and manslaughter as far as regards this case. The next thing to be done is to apply such parts of the evidence as are material to the rules just laid down.

The first thing that presents itself is, Norris' going in Ramsay's house. He does not appear to have behaved illy there; from the whole of the evidence it does not appear he went there with a design to quarrel; he had retired before Daves and Dudley stripped and went out. They hallooed for him and Young in the street, calling them cowards. Daves charged Norris, when met, with a design to raise a riot; he denied it again and again, till called a damned liar, when he retorted the lie conditionally; Daves tripped up his heels, kicked at him on the ground, struck him after he had risen; and upon Norris' intimating an intention to resort to the law for redress, repeated his blows three or four times, when Norris ran off. Now the question arises, Was this a great provocation? Would such treatment excite the passions of man in general to a degree of excess? I think it would. If Norris had killed Daves on the spot, I think it would have been but manslaughter. Norris (448) returned in three or four minutes, and gave the fatal stab. If he came up and nothing more passed before the stab, as the witnesses Campbell and Dudley say they did not, then it is for the jury to consider whether the three or four minutes intervening between the blows near Mrs. Ramsay's and the stab opposite Thompson's was sufficient time for the passions to cool. If it was, the killing was murder. If it was not, the case falls under the same consideration as if the fatal stroke had been given when Daves first struck him. If the jury believe what was sworn by Mrs. Thompson, and which the other witnesses do not mention, that Daves when he advanced towards Norris after his return struck him two or three blows before the stab, they have a right to consider whether that was not a fresh provocation sufficient to extenuate the homicide into manslaughter. If, however, the jury believe there was not a sufficient time for the passions to subside, and that the blows mentioned by Mrs. Thomp-

son did not pass, yet the circumstances related by two witnesses of Norris' having twice denied his having a weapon or club, as it tends to evince deliberation and reflection, must be taken into their consideration; and if they believe from this circumstance that he at that time had a reflecting capacity, and meant to conceal the weapon from Daves in order to draw him on, that he might kill him, then he is guilty of murder. It is proper, however, to observe that such a conclusion is in some sort negatived by Mrs. Thompson, who declares Norris told him to stand off, or the worst would be his. The jury will now take the law, the facts, and the circumstances of this case, and by a careful comparison of the one with the other, they will draw a conclusion and say whether the prisoner is guilty of murder or manslaughter. I trust I have stated the law correctly.

WILLIAMS, J. I agree with Judge HAYWOOD except in a few particulars: He says malice is understood of a killing under such circumstances as cuts the party off from all manner of excuse. I do not think this a true position. He may have some kind of excuse, as a slight provocation or the like, or a provocation not sufficiently violent; he may, in short, have some sort of excuse, and yet be guilty of murder. I cannot think it an excuse to reduce the offense to manslaughter where two persons (449) quarrel and fight, and one goes some distance, gets a knife, returns and kills the other with it. Such disputes happen every day. If we say it is not murder to kill shortly after, under such circumstances as this man was killed, much blood will be spilt in a very short time. It will be establishing a dreadful precedent. Norris ran off from the first combat and went home; he got into his house, his castle of refuge and defense, where no one would have offered to molest him. Why did he not remain there? Why take his knife and return back 80 or 100 yards to an enraged man? Did not this show a murderous intent, and that his heart was bent upon cruelty? I think it is no matter what provocation the slayer may have received from the other, if notwithstanding that he appears to have possessed the faculty of reflecting. It is a temporary frenzy occasioned by passion, and depriving the man for the time of his reason, that the law considers and goes upon in estimating and reducing the homicide to manslaughter; but there is not any evidence in this case of a deprivation of reason, but evidence of the contrary. He denied having any weapon, when expressly asked whether he had or not. The jury will consider why and for what purpose he made such an answer. If he had any certain end in view, it is an evidence that his reason and judgment were not overturned. On occasions like the present we are not to give up ourselves to the guidance of commiseration. We ought inflexibly to do justice without regard to consequences. I am sure I have

as much feeling and compassion for my fellow-creatures in distress as any man; but it is great cruelty to the public in a judge or juror to acquit a murderer from motives of compassion. It encourages such offenses; besides, how is the prisoner dearer to us than the person slain, who may have left a wife and helpless orphans to deplore his loss, deprived of their only friend, and now exposed comfortless to the world? I do not know what was the situation of the deceased, but this may be the case with persons who fall by murderous hands, and their dependents. I meant not to prejudice the case of the prisoner, but only to express my idea of the impropriety there is in showing favor. If the prisoner by his conduct has subjected himself to the punishment of the laws of his country, we were not the cause of his transgression. If any mishap befall him, it is his own fault, not ours. We should never attempt to trample upon the rules of law from motives of mercy or compassion.

The jury retired, and after some time returned, and found the (450) prisoner not guilty of murder, but guilty of manslaughter; and he was burnt in the hand and discharged.

NOTE BY REPORTER.—The cause of reporting this case with so much minuteness is that the public opinion ran very high against the prisoner, before and after his trial, and he was pronounced guilty of murder by many who were present at his trial. The jury who acquitted him were highly censured. Perhaps the learned may be of opinion, when they meet with this case, that the jury gave a proper verdict. It is possible that may become the general opinion. If so, probably some of those who are to be hereafter concerned in trials of this sort may be led to reflect on the rapidity with which a wrong opinion sometimes spreads its influence over the public mind, and to be cautioned, that a popular sentiment, however honest and well meaning it may be, may sometimes become current for want of sufficient consideration or information, and as frequently so respecting matters of judicial deliberation as any others.

Cited: S. v. Benton, 19 N. C., 208; *Hill v. Cox,* 34 N. C., 322.
Overruled: S. v. Taylor, 88 N. C., 697.

STATE v. OLDHAM.

The act of 1779, Rev., ch. 157, sec. 2, respecting the appointment of jurors is only directory, and does not apply to grand jurors.

THE prisoner was convicted at this term of the murder of one Archibald Jackson, and it being demanded of him what he had to say why sentence of death should not be passed, his counsel, Mr. Duffy and Mr.

Taylor, offered reasons in arrest of judgment, all of which were abandoned in the course of the observations made upon them, except the following, viz.: That several of those who were of the grand jury that found the bill, naming them particularly, amongst whom was Mr. Hodges, the foreman, were persons who then severally had a suit or suits depending and at issue in this Court, and were therefore disqualified to serve as jurors; and for the maintenance of this objection they relied upon 1779, ch. 6, sec. 2, in which is this proviso, viz.: *"Provided always,* that no county court shall knowingly nominate any person to serve as a juror at two courts successively, or any person who shall have an action or suit at issue in the Superior Court at the term to which he (451) shall be so nominated"; and they said that under this clause MACAY, J., and HAYWOOD, J., on the Western circuit of the spring, 1795, had rejected all such jurors as disqualified.

PER CURIAM. This act is only directory. The intent of it was to exclude suitors from the petit jury, from an apprehension lest, in the course of the term, such persons might combine mutually to serve each other. This is not to be apprehended in the case of a grand juror, who has it not in his power to render a *quid pro quo* in the same way, should he be ever so much inclined. This act is as well directory to the Superior as to the county courts. If the county court ought not, knowingly, to nominate suitors for jurors, neither ought this Court knowingly to receive them as petit jurors when sent. The intent of the act is that they shall be excluded, and so far as the view of this act extends, the Superior Court will not suffer its object to be eluded. Upon this ground, the Court proceeded in the spring circuit of 1795.

Et per WILLIAMS, J. That practice was well begun, and I do not know why we have not continued it.

The reasons were overruled.

Cited: S. v. Seaborn, 15 N. C., 311.

ANONYMOUS.

Computation of terms within which complainant must proceed after dissolution of his injunction.

IN this case the question was how the two terms should be computed within which a complainant on an injunction bill, must proceed after

the dissolution of his injunction, whether the present, term not being yet ended, should be reckoned as one, this being the second, exclusive of that wherein the dissolution took place.

PER CURIAM. The present term is to be accounted the second, and if he has not proceeded before we come regularly to his cause on the equity days, his cause shall be dismissed.

And the suit in the present case was dismissed. But on the last day of the term the defendant's counsel being absent, Mr. Hay showed that the complainant actually had proceeded within time, and the dismission was ordered to be stricken out.

See *Anonymous*, *ante*, 162.

HALIFAX—OCTOBER TERM, 1796

PARKER AND WIFE v. PHILLIPS.

Where a father, upon the marriage of his daughter, sends negroes or other property with her in marriage, it is *prima facie* a gift.

TROVER for a negro, which the father of the plaintiff's wife (and also of Phillips, who claims under a subsequent gift) sent with her, on her marriage, to her husband's house. About a year afterwards, in occasional conversation, he mentioned to his daughter that he had not intended ever to take the negro away from her, when he sent her to her husband's house. There was other evidence, but upon this: (452)

STONE, J., ruled according to the former decisions in *Farrell v. Perry*, *ante*, 2; *Carter v. Rutland*, *ante*, 97, and *Whitmell v. Moore*, decided at Edenton, prior to the two others: Where a father, upon the marriage of his daughter, sends negroes or other property with her, upon her marriage, to her husband's house, that it is a gift, unless the contrary be proven: which in the present case not having been done, there was a verdict and judgment for the plaintiff.

SMITH v. POWELL.

Though a judgment is not negotiable, yet the law will so far take notice of an assignment as to protect it against the act of the assignor.

SCI. FA. to revive a judgment, and payment pleaded; and on trial of the issue it appeared that on the day when the judgment was obtained it was assigned by Smith to Barkesdale; that afterwards execution issued and was put into the hands of the sheriff, who returned, "Satisfied as to costs." Smith and Powell both informed him that certain judgments which Powell had obtained against Smith were agreed to be set off against this judgment of Smith's against Powell, and by that means the whole of the judgment was satisfied. About six months ago Smith gave a receipt to Powell for the money due upon the judgment. The counsel argued as this was done without the knowledge or consent of Barkesdale, it was fraudulent and void. On the other hand, it was argued that a judgment was not assignable so as to vest the legal interest in the assignee, and that the plaintiff in the judgment, notwithstanding the assignment, might receive the money due upon it, and might give a good discharge to the debtor.

PER CURIAM. Though a judgment, strictly speaking, is not negotiable, it may be *de facto* assigned, and such assignment will give an interest to the assignee which the law will take notice of, and protect against the acts of the assignor. This was decided some years ago, in *McDaniel v. Tate,* at Morganton.

There was a verdict and judgment for Smith, whose name was used by Barkesdale, the assignee.

NOTE BY REPORTER.—The case of *McDaniel v. Tate* was thus: McDaniel had sold a negro to Tate, and had taken a bond for tobacco, which he assigned to Wier, who sued Tate in the name of McDaniel, in the county court of Burke. Tate attempted to defend himself by proving the negro to have been unsound. There was a verdict in the county court, and the cause came up by appeal to the Superior Court, and depended in that court for trial. Tate had full knowledge of the assignment to Wier, and had conversed with him on the subject at different times, as the proprietor of the bond. Tate, however, prevailed upon McDaniel to give him a release, and gave him a (453) considerable reward for it, and by his attorney, Mr. Avery, pleaded it since the last continuance. At the trial it was insisted by the plaintiff's counsel, and so ruled by the Court, that all the former pleas were waived by this plea since the last continuance. The plaintiff's counsel then insisted that this was a fraudulent transaction between McDaniel, the nominal plaintiff, and the defendant, to defraud Wier, who had such an interest as the law at this day will take notice of, though it was otherwise held

formerly, and cited 1 Term Rep., 619, *Winch v. Keeby.* And upon this, the Court charged the jury to find for the plaintiff, which they did. A new trial was moved for, and a rule to show cause obtained and enlarged to the next term, when the matter of law was argued before ASHE and MACAY, JJ., who decided the directions were right, but Avery alleging he had been taken by surprise, they offered him a new trial for that cause, if he would pay the costs up to that time, which being considerable, and he having filed a bill in equity for relief, he refused to accept of the new trial upon those terms, and there was judgment for the plaintiff.

Cited: Hogg v. Ashe, post, 480; *Ricaud v. Aldermen,* 132 N. C., 64.

SALISBURY—MARCH TERM, 1797

YARBOROUGH v. GILES.

Where, in appeal from the county court, and a new trial had in the Superior Court, a verdict for as great a sum was obtained in the Superior Court as had been rendered in the county court, HAYWOOD, J., thought judgment might be entered up *instanter* against the appellant and his securities, under the act of 1785, Rev., ch. 233, sec. 2. But STONE, J., was of opinion the act did not apply in such case.

APPEAL from the county court, and upon a trial here, this term, there was a verdict for the plaintiff for as great a sum as there was in the county court; and the plaintiff now moved by his counsel to enter up judgment against the sureties in the appeal bond, according to the act of 1785, ch. 2, sec. 2.

HAYWOOD, J. It may be done; the act is express.

STONE, J. The sureties are not in court. If a judgment is now entered against them, it will be to condemn them unheard. The law which says this is a harsh one, and should be construed with all possible strictness according to the letter. The act says, when any appeal prayed shall not be prosecuted, or the court before whom the appeal may be determined shall affirm the judgment, then shall the appellant be decreed to pay to the appellee 12½ per cent interest from the passing of the judgment in the county court by which such appeal may have been granted; and the bonds taken for prosecution of appeals with effect should hereafter make part of the records sent up to the Superior Court,

on which judgment may be *instanter* entered up against the appellant and his securities. The sentences respecting the 12½ per cent and that of entering up judgment against the sureties were conjoined by the particle *and*. Judgment may be entered *instanter* against the sureties where the appeal is not prosecuted, or where the judgment is affirmed. A judgment is not affirmed where there is a new trial in the court above, for then that court gives a new judgment. The judgment of the county court is only affirmed when the appeal is not prosecuted, and the (454) appellee for that cause moves for an affirmation of the judgment below. That is not the present case. The appeal has been prosecuted.

HAYWOOD, J. I think there are two cases specified in the act that entitle the plaintiff to enter up judgment: first, if the appeal shall not be prosecuted; secondly, if the judgment shall be affirmed; and that the affirmation of judgment here spoken of intends a judgment in the Superior Court, obtained for the same or a greater sum than the judgment in the county court. The affirmation here spoken of is not meant of an affirmation upon motion for want of prosecuting the appeal; for then the latter part of the sentence means the same as the former part, when it is evident from their disjunction by the Assembly that they were meant to express different circumstances.

STONE, J. I am of opinion the act does not necessarily embrace the case now before the Court. I am willing, however, a notice may be issued to show cause.

So the plaintiff did not obtain judgment *instanter*.

SURVIVING PARTNERS OF AULEY McNAUGHTON & CO. v. HUNTER.

Under the acts of 1777, Rev., ch. 115, sec. 10, and 1793, Rev., ch. 392, it is held that a plea in abatement is not the proper mode to take advantage of the plaintiff's having brought his suit in the Superior Court for less value than £50.

PLEA in abatement, that the plaintiff's demand is not of the value of £50.

Williams for the plaintiff: The act of 1777, ch. 2, sec. 10, directs that no suit shall be commenced in the Superior Court of less value than £50, where the parties live in different districts; and if any person shall demand a greater sum than is due, on purpose to evade this act, or if

any suit shall be commenced contrary to the true meaning of this act, the plaintiff in either case shall be nonsuited and pay costs: *Provided,* that if the plaintiff, or any person for him, will make an affidavit that the sum for which his suit shall be brought is really due, but that for want of proof, or that the time limited for the recovery of any article bars a recovery, then and in that case the plaintiff shall have a verdict and judgment for what appears to be legally proved, etc. The same clause is repeated and reënacted in a subsequent act passed lately. The pleader of the plea has supposed the Court has no jurisdiction where the sum really due is of less value than £50, and has accordingly pleaded in abatement; but this is a mistake, as becomes evident if we only consider the consequences of a plea in abatement, and how different the course of proceedings must be upon that from what the law intended. Suppose part of the demand is barred by the act of limitations, (455) how is the defendant to take advantage of that circumstance upon a plea in abatement, or how is the plaintiff to know of his intention to take advantage of it before the trial? Is the defendant to be permitted to plead a plea in abatement, and to give the statute in evidence? Suppose he has a set-off reducing the sum below £50, is that to be a set-off upon this plea in abatement without notice given? If not, how is the sum really due to the plaintiff to be ascertained, if the verdict upon such a plea should find the sum really due to be less than £50, and the plaintiff then makes the affidavit required by the act, will the Court give judgment in chief upon such a finding? They cannot, for the jury upon issue joined on a plea in abatement are not to assess damages but only when they find against the plea. In the case I have supposed, they would find for it. It is argued a plea in abatement is most proper, because the plaintiff cannot be nonsuited after the finding of the jury. It is true he cannot voluntarily suffer a nonsuit in common cases, nor, indeed, can he in common cases be nonsuited against his consent; but if an act empowers the Court to nonsuit him, whether he will or not, they may in that particular case give judgment as in case of a nonsuit. This is only a critical objection; it does not meet the act. We are to form our judgment upon that, and its true meaning. It is plain from the cases I have before stated, the objects of the act cannot be attained by a plea in abatement.

PER CURIAM. Judgment of *respondens ouster,* and all costs up to the time of overruling the plea.

See *Allen v. Stokes, ante,* 122.

Sci. fa. must issue on death of a defendant, but not on death of plaintiff.

PER CURIAM. Where the defendant dies, there must be a *sci. fa.* against the executors to make them parties. But where the plaintiff dies, there needs no *sci. fa.*, for the defendant is continued in court two terms by the act of 1786, ch. 14, and 1789, ch. 57, sec. 7; and the executors may come in and pray to be admitted to prosecute, and the Court will permit them to do so without any process.

Cited: Spencer v. Cahoon, 14 N. C., 81; *Hobbs v. Bush,* 19 N. C., 511; *Collier v. Bank,* 21 N. C., 331.

STATE v. BROMFIELD LONG.

Naked confessions, unattended with circumstances, are not sufficient to convict of a capital crime.

INDICTMENT for horse-stealing, upon which the evidence was that the horse was missing, and about three days afterwards two men came with the horse, and Long tied, to the house of the owner. Long confessed to the owner he had taken the horse, and begged forgiveness. The two men who brought him were not present at the trial, and there was no other circumstance proved in the case.

(456) PER CURIAM. Where A makes a confession, and relates circumstances which are proven to have actually existed as related in the confession, that may be evidence sufficient for a jury to proceed upon to convict the prisoner; but a naked confession, unattended with circumstances, is not sufficient. A confession, from the very nature of the thing, is a very doubtful species of evidence, and to be received with great caution. It is hardly to be supposed that a man perfectly possessed of himself would make a confession to take away his own life. It must generally proceed from a promise or hope of favor, or from a dread of punishment, and in such situations the mind is agitated—the man may be easily tempted to go further than the truth. Besides, the witness, respecting the confession, may have mistaken his meaning. How easy is it to understand the speaking differently from what he meant; and the smallest mistake in this particular might prove fatal. As there are no confirmatory circumstances in the present case, it is better to acquit the prisoner.

The jury found him not guilty.

CUPPLES, GUARDIAN OF ALLEN, v. ————.

In a *caveat* a verdict was found against the plaintiff, which was confirmed in the county court, before which time, however, the plaintiff had obtained a grant from the State for the land; and now, in the Superior Court, it was held that the grant could not be impeached at law, but as the defendant appeared to have had the justice of the case on his side, he shall have the costs of the *caveat*.

CAVEAT. Upon the trial the jury found for the party opposed to Mr. Cupples, which verdict was confirmed by the county court; before which time Mr. Cupples, for his ward, had abtained a grant from the Secretary's office; and the verdict and proceedings of the county court were moved into this Court.

PER CURIAM. There have been so many decisions that a grant, although irregularly obtained, is valid in law, that we think ourselves bound by them at present, although we cannot subscribe to the reasoning of them. Of course, it is useless now to consider whether these objections to the verdict are valid or not. However, with respect to costs, it is necessary to say something. There can be no doubt but in point of equity Mr. Cupples should pay them. There has been the verdict of a jury against him, and that verdict confirmed by the county court. Upon argument he has caused an abatement of the suit, like that partial abatement which sometimes happens in case of the death, destruction, or ceasing of the principal thing in dispute, so that the Court cannot give judgment for it, as where an action is brought against tenant *per autre vie*, and *cestui qui vie* dies, demandant may proceed for damages for detention; in ejectment for lands leased, if the lease expires before a decision, plaintiff may proceed for damages and costs. Here, before the suit is decided, one of the parties puts an end to it by removing (457) out of the Court's power the thing in controversy. The Court cannot give judgment upon the merits of the dispute, or for the principal; but the party may proceed for the accessory.

There was judgment for costs.

NOTE.—As to the grant's being unimpeached at law, see *Reynolds v. Flinn*, *ante*, 106.

ANONYMOUS.

HAYWOOD, J. The county court, after establishing one ferry at a particular place, has no right to establish another so near the former as to draw away its profits. But STONE, J.: The county court is empowered to establish ferries where necessary, and may establish two at the same place, if it is deemed proper to do so.

THERE was a ferry established by order of the county court, on the river near the courthouse; and some time afterwards, upon some complaint to the county court that the people of the county were often delayed on public days for want of crafts and ferrymen, they made an order permitting another person on the other side of the river to keep a ferry at or near the same place; and from this order the former ferryman appealed.

HAYWOOD, J. These orders for keeping ferries, made by the county court, are like grants of the king for the same purpose in the English law; and the liberty granted by them, like those in the king's grant, are forfeitable for *abuser* or *nonuser;* but there is no evidence set up of improper behavior in the ferryman, of *nonuser* or *abuser*. The act of 1784, ch. 14, secs. 1 and 15, has ordered bonds to be given by the ferryman, in a large penalty, for the faithful and punctual discharge of his duty; he is thereby liable for inattention in any special instances. By the same act £5 penalty is inflicted for detaining any persons for want of hands, boats, or attendance. With respect to ferries, the common law was that no ferry should be erected so near another bound by law to be provided with crafts, attendance, etc., as to draw away its profits. 3 Bl. Com., 219; 2 Roll. Ab., 140. It goes upon this principle, that such prohibition is for the public good, as the best way of encouraging expensive undertakings for the service of the public is to secure to the undertaker the profits accruing. The principle of our act of Assembly is the same. 1787, ch. 16, sec, 1, inflicts a penalty on those who transport passengers across at public ferries, not being duly authorized. So does the act of 1764, ch. 3, sec. 4. They deem it unreasonable to suffer another to interfere with the profits of a ferry already established, at a considerable expense, perhaps, to the owner, as such interference is discouraging to undertakings of that sort, and of course disadvantageous to the public. This being the principle of our law, I am not for allowing another ferry to be established at or near the same place. It might divide the profits so as to render the ferry of no value to either.

(458) STONE, J. The act of Assembly empowers the county court to establish ferries where necessary. They are the proper judges where it is fit to establish them. If they deem it proper to establish two

ferries at the same place, they may do so. There are two ferries established at the same place in several parts of this State. This proves the power of the county court to establish them. *Sic adjournatur.*

NOTE.—That the county court does possess the power to establish more than one ferry at or near the same place seems not to have been doubted in *Beard v. Long*, 4 N. C., 167. But it is there said that the public faith pledged to the first grantee ought not to be violated unless the public interest manifestly demands the establishment of an additional ferry.

Cited: Atkinson v. Foreman, 6. N. C., 57; *Barrington v. Ferry Co.,* 69 N. C., 170.

HILLSBORO—APRIL TERM, 1797

KENNEDY & CO. v. FAIRMAN.

Proof of the clerk's handwriting, in entries made on the plaintiff's books, shall not be admitted while the clerk is living, although he may be absent from the country.

ASSUMPSIT for goods, wares and merchandise sold and delivered, etc., and upon the general issue pleaded, the cause now came on to be tried.

The plaintiff offered a deposition taken in Maryland, which proved the entries in the plaintiff's books to be in the handwriting of a person who was a clerk of the plaintiff's at the time when the entries were made, and who at the time of the deposition taken was on a voyage to the West Indies.

Davie, for the defendant, objected to this evidence, and cited *Cowper v. Marsden,* Esp., 2. He urged the danger of such evidence, for if it is receivable, a man may get his clerk to make what entries he pleases, and to what amount also he pleases, and then set out on a voyage to the East or West Indies, and the entries will enable the principal to recover the moneys contained in them by proving the handwriting of the clerk.

Williams, *e contra.* Such evidence has been admitted in our courts. It was admitted in a case at Fayetteville, where the plaintiff's clerk had gone to some of the Northern States.

HAYWOOD, J. It has been admitted, I believe, in the case cited by Mr. Williams. That case was cited and stated by some of the bar at

Fayetteville, in the course of their argument, some time after it took place. I was informed of the decision soon after it took place, but for my own part I was always opposed to the principle of it, and took the earliest opportunity at the next term after it happened, and at Fayetteville, where the decision was given, to give it my disapprobation. There a case came before the Court where the clerk had gone to Georgia, and it was offered to substantiate the amount by proof of his clerkship to the plaintiff, and that the entries were in his handwriting. This evidence was rejected by myself, and WILLIAMS, J., seemed to concur that the evidence was not proper. I am of opinion most clearly the evidence now offered is improper, and ought not be received for the reasons (459) offered by the defendant's counsel. The admission of such testimony would be immediately followed by a long train of frauds, as the committing of them would be rendered so easy and inviting by it.

STONE, J. I am of the same opinion. We should take care not to open a door to the practice of frauds. The receiving of such testimony is certainly liable to the inconveniences mentioned by the defendant's counsel.

The evidence was rejected.

ANONYMOUS.

No point can be raised in a special verdict, except what appears upon the record. No person can plead the statute of limitations except the defendant. The statute of limitations will run although the defendant may be out of the country.

THIS was a special case for the opinion of the Court, in which the question proposed was whether the act of limitations would run against the plaintiff when the defendant was beyond seas.

Mr. Duffy brought on another question, which was not on the record, but which as to its subject-matter he said he could make out by proof, namely, whether a person called into court as garnishee could plead the act of limitations for the principal defendant, whose property was attached. For the latter point Mr. Duffy cited 2 Bl. Rep., 762 to 764, and as to the first, he argued that by the equity of the act it ought not to run when a defendant was beyond sea. The reason why length of time is a bar at all is because of the presumption from thence that the debt is satisfied, though the evidence of a discharge is lost. Where such presumption cannot fairly arise, the act will not attach. It cannot fairly arise here, for the defendant hath been absent ever since the accruing of

the debt. We may even suppose from this record the debt was not contracted in this country, but beyond sea, where the defendant resides; if so, perhaps the debt is not subject to our act of limitations at all. Certainly the act did not begin to run in this country, and if it did not, the being beyond sea is within the saving of the act.

Davie argued *e contra.*

PER CURIAM. We are very clearly of opinion that the act of limitations cannot be pleaded by any other person than the defendant. It does not appear, however, by the record that the plea was pleaded by the garnishee, and we cannot receive any verbal testimony of that fact. We are bound to follow the record. As to the point whether the act will run against the plaintiff whilst the defendant is beyond sea, the defendant was in fact in this country when the debt was contracted, though that is not stated in the record so as to enable us to take notice of it. Laying that out of the case, our act makes no saving in favor of a plaintiff where the defendant is beyond sea. The British act, which had the same savings as ours, was always construed not to save the plaintiff's action when the defendant was beyond sea, and that occasioned (460) the 4th and 5th Anne, ch. 16, sec. 19. If the defendant was in this country when the contract was made, and the act began to run against the plaintiff, it will run on notwithstanding the defendant's removal; or if it had not began to run before his removal, his absence will not suspend its operation; or if he resided beyond sea at the time of the contract, and the plaintiff will make use of the remedies offered by our courts, he must accept of them upon the terms imposed by our law; that is to say, he must bring his suit within three years. Length of time is naturally, and everywhere, presumption of payment; where no time is limited by law, the presumption is left to be governed by such circumstances as are sufficient to raise it; where the law has fixed the time, the presumption is not left to be regulated by opinion, but it must arise after the lapse of the prescribed time. If in this country no time was limited by an express law, yet payment of this debt might be inferred from a lapse of three years, wherever it was contracted. This proves that all contracts, wherever made, are subject to be affected by the lapse of time in every country, particularly by a lapse of three years, when there is no circumstance attending the case that can legally save the plaintiff's right.

ANONYMOUS.

Where two judgments are obtained against an administrator, the first an absolute one, but the second a *quando* judgment, and assets afterwards come to his hands, HAYWOOD, J., said that the assets must be applied to the first judgment, but STONE, J., seemed clear that they should go to the satisfaction of the second.

SCI. FA. to have execution out of assets come to the hands of the defendant since this judgment obtained against him of assets *in futuro*. To this *sci. fa.* the defendant pleaded, amongst other things, a former judgment. The jury found a former judgment recovered at Wilmington, not yet satisfied, and that £15 had come to the defendant's hands since the judgment on which this *sci. fa.* is grounded, which was a judgment to be satisfied *quando assets acciderint*.

STONE, J. This £15 must be applied towards satisfaction of the latter judgment. As to the former judgment, it is not a judgment to be satisfied out of assets *in futuro;* and when obtained, it must have been on the admission of the defendant that he had then assets to satisfy it; otherwise, he would have pleaded a want of them, and then the judgment would have been absolute as to the assets he had, and for the residue to be levied out of assets which in future should come to his hands.

(461) HAYWOOD, J. When a judgment is entered against an executor or administrator, though it be generally, to be levied *de bonis testatoris,* without saying anything of assets *in futuro,* that judgment must be satisfied prior to any subsequent one. The executor may have suffered it, knowing assets would afterwards come to his hands sufficient to satisfy it. By admitting assets he has made himself absolutely liable to the debt. Shall he be abolutely liable, and yet not permitted by law to reimburse himself out of assets? Must he pay the former judgment out of his own pocket, though he has assets in his hands sufficient to satisfy it? Suppose he had paid this judgment, or the debt before judgment, with his own money, trusting to the coming in of assets for his reimbursement, would he not thereby have entitled himself to retain assets to that amount when they should come into his possession? If he could thus reimburse himself, having paid the debt or judgment, why not, when he has made himself liable to the payment of it? It is well known, an executor may plead judgments obtained against him when subsequently sued, and there is no instance of a replication that the assets came to hand after the judgments were obtained.

Some of the bar, not concerned, expressed a clear opinion that the £15 should be applied to the latter judgment, whereupon the Court took

time to advise; and afterwards, the cause being again mentioned, HAYWOOD, J., said he continued to be of the same opinion he was the other day. There were not many authorities in point. He had, however, found one in 12 Mod., 196, where it is laid down that the pleading of the judgment is a protection of the assets which you have or may have, until the judgment be satisfied.

STONE, J. I do not think that case applies. I am of the same opinion I was. The £15 should be applied to the latter judgment. *Sic adjournatur.*

Cited: Dancy v. Pope, 68 N. C., 150.

SOUTHERLAND v. MALLETT.

A decree will be entered on an award at the term to which it is returned, if no exceptions to the award be made at that time.

THIS was a suit in equity, and all matters in dispute had been referred to arbitrators, who made an award in favor of complainant, who now moved for a decree according to the terms of the submission.

Williams, *e contra:* A decree cannot now be entered on the award, for it was only returned to this term. The defendant is absent, has not been served with the award, and has had no opportunity to except.

Davie was stopped by the Court.

PER CURIAM. The practice never has been to wait for excep- (462) tions against an award. The party is present at the examination by the arbitrators; he is notified of the time; he may apply at the ultimate time appointed for its delivery or publication, and know the contents; he is or ought to be in court attending on his suit, and may except to any thing improper. If Mr. Williams will now make any exceptions, we will hear them, and, if proper, give time to support them; but we will not wait for the party to make exceptions.

No exceptions being made, there was a decree according to the award.

ANONYMOUS.

The fifteen days before the term in which appeals must be filed in the Superior Court are inclusive of the day on which the appeal is filed, and also of the first day of the term.

THIS appeal was lodged with the clerk of the Superior Court on 28 September. The term commenced on 6 October.

After argument by Davie and Williams:

HAYWOOD, J. I am of opinion the Legislature allowed fifteen days for the purpose of affording the appellee time to come to the office and see whether or not the papers were lodged there, and afterwards, to go to any part of the State and get his testimony and return. In other words, that it was intended to allow him fifteen traveling days after knowing the appeal papers were lodged; and that, therefore, there should be fifteen clear days, excluding the day of filing and the first day of the term. Suppose they had said the papers should have been filed one day before the term; if it could be filed on the first day of the term, the appellee would have no time to prepare; if filed on the day before, and that allowed to be one day, it might be filed on the last moment of that day, and the term commence on the next; so there would be no time allowed.

STONE, J. In a case at Edenton last term it was decided that the day of filing and the first day of the term were both to be reckoned inclusive. The reasons of this decision then appeared and do now appear to be to be strong. These were, that heavy penalties were annexed to the not bringing a transcript up in time; affirmation of judgment with double costs by the act of 1777, 12½ per cent interest by the act of 1785, and, therefore, the act ought to be so construed as to avoid the penalty, and not so as to multiply the chances of incurring it. Moreover, the right of appealing is favored in law, and ought not to be abridged by the construction we put upon the act.

HAYWOOD, J. If it has been decided, though against my opinion, as it is only a matter of practice, and as uncertainty in such cases is a great evil, I had rather adopt the decision than leave the matter
(463) in uncertainty.

PER CURIAM. The papers were brought up in time. Let the cause be placed upon the trial docket.

See *Anonymous, ante*, 402.

STATE v. BRADLEY. [*S. c., ante,* 403.]

The words assigned in an indictment for perjury were that "Gatling did not interrupt the constable in driving the cattle to Gatling's house," and the words proved were that "Gatling did not assist in driving the cattle from the officer." It was held that the words charged must be clearly and evidently of the same meaning without the help of any implication, or anything extrinsic and that in this case the variance was fatal.

THIS cause was now brought before the Court, and they took time to consider of it and to look into authorities, and after a few days gave judgment.

PER CURIAM. We have looked into the authorities in Salk., 660; Doug., 193, 665; Cowp., 229; 1 Term, 235; 2 H. P. C., 436, s. 36. The result of these cases seem to be that any, the least, variance in the description of a record is fatal; and as to things written, that they may be described two ways—either by the tenor or according to the substance. When described by the tenor, the very words must be followed; but the omission of a letter, not altering the word to another, is not fatal. If you described the thing written by its substance and effect, then you need not set down the very words written; but if you describe the same sense and meaning, it will do. As to the words spoken, there can be no tenor of them, and therefore where the sense and meaning of the words set down in the indictment is precisely the same with those proven in the evidence, though not the very same words, such evidence will support the indictment; but then the meaning must be evidently and clearly the same, without the help of any implication or anything extrinsic. The oath charged to be sworn is that Gatling did not interrupt the constable in driving the cattle to Gatling's house: the evidence is, he swore Gatling did not assist in driving the cattle from the officer. The words contained in the evidence are not necessarily of the same sense and meaning with those laid. Therefore, let the judgment be arrested. And it was arrested. *Vide* L. R., 1515; 2 Stra., 787.

See *S. v. Coffey,* 4 N. C., 694, and *Whitaker v. Freeman,* 12 N. C., 271.

Cited: S. v. Groves, 44 N. C., 405.

STATE v. ADAMS.

In an indictment for horse-stealing, the jury may infer from circumstances that the horse was taken by the prisoner, in the district in which he is tried, although he was never seen with the horse in that district.

INDICTMENT for horse-stealing, and not guilty pleaded; and upon trial the evidence was that the horse was lost in Wake County, on the 10th, and was in Adam's possession, 60 miles from the place, on the 16th of the month. There he sold him to one of the witnesses, and said he had purchased him a few days before, near Edenton, distant from thence about 200 miles.

Duffy for the prisoner: There must be a proof of the taking, and that must be in the district where the prisoner is tried. In the present case there is no proof of a taking in Wake, nor was the prisoner ever
(464) seen in possession of the horse in this district; the place where he sold the horse to the witness is in the district of Salisbury. It is probable he might have received the horse from the person that did steal him.

PER CURIAM. When a horse is stolen, and is found in possession of a man at such a distance from the place where the horse was missing in so short a time after as shows he must have come directly from that place, and without any loss of time, that is such evidence as a jury may infer the guilt of the prisoner upon, as it raises a violent presumption against him that he was the taker. It is, however, not conclusive. Any circumstance inducing a probability that the prisoner may have gotten him honestly will render it improper for a jury to convict. The case in Hale, where a thief was pursued, finding himself pressed, got down, desiring a man in the road to hold his horse till he returned, and the innocent man was taken with the horse, proves how necessary it is to use caution in convictions founded upon presumptive testimony. There is, however, part of the evidence in this case which shows probably that the prisoner did not get the horse from another. He said he had purchased him near Edenton. There was not time sufficient to travel the horse to Edenton and back to the place where the prisoner sold him. If from circumstances the jury infer a taking, the inference also follows that he was taken at the place where missing, and that was in this district.

The jury found him guilty, and he had judgment of death.

GALBRAITH v. WHYTE.

Doctrine of *caveat emptor* stated.

PER CURIAM. *Caveat emptor* applies where a man purchases an article of personal property not in the vendor's possession. He ought in such case to require a warranty; the not being in possession gives reason to doubt. Another case is where the thing sold has some visible quality which lessens its value. Where it has a quality lessening its value, and that is not discoverable by ordinary inspection, it is otherwise; in such case there is no need of an express warranty. Every man is bound to be honest. He ought to discover to the vendee all such properties as if known might probably dispose him not to purchase. If a man sell an unsound horse, whose disorder is not known, and receives full value as for a sound horse, an action lies against the vendor; and that action may be an assumpsit stating the sale, and that the vendor (465) undertook that the horse was sound.

TROXLER v. GIBSON.

An amendment cannot be permitted in an ejectment, so as to embrace land not included in the declaration.

EJECTMENT. The plaintiff's patent described the last line as running a course and distance which led not to the beginning, but through the body of the land. The plaintiff's attorney, in drawing the declaration, followed that description instead of saying thence to the beginning, so as to have included the land in dispute, which lay between the beginning point and that which terminated the last line as described in the patent.

Davie moved for a nonsuit, saying it was needless to go into the examination of testimony, since it was impossible for the plaintiff to give any evidence respecting the land really in dispute, as it was not demanded in this declaration.

PER CURIAM. Land not demanded cannot be recovered by any judgment of the court; and in the present case no land is demanded but that which the plaintiff has no claim to. This point has been often decided in our Court. It was so decided in this very Court a very few years ago, in *Hunter v. Jones*. Let the plaintiff be called.

The Court recommended to Mr. Duffy to take a rule to show cause why the declaration should not be amended, saying perhaps authorities may be found to justify an amendment, or perhaps the act of 1790 may authorize it. A rule was taken.

Afterwards the case was argued by Mr. Duffy for the amendment and Davie against it. Mr. Duffy produced a great number of cases, but seemed to rely chiefly on the case in 4 Burr., 2448.

PER CURIAM. These cases show that the demise may be enlarged, but none go so far as to show that the description of the thing demanded may be altered. If it could, a defendant might be at a great expense in preparing to defend his title to one tract of land, and afterwards be forced to go through the same process as to another, and for a third, and so on *ad infinitum*. For if it is proper to alter the *petitum* in the first instance, why should it not be done afterwards as often as the plaintiff pleases? If after the institution of the action the defendant sells that part not included in the declaration, and then an amendment is permitted which will include it, the purchaser having acquired the land *pendente lite,* will be bound by the decision, though no party to
(466) it. The amendment would be of little service to the plaintiff, as it would be required of him to pay all the costs up to this time. However, it suffices to say there is no precedent in the books for such an amendment. The *petitum* cannot be amended. The Court thought a day or two ago that possibly it might be amended under the act of 1790, ch. 3, sec. 9, but upon consideration we think that act does not extend to this case. It has been decided that under that act all such matters of form may be amended except such as are specially demurred to, and that where a special demurrer was not proper as to the matter, no amendment could be made. In ejectment there can be no special demurrer on account of the form, for the defendant is admitted upon terms which preclude it; yet such irregularities as in other actions might be proper subjects for a special demurrer shall in this be amended; otherwise, the ejectment, which is a liberal action, would be in a worse situation than any other. Special demurrers do not lie for not demanding the thing intended to be demanded in any action; that omission makes a substantial defect in the declaration, not a mere formal one. It cannot be amended in a point so material, any more than a demand of a horse in detinue or replevin could be altered to that of an ox.

So the amendment was refused.

See *Cowper v. Edwards, ante,* 19.

ANONYMOUS.

The caveator was settled upon a tract of appropriated land for many years, and supposed the land in dispute to be included within his boundaries, when in fact it was not. The possession is stated to have been upwards of twenty-one years. It was decided that the caveator was not entitled by the entry laws of 1777 and 1779, as not having claimed within the time limited by the act, nor by the statute of limitations of 1715, which applies only to claimants under patents, nor yet by the act of 1791, limiting the claims of the State, as that act is bottomed upon the presumption of a former grant, and is not applicable to vacant lands.

PER CURIAM. The caveator was settled upon a tract of appropriated land for many years, and supposed the land now in dispute to be included within his boundaries, when in fact it was not. This possession is stated to have been upwards of twenty-one years. It is now alleged the jury have found an improper verdict in deciding the right of entry to be in the caveatee. It is argued that the caveator is entitled either under the entry laws, the act of limitations, or the act for limiting the claims of the State. We will consider each in its order.

The act of 1777, ch. 1, sec. 16, entitles such as had actually possessed or improved any vacant lands, in preference to all others, to enter and obtain grants for the same, so that such entries be made before the first of January, 1779. Under this act possession gives a right of preëmption for a certain time. The right is temporary, and expires if not exerted before the period limited by the act; and the land became free for all persons who may choose to enter and pay for it. He has no rights under this act, for he did not enter within the prescribed time. Then the act of 1778, ch. 7, sec. 2, is relied on, which enacts that persons who have settled within the bounds of a former entry or survey, and have improved and continued in peaceable possession for seven (467) years, without interruption by or from the person claiming, or declaration of right to the person possessed under such entry or survey, the person claiming under such former entry or survey shall be forever barred of his right of entry of the land in question, and preference shall be given to him who settled on and continued peaceable possession of the same, etc. It is argued that a possession of seven years under this act gives a title to the possessor. The object of this clause is to correct the generality of the clause in the act of 1777. By that or former entry or survey in Lord Granville's office entitled the enterer to a preference of entry in ours; and by virtue of such former entry he might turn a man out of possession who perhaps knew nothing of the former entry and had settled upon the land and improved it and never had any intimation for seven years from the former enterer of his pretensions to it. This was

a hardship arising under the former law, and the Legislature meant to alter it by declaring that such possession should entitle the possessor to preëmption, rather than the former enterer. They did not intend to give him a property or dominion in the land without entering it and paying for it to the State; and of necessity this right of preëmption must be exercised within some limited time, for if it was confined to no limits, he might never enter at all, and might always destroy another's entry by proving his seven year's possession, and so hold the land always, without either entering it or paying for it. This act was made in January, 1779, but was intended to regulate disputes that had arisen or might arise under the former act, and to empower juries to decide in favor of possession where the former enterer had entered in the new office before 1 January, 1779, or where the possessor had entered before that time; for no dispute could arise where the possessor had entered or might enter after 1 January, 1779, the former enterer having made no claim before. The words "which may hereafter arise" refer to disputes to arise upon caveats to be entered, or suspensions upon claims then already entered. If, therefore, the possessor for seven years, who had a right of preëmption, did not exert that right before the time limited by the former act, it expired. The former enterer is forever barred to claim by virtue of his former entry; but he, as well as any other citizen, might set upon a new claim, as for lands open to be entered by every citizen indif-
(468) ferently. The caveator has no right, then, under this act; he has not claimed in due time.

It is next contended he has title under the act of limitations, 1715, ch. 27, sec. 3: "No person nor persons, nor their heirs, which shall hereafter have any right or title to any lands, tenements or hereditaments, shall thereunto enter or make claim but within seven years after his, her, or their right or title which descend or accrue; and in default, he shall be utterly excluded and disabled from any entry or claim thereafter to be made." The act of limitations was made to quiet disputes arising between different patentees of the same land, and those claiming under them. It supposes the land to have been already appropriated. It never speaks when the question concerns vacant lands. The preamble shows it was never intended to operate against the King or the Lords Proprietors. The right or title to be barred by a neglect to enter within seven years is a right or title which by the common law may be preserved by entry—a *jus possessionis* derived under some grant of appropriation; a right totally distinct from the *jus preëmptionis* created by the entry laws. The latter is acquired by the circumstances mentioned in the entry laws, and is lost by not being executed in due time. The former is acquired originally by grant actually issued, and is continued and transmitted down

by mesne conveyances or descents, and may be lost by seven years adverse possession of another. The land now in dispute never was appropriated, and, therefore, neither of the parties can acquire or lose any right under the act of limitations.

It is next argued that the caveator has title under the act of 1791, ch. 15: "Where any person or persons, or those under whom he or they claim, shall have been or shall continue to be in possession of any lands, tenements or hereditaments, under titles derived from sales made either by creditors, executors, or administrators of any person deceased, or by husbands and their wives, or by endorsement of patents or other colorable title, for the space of twenty-one years, all such possessions under such titles shall be and are hereby ratified, confirmed, and declared to be a good and legal bar against the entry of any person or persons under the right or claim of the State, etc., provided the possession so set up shall have been ascertained and identified under known and visible lines and boundaries." Before this act persons whose lands had been actually surveyed and marked, and who had obtained patents which had been lost, and no registration of them to be found, were liable to be turned out of possession, and in some instances had actu- (469) ally lost their lands by persons who entered claims for them as vacant lands, though there was every reason to suppose from the length of possession, and from the visible boundaries claimed, that the lands had once been appropriated. The act of limitations was no protection to such persons, and justice required for their safety that some length of possession under such circumstances should be taken as evidence of a former appropriation and grant, and should bar the State and those claiming under it. To this end the act was made. It never applies but where the circumstances of twenty-one years possession, and known and visible boundaries, induce a presumption of a former grant. This act is bottomed upon that presumption. It operates upon the supposition of a former grant now lost, and not otherwise. In the present case it is admitted on both sides that the lands in dispute are vacant lands. They cannot, therefore, be a subject for the operation of this act, and consequently the caveator can have no title under it.

Cited: Fitzrandolph v. Norman, 4 N. C., 576; *Graham v. Houston,* 15 N. C., 235.

ANONYMOUS.

A writ of false judgment is a matter of right, and cannot be refused. A *recordari* is a matter of discretion, and may be refused.

MR. NORWOOD moved upon an affidavit filed, stating the evidence before the justice of the peace and showing his judgment to have been illegal, for a writ of *recordari* to bring the proceedings into this Court.

HAYWOOD, J. A writ of false judgment is a writ of right, and we cannot deny it. It is like a writ of error, which the party may bring without leave of the Court.

STONE, J. The writ of false judgment and the writ of *recordari* are not the same. When a *recordari* is moved for, I think we have power to refuse it. *Sic adjournatur.*

NOTE 1 BY REPORTER.—The case of *Brickell v. Byrd's Administrators*, which was a suit before a justice of the peace, who had given judgment, removed into the Superior Court of Halifax by a writ of *recordari*, was brought on and argued in April Term, 1797, but not decided, owing to a difference in opinion between WILLIAMS, MACAY, JJ. Whyte, for the defendant, moved for an issue to be made up, and the cause to be tried by a jury. *E contra*, it was argued that the different modes of bringing up proceedings from inferior courts not of record are *pone*, *recordari*, false judgment, and *accedas ad curiam*. 3 Bl. Com., 34, 37, 149. The two latter being the same in their object to review the matter in law. Fitz. Nat. Br., 38 A. and D. The two former also to try the matter of fact. Fitz. Nat. Br., 160, 162. Both issue to courts not of record. Their difference results from the different modes of commencing by writ, the *recordari loquelam* being appropriated to the removal of proceedings commencing without writ. In either case the Superior Court proceeds on the *plaint*, not on the *pone* or *recordari* (Fitz. Nat. Br., 160. Note *a*), and either plaintiff or defendant may remove the proceedings by these writs for good cause; but then these writs always issue before judgment. A *recordari* will not lie after judgment, for the purpose of a new trial. And as the writ in the present case was issued after judgment, there can be no trial of the facts upon it. *E contra:* Writs of false judgment and of error are for the same ends, to revise erroneous judgments, the first lying to a court not of record, the other lying to a (470) court of record. So, also, the writs of *recordari* and of *certiorari* are for the same end, to have a trial *de novo*, the former lying to courts not of record, the latter to courts of record only. Fitz. Nat. Br., 164; 1 Bac. Ab., 559. Then the doctrine of our courts respecting *certiorari* all apply to *recordaris*. The object of each is rendered a little different here from what it is in England. There the *certiorari* is used almost always for taking up proceedings before judgment: here, most commonly after. Why not also apply the *recordari* to the purposes of new trials after judgment, as well as the *certiorari?* If it be said the writ of *recordari* and false judgment are the same, then there are some writs to bring up proceedings for error in law, none to rectify errors in fact; there will be no means of getting redress in cases of

improper decisions before justices of the peace, even in such cases, where the justice is a party, the statute of gaming is pleaded, or the like, which justices ought not to try; or where the party is unable to get sureties for an appeal; and besides all this, this is an attempt to overturn a proceeding which has been constantly used for six or seven years, now last past. WILLIAMS, J., said there might be a new trial after the proceedings were removed by a *recordari*, if justice required it. MACAY, J.: There can not. *Sic adjournatur.*

NOTE 2 BY REPORTER.—The writ of *pone* is to remove a *plaint* commenced by writ in the county court, which is a court not of record, into the Superior Court, when it is apprehended a fair trial will not be had in the court below; and when it is removed by the defendant the cause is put in the writ. When the *plaint* is in the county court without writ, and is to be removed, a *recordari*, properly so termed, issues, commanding the sheriff to record the *plaint*, and return it. Here, also, the defendant must assign cause. If the *plaint* be not in the sheriff's court, but in some other inferior court not of record, then the *accedas ad curiam* issues, commanding the sheriff that he go to the court and cause the *plaint* to be recorded and returned. All these writs, when issued before judgment, are for the same purpose—to have a fair trial in the Superior Court; but they have different names, for reasons peculiar to each. Where the *plaint* commences by writ, and is already in writing, the sheriff has nothing to do but to bring (or put) it into the court above; and therefore he is not commanded to record. When the *plaint* is not by writ, but is already in a court where he presides, he need not go to another court to record it; and, therefore, he is commanded simply to record and return it. But when the *plaint* is without writ, and in another court where he does not preside, then he must go to the court and record it. Each writ takes its denomination from the principal act or acts the sheriff has to do, but the proceedings in all of them are exactly the same, when once removed before judgment. The parties proceed to a trial of the facts. If the complaint be of a false judgment rendered in the court below, then a writ of false judgment issues, commanding the sheriff to go to the court below and record the *plaint*, etc., if in a court where he did not preside or simply to record the *plaint* if in a court where he does preside; so that, in fact, the *recordari* and *accedas ad curiam* is the first process in the writ of false judgment. The *recordari* is not the commencement of any specific suit, but is a process common to several cases, like a *capias* in other suits, and is used indifferently for the purpose of bringing up proceedings, either before or after judgment, and either for the purpose of having a trial on the facts or for examining whether there is error in the judgment in order to its removal. The only use of the *recordari* (either that properly so termed or of the *accedas ad curiam recordari* is to bring the proceedings into court, in the same manner as the only use of the *certiorari* is to bring the (471) record into court; and as the *certiorari* has been used by our courts for one more purpose than it was used in the English courts, owing to the peculiar situation and construction of our courts, namely, for the purpose of obtaining a new trial in the court above and as there is the same reason and necessity for carrying the *recordari* one step further, also, to prevent a defect of justice, it may be concluded that the *recordari* may be as well converted to that use as the *certiorari*. Why shall it be said we will extend the *certiorari* to other uses than it was formerly employed for, and not the *recordari*, when the reason and necessity for so extending it is equally urgent in the latter as in the former case? If the justice refuse the party his appeal, or if the party is injured and

cannot find sureties for his appeal, or if he offers sureties and they are rejected upon pretense of insufficiency, or if the justice is a party concerned, or acts otherwise corruptly, oppressively, or injuriously to the party, he can have no redress whatever unless this writ is allowed to lie for the purposes contended for by Byrd's counsel.

STATE v. CURTIS.

Directions for officers in serving process issued by a justice of the peace.

PER CURIAM. If a justice of peace issue a warrant for a matter within his jurisdiction, although he may have acted erroneously in the previous stages, the officer should execute it; but if it be for a matter not within his jurisdiction, the officer ought not to execute it.

2. If the officer be a known officer of that district in which he is acting, he need not show his warrant when he makes the arrest; but if he is an officer appointed for a special purpose, he ought to show his warrant, if demanded.

3. When he makes the arrest, he should briefly inform the party arrested of the cause—as "I arrest you at the suit of A," or "in behalf of the State," otherwise, the arrest is not good. 6 Rep., 54; 9 Re., 68 b.

4. That if a warrant want any circumstances essential to its legal form or constitution, as if it want a seal, it is void, and will not justify the officer in making the arrest. 1 Hale, 577; Foster, 311, 312. And as the officer did not tell Curtis for what he arrested him, and the warrant he had was not under seal, Curtis, who resisted and beat him for making the arrest, was acquitted.

Cited: Welch v. Scott, 27 N. C., 75; *S. v. Dula,* 100 N. C., 427; *S. v. McMahan,* 103 N. C., 382; *S. v. Armistead,* 106 N. C., 644; *S. v. Beal,* 170 N. C., 767.

HOGG'S EXECUTORS v. ASHE.

Unliquidated damages cannot be set off, but when they are reduced *in rem judicatam* they may be. In an action brought by two partners, a debt due from one of them cannot be set off, but if one of the partners dies, then in a suit by the survivor a debt due from him may be set off. When a chose in action is assigned for value received, no debt contracted subsequently shall be allowed even at law as a set-off against the assignee,

especially if there be an act of the Legislature taking notice of the assignment and enabling the assignee to sue in his own name.

DEBT upon bond. Pleas, general issue, notice of set-off, payment at and after the day. And now upon the trial it appeared on the part of the plaintiffs that prior to 1778, Robert Hogg, now deceased, and Campbell, were partners in trade; that Hogg died, and in 1778 the defendant, being indebted to the firm of that company, gave the bond in question to Campbell, the survivor; that in 1780 Campbell for valu- (472) able consideration, by deed, assigned all his share and interest in the partnership effects and debts to James Hogg, the principal legatee in the will of Robert, and some time after joined the enemy, and was thereby rendered incapable of carrying on suits at law; and in 1786 the Legislature passed an act taking notice of the assignment, and of Campbell's disability, and that it was injurious to the creditors, and vested the right of suing for the partnership debts in the executors of Robert Hogg, making them also liable to actions on account of debts due from the partnership. In 1789 the defendant recovered against Campbell £500 for negroes of the defendant, carried away by Campbell when he joined the enemy. The plaintiff produced the bond, the deed of assignment, and the act of Assembly, and there rested his case. The defendant then offered the judgment recovered by him against Campbell as a set-off, which was objected to by Williams for the plaintiff.

Davie for defendant.
Williams in reply.

HAYWOOD, J. In 1778 the bond was executed upon which this action is founded; in 1780 the surviving partner assigned all his interest in the partnership effects; in 1786 the act of Assembly passed, and in 1789 the defendant recovered this judgment, which he now offers to set off.

The best way of ascertaining whether a demand may be set off is to consider, in the first place, whether it is such a demand in itself, and of its own nature, as may be set off; secondly, against whom it may be set off. A demand for unliquidated damages cannot be set off. The Legislature never could intend to introduce so much confusion as that of trying actions of trover, trespass, or the like, by way of set-off in an action of debt. Had the defendant's demand been for damages, or any unliquidated sum, I should have been very clearly of opinion it could not be set off; but it is not for unliquidated damages; it is for a sum certain, reduced in *rem judicatam* by the judgment. It is, therefore, in itself and of its own nature, capable of being set off, whatever may have been its origin, and although before the judgment it might have sounded only

in damages. The true question is, Can debt or *indebitatus assumpsit* be brought upon the demand offered to be set off? If it may, then the sum is such an one as may be set off. Here debt would lie upon the judgment, and therefore it is capable in itself of being set off. With regard to the party against whom it may be set off, I take the distinction to be this: where the debt offered to be set off is recoverable and payable out of the same fund that the debt to be recovered in the action goes to increase, it may be set off. Where two plaintiffs sue, and the sum offered to be set off can be recovered of one of them only, it cannot be set off; or where one sues, and the sum offered to be set off is due from that one and another, it cannot be set off; because, in either case, the two actions cannot be reduced to one by a set-off without doing an injury to a third person by subjecting him to the effects of an action to which before the act of set-offs he would not have been subject. The act did not mean to extend the action of the defendant to a person not (477) liable to it without the act but only to give him the effect of an action against the plaintiff to which the plaintiff was liable without the act, but not subject to by way of set-off. The law is so with respect to a partnership dealing. The defendant cannot, by execution upon a judgment against one partner in his private capacity, seize and sell the whole partnership effects; he can only sell the share of the partner against whom he has judgment, and the vendee becomes tenant in common with the other. If he cannot affect the other's share by judgment and execution, surely he cannot do it by set-off, which is in lieu of an action. The law is so stated in Salk and several other books, and this is the meaning of the case cited by Mr. Williams from Term Re., but all this goes upon the supposition that the two partners are alive, and both sue. The case is widely different where one dies, for then the survivor has all the partnership effects in *jure proprio*. He may release the debts, give away the effects, sell and dispose of them to whom he pleases; he alone can take possession of all the effects. The executors of the deceased cannot object to any disposition he may think proper to make; they cannot lay claim to any particular article; they cannot sue as vendee or donee, and recover the effects. When an action is brought for the partnership debts and effects, he sues in *jure proprio*, naming himself by his proper name without the addition of surviving partner, and states his right in the declaration. The maxim cited by Mr. Williams is a true one, but it is not to be understood as he understands it. It means that the interest and property of the deceased does not cease as to him, and become vested in the survivor, as in the case of other joint tenants; but that there survives to the representatives of the deceased a right to demand the deceased's share of the clear balance that shall re-

main after the debts due to and from the partnership shall be collected and paid by the survivor. Their claim is to an account, and for the balance in money, not to any specific articles or debts of the partnership. The survivor is their debtor and they his creditors to the amount of the balance; therefore, when he sues a partnership debtor he sues in *jure proprio;* and that debtor, if he has a demand against him in his private right, may set it off; and that is the reason of the case in 5 Term, 493. If Campbell were the plaintiff here, and the assignment had not been made, this debt might be set off. Then what effect has the assignment? In this Court, by the rules of the old common law, it has no effect. A chose in action cannot be assigned; it vests no legal interest in the assignee; but then the act of Assembly comes in and legalizes (478) the assignment, and gives it the effect of legally vesting the whole interest the assignor had in the assignee; and that assignment having been prior to the defendant's recovery, exempts the effects in the assignee's hands from the after incumbrances of the assignor. From the time of this act Campbell had neither an interest in nor a remedy for this debt; he could not now sue for it were he in the country, and if his interest has so completely departed from him that he has no control over the debt, nor can institute nor release any suit for it, then he and his property is liable to the defendant's action upon the judgment, and the defendant is liable for the bond to the action of other persons, whose recovery will go to increase the fund of the assignee, which is not liable to pay the debt due to the defendant; and, consequently, the plaintiffs are not such persons against whom the defendant's demand can be set off.

STONE, J. I am of the same opinion with HAYWOOD, J., as to the principal point, that this set-off ought not to be allowed.

Davie for the defendant: The opinion of the Court proceeds entirely upon the effect of the act of Assembly. I did not foresee this, and hope I shall be indulged with another argument. I can show very clearly that the act has not the meaning given it by the Court.

PER CURIAM. Let the case be specially stated. We will hear another argument.

It was so stated, and afterwards, at another day in the term, the cause was again argued.

Davie for the defendant.
Williams in reply.

Curia Advisari: A few days afterwards STONE, J., delivered the final opinion of the Court that the set-off was not allowable, and added he would give his reasons. The idea, he said, of the unassignability of choses in action is much altered now from what it was formerly. Courts of equity for a long time have protected such assignments when for valuable consideration. Courts of law also have lately come into the resolution of taking notice of them, and very properly, for why should a court of law refuse to do what is really just and proper to be done, and what is usually and every day done in court of equity? Many of the ancient common-law rules have been changed merely because they would not do that which courts of equity would. Accordingly courts of law now view the assignor of a chose in action for a valuable consideration as a trustee for the assignee, and the thing assigned is really and substantially belonging to the assignee. One consequence resulting from this is that a chose in action actually assigned for value is not liable to the after charge of the assignor, especially where the third person has notice of the assignment, and of course not to a set-off of a sum subsequently becoming due from the assignor. My opinion is founded not only on the reason and propriety of the thing, but also upon a case in 1 Term, 619, and the cases there cited, where the doctrine I am treating of is fully established. The law of these cases has been recognized by several decisions in our own courts—*Smith v. Powell,* decided
(481) at Halifax, on the last circuit, *ante,* 452, and *McDaniel v. Tate,* decided at Morganton, some years ago.

It is said, however, that these cases proceeded upon fraud; but is not every case of a fair assignment for value, attempted to be defeated by the assignor to the prejudice of the assignee, a case of fraud? I think this modern doctrine respecting choses in action assigned more peculiarly proper here because our courts of law and courts of equity are united, and both jurisdictions to be exercised by the same judges. It seems very idle to give a judgment at law merely for the purpose of setting it aside or correcting it in a court of equity. It is more proper, because much less expensive and dilatory, for the court of law at once to make the same decision that is attainable by an application to the court of equity. I am also of opinion the act of Assembly meant to give efficacy to the assignment. It has certainly given the right of suing to the present plaintiffs; and if they are only plaintiffs in form, as there is no instance of pleading a set-off against a person who is not plaintiff on record, I think that circumstance alone, independent of any consideration respecting the interest, sufficient to oust the defendant of the set-off he proposes to make. As to the doctrine of set-offs, with respect to the quality of the demands capable in themselves of being set off,

and the persons against whom they may be set off, I am of opinion the law was accurately stated the other day from the bench.

The set-off was disallowed. Then Williams moved for a new trial, the jury having not allowed interest enough, and being not opposed, it was granted.

Cited: Norment v. Johnston, 32 N. C., 90.

FAYETTEVILLE—APRIL TERM, 1797

ANONYMOUS.

When an administrator does not in his inventory specify any debts as bad, it is presumed they are all solvent.

PER CURIAM. The defendant, the administrator, has not distinguished in the inventory the good from the bad debts. We must take if they are all good debts, but you may discharge him (speaking to Mr. Taylor) by proving suits for them, and that the debtors were unable to pay. The constable who had served the warrants, and had the executions in his hands, was now dead, and Mr. Taylor could not prove insolvency in the debtors, and his client was charged with all the debts mentioned in the inventory. The administrator, in returning his inventory, should have said these debts are separate, and I allow myself to be charged with them when recovered, these are desperate; and then he would not have been charged with them unless recovered; but when he gives an account of debts in his inventory, and says nothing about them, it is an admission in law that the debts may be had by demanding them (482) of the debtor.

SPILLER v. SPILLER.

In proceedings for alimony, property of husband will not be put in hands of a receiver unless husband is about to remove it.

BILL filed by Mrs. Spiller for alimony; and her counsel now moved that so much of his property might be taken as would probably equal the decree of the Court, saying Mr. Spiller was wasting his property.

PER CURIAM. We have ordered sequestrations of this kind when we have found the defendant withdrawing his property, or being about to move it and himself to avoid an execution of the decree; but not otherwise. It would be a great stretch of power in this Court to order a sequestration, or a bond for the absolute performance of the decree, whenever a bill is filed against a man by one who claims to be his wife.

See *Anonymous, ante,* 347.

Cited: Crews v. Crews, 175 N. C., 170.

ANONYMOUS.

One who has bought part of mortgaged property for value should be allowed to come in and pay off the encumbrance at any time before absolute foreclosure entered.

BILL to foreclose a mortgage. Cochran was mortgagor. He sold one moiety of the premises to Huitt, and his partner, in fee. Their title came by a sheriff's sale to Spiller. The mortgagee had a decree of foreclosure unless before a certain day the money was paid. That day was past, but no absolute decree of foreclosure yet entered. Spiller moved to be made a party, and to have the decree so altered that he might be at liberty to pay the money for saving his equity of redemption.

PER CURIAM. Let Mr. Spiller be at liberty to file a bill, stating his interest, and praying the decree may be so varied as to let him in to pay the money. It would be unjust to foreclose the equity of redemption and bar his title to his moiety, which he acquired fairly, without putting it in his power to prevent the foreclosure by paying the money.

STATE v. MOORE.

Confessions, whether extorted or not, that relate a number of circumstances, all of which are proved by other testimony actually to exist, are admissible against the prisoner.

INDICTMENT for murder, and not guilty pleaded. Upon trial, it appeared the body was found near Wadesboro, and as the deceased and

Moore were seen together a few days before, the suspicions of the neighborhood fell upon him. Two men pursued him, and in the neighborhood where he resided met him in an old field, returning home from the house of a neighbor. They tied him and ordered him to produce the deceased's money. He produced some immediately, and promised to carry them to the place where the residue was. He carried them into a swamp and showed the residue. They struck him, when they first met him for denying that he had killed the deceased; upon (483) which he owned it, and said he struck him with a hickory club, standing on his left side as the deceased rode along the road; that he dragged the body out of the road, and left the club lying by it; that he covered the body with brush, in a place where the road formerly ran, about 10 or 12 yards from the present road. These circumstances were all now proven to be true, and actually to have existed as he then represented them. He promised to show them where the saddle-bags and clothes of the deceased were, and about four miles from the place where the body was found he pointed to a log lying not far from the road, and said the bags were in that; the witness went and found the bags there, and the clothes of the deceased, and produced them now in court; and they were proven in court to be the bags and clothes of the deceased.

The prisoner's counsel objected that there was no evidence in the present case to affect the prisoner, without the aid of his confession. The money, the club, and the bags are only of weight as they correspond with the confession, and by that means prove a consciousness and knowledge of the principal fact, whence is inferred the guilt of the prisoner. The confession in the present instance ought not to be received as any part of the evidence against the prisoner; it was extorted by violence, and ought not to have been heard; and having been heard improperly, it ought to be rejected, and then there is no proof against him.

PER CURIAM. A confession extorted and uncorroborated by circumstances weighs nothing; but a confession, whether extorted or not, that relates a number of circumstances which the prisoner could not well be acquainted with but as perpetrator of the crime, all of which circumstances are proved by other testimony to have actually existed, is such testimony as should be left to the consideration of a jury. That is the nature of the confession in the present case; and upon such testimony, if the jury are satisfied with its truth and sufficiency, they may find the prisoner guilty. They should be very cautious, however, and examine every circumstance with the most critical nicety before they do so.

The jury found him guilty, and he had judgment of death.

NOTE.—In this case the saddle bags were pointed to voluntarily. Also, part of the money produced before any blow given.

See *S. v. Long, ante,* 455; *S. v. Roberts,* 12 N. C., 259.

Cited: S. v. Cruse, 74 N. C., 492; *S. v. Lowry,* 170 N. C., 733.

(484)

WILCOX v. ———, [*S. c., ante,* 223.]

A surveyor and jury who were appointed under separate orders in several distinct suits shall be paid full costs in each suit, although from the locality of the lots sued for the same labor answered for all the surveys.

THERE were several ejectments against several persons who were settled on lots in Fayetteville claimed by the plaintiff, who alleged them to be included in a tract of 1,000 acres adjoining the town. A jury and surveyor were appointed in each of the suits, by distinct orders made in each, for the purpose of ascertaining where the line of this 1,000-acre tract really was. After the trial a question arose relative to the costs of the jury and surveyor, whether, as they were the same jury and surveyor, they should be allowed in each of the suits or only in one; in other words, whether they should be allowed single or double wages. It was reserved for several terms, MACAY, J., saying he would search the records of a similar case decided at Salisbury, where this question was decided; and now the Court decided that they were to be allowed in each of the suits; the surveyors were to return plats in each, the jurors to attend in each. Had one suit been determined, the juror must have attended in the others, just in the same manner as a witness summoned in several distinct suits is entitled to wages in each, though they are all tried on the same day.

ANONYMOUS.

The plea of *plene administravit* shall be received at all times, provided the defendant does not come in with it at a very late period, to delay the trial.

THIS suit had come from the county court by appeal, which was taken for this cause, that after the suit had depended for some time upon the

general issue, the defendant's counsel moved to put in the plea of *plene administravit,* which was opposed there, and now at the bar of this Court, because if the plea could be now put in, the consequence would be that a defendant might administer his assets after being served with process, and then come in and defeat the plaintiff by such a plea.

PER CURIAM. *Plene administravit,* whenever put in, relates to the day of service of the writ; at least it must state that on the day of exhibiting the plaintiff's demand by writ the defendant had fully administered, or at least that the writ was first served on such a day, before which day he had no notice, and that before that day he had fully administered, etc. This plea should be received at all times, provided the defendant does not come in with it at a very late period, and thereby delay the trial; otherwise, the defendant might be subjected to pay the debt out of his own estate, when perhaps he had in fact no goods to be administered on wherewithal to pay it.

The plea was admitted.

See *Sawyer v. Sexton*, 3 N. C., 67; *Reid v. Hester*, 1 N. C., 603.

(485)

BARGES, BY HER GUARDIAN, v. HOGG.

A plea in abatement, that the plaintiff is an alien, is not sustainable in the action of trespass *quare clausum fregit.*

TRESPASS *quare clausum fregit,* and a plea in abatement that she is an alien, and demurrer thereupon. After argument by Williams for the defendant and Hay for plaintiff.

PER CURIAM. An alien cannot maintain ejectment or any action for the recovery of a freehold. Aliens are not allowed to acquire real property; but if an alien has purchased real property, and is in possession of it, the purchase is good, and will be for the benefit of the public whenever the State thinks proper to exert its right by causing an office to be found; but before such advantage is taken, no individual can interfere with the freehold and violate the possession of the alien purchaser. His possession is lawful as to all persons but the State, and he may demand

damage for the violation of it, in a personal action. Wherefore, let the defendant answer over. See Dyer, 283; 5 Re., 52 b; Terms *de ley Verbo* alien; Co. Litt., 2; Leonard, 61.

NOTE BY REPORTER.—In this case the lands were purchased by the plaintiff's father, who was a citizen and died leaving the plaintiff, his daughter, residing in Great Britain, in which case, it seems, the freehold is cast upon the State, as the law will not allow the alien to inherit, and differs from the case of the purchaser who may take and continue possession till an office entitles the public. 1 Bac. Abr., 81.

See *Blount v. Horniblow*, 3 N. C., 37.

Overruled: Rouche v. Williamson, 25 N. C., 146.

ANONYMOUS.

Assumpsit will lie for promise to pay rent of a house.

THIS was a special case in which it was referred to the Court to decide whether or not an action on the case upon assumpsit would lie for the use and occupation of a house. The declaration stated the use and occupation, and a promise to pay. Mr. Hay cited 2 Cro., 596, 668, 684; Cro. El., 118, 859; Cro. C., 414.

PER CURIAM. An express promise, by all the books, will support this action. Some of them say an implied promise will not, because debt for rent is the assigned action. The promise here stated may be taken to have been an express one, as the contrary is not stated in the special case.

The plaintiff had judgment.

Judgments have been given for the plaintiffs upon a *quantum meruit,* before 2 Geo. II., c. 19; *Vide,* 3 Mo., 73.

See *Hayes v. Acre,* 1 N. C., 247.

Cited: Sessoms v. Tayloe, 148 N. C., 373.

TUTON v. SHERIFF OF WAKE.

If the sheriff returns an escape to a *capias ad respondendum*, he may be sued for the escape, and not be proceeded against as bail.

To a *capais ad respondendum* he returned an escape; and this was an action for the escape.

HAYWOOD, J. In England an action will lie for an escape on mesne process, whether the escape be voluntary or negligent; for there, when the sheriff has taken the body, he must produce it, or return (486) a bail bond; and if he has him not at the day assigned by the writ, he fails in his duty: but here, the sheriff may, if he pleases, permit the party to go at large, and become his special bail under the act of 1777, ch. 2, sec. 16 and 76; so that here, perhaps, it is not an escape subjecting the sheriff to an action if he has not the body at the day. The plaintiff may consider the sheriff as bail, and the defendant in his custody, and proceed to judgment; whereas, in England, the plaintiff cannot proceed in such case to judgment. If the sheriff is to be considered as bail when he returns an arrest without a bail bond, and has not the party in prison, then he may surrender the defendant at any time before final judgment against himself as bail upon a *sci. fa.*, which he cannot do if an action for escape lies against him. In England a voluntary permission to go at large will make a recaption by the sheriff unlawful; here it will not. The sheriff is considered as bail, and perhaps may retake him for the purpose of making a surrender. Upon these considerations it is possible that the action for an escape, where it is permitted by the sheriff, is not the proper action, but that he ought to be proceeded against as bail by *sci. fa.* Perhaps this escape may have been effected by force and violence, under such circumstances as to make it a *rescous,* and then the sheriff is not liable by any law. It is true, he has returned simply that the prisoner escaped; but as he must have known that a negligent or voluntary escape would not excuse him, he probably intended to have returned a *rescous.* An opinion was given by some of the present judges, not long ago at Halifax, that a sheriff upon a negligent escape might be considered as bail. I wish to consider the case before I give my judgment. I wish it to be specially stated.

It was so stated accordingly, and afterwards in this term was argued by Duffy for the sheriff and Taylor for the plaintiff; and the Court gave judgment for the plaintiff, saying the returning an escape excludes the supposition of the sheriff's having become bail; though Mr. Duffy

strongly insisted that the plaintiff by proceeding to judgment as he had done in the county court, had thereby admitted, notwithstanding the return, that the defendant was in court, which could not otherwise be than by his returning to prison after the return or by being considered as bailed by the sheriff. To which it was answered, *e contra,* that the judgment is erroneous for that cause, but is to be considered as a (487) good judgment till reversed.

See *Swepson v. Whitaker,* and the note thereto, *ante,* 224.

Cited: Hart v. Lanier, 10 N. C., 246; *Huggins v. Fonville,* 14 N. C., 394; *Barker v. Munroe,* 15 N. C., 415.

ANONYMOUS.

When each party is adjudged to pay his own costs the copy of the bill must be taxed against the plaintiff.

THE decree of the Court made at a former term was that each party should pay his own costs. Upon which a doubt arose whether each party should pay half the costs or only the costs which had accrued upon business done for himself. And at the last term it was brought before the Court, who decided that each party should pay for the process issued for his benefit. And then another question arose, whether a copy of the bill taken out to be served on the defendant was for the benefit of the plaintiff or the defendant. And at last term, after much argument.

WILLIAMS and HAYWOOD, JJ., differed in opinion. The matter was again moved now and argued, and the Court clearly agreed that it was a part of the process to bring the defendant into court, without which he could not be effectually brought in; and, therefore, it was for the plaintiff's benefit as much as the *subpœna* was, and, therefore, that he should pay the expense of it under the decree.

ANONYMOUS.

A writ issued against two jointly, and one pleaded in abatement. Plaintiff was suffered to take judgment against the other.

A WRIT issued against two upon their joint and several bond, and was returned executed upon both. One pleaded in abatement that the proc-

ess was not served upon him in due time, and the writ was abated as to him; and then Spiller moved to have judgment against the other.

HAYWOOD, J. This action, as you have brought it, is a joint one, and an abatement as to one is therefore an abatement of the whole writ; for otherwise, your judgment will not be as broad as the writ. That demands a debt against two; the judgment will be against one only; the other, by his contract, is to be contributary to the debt, and the Court will not discharge him because of an irregular service of process and lay the burden of the whole upon the other. That does not go to the merits, nor does it prove him not to be contributary, as you have declared he is.

STONE, J. I think the plaintiff is entitled to judgment. If two are sued, and both plead the general issue, and there is a verdict for one, the plaintiff may have judgment against the other.

Spiller then cited Gil. L. Ev., 159; 5 Re., 119, and the Court permitted him to enter his judgment.

Quere de hoc, BY REPORTER.—For if two be sued upon a joint bond, and both plead *non est factum*, and it be found for the one, and against the other, then it appears one of them can never be made contributary. Though the plaintiff should be put to a new action, he is forever discharged by the verdict, and therefore the law will give judgment against the (488) other, as there must be a writ of the same form against him, should a new one be taken out. But where one only abates the writ as to himself, that does not prove him not to be a coöbligor; it is still to be taken, according to the plaintiff's averment in his declaration, that he is a coöbligor, and jointly contributary with the other, and therefore jointly to be proceeded against with him. This other ought not to be made answerable for the whole debt, when the defendant who pleaded in abatement by his contract is equally liable, merely because the plaintiff has chosen, for instance, to misname him, or has committed some other irregularity which causes the writ to be abatable as to one. The plaintiff is bound by law and his contract to sue both. If he sues one only, the writ may be abated for that (Stra., 503), and yet, according to this determination, the plaintiff may do that indirectly which the law will not suffer him to do directly; for he may misname one and have an abatement as to him, and then proceed against the other alone. It is no answer to say that joint bonds are now considered in law as joint and several; for if the plaintiff sues upon it as a joint bond, then it is in all respects still to be held as a joint bond, and all the common-law rules respecting joint bonds attach upon it. If there be two defendants, and they plead several pleas, and the plaintiff take issue upon one and demur to the other, and the issue be found for the defendant, the Court will not proceed on the demurrer (1 Bac. Ab., 15; Hob., 250, *et sic vice versa*), for in both cases the suit being once abated, it would be impertinent to judge whether it ought to abate on the other's plea. *Vide*, also, Hob., 180, where plaintiff sues two, and is nonsuit

as to one before judgment against the other, he is barred as to both. If there are two executors, and the one is misnamed and abate the writ, it is abated as to both. 1 Bac. Ab., 11; 6 Mo., 10. Though one defendant may be acquitted in part and condemned in part of a trespass, or one condemned in the action and the other acquitted, the writ cannot abate as to one and subsist as to the other, though 8 Co., 159, seems *e contra.*

NOTE BY REPORTER.—This decision was certainly an erroneous one.

ANONYMOUS.

Instance of fatal variance.

THE declaration stated an undertaking by two with a third to run a race with him, and to pay him if he won. The evidence was of a race made between one of the two and the third, for performance whereof the other of the two became his surety on the day of the race.

PER CURIAM. This is a fatal variance. You should have stated the contract as it really was.

Mr. Taylor for the plaintiff insisted he could maintain it, and prayed time for that purpose. So a special case was made; and afterwards, in this term, the Court calling the cause, Mr. Taylor declined arguing it, and the plaintiff was nonsuited.

HALIFAX—APRIL TERM, 1797

JONES v. JONES.

Rocks in a river above the surface of the water are vacant property, and the subjects of our entry laws.

TRESPASS *quare clausum fregit.* Issues, *liberum tenementum* and justification.

On the trial the defendant admitted he had repaired a stand, erected in the river Roanoke to catch fish, and that he had fished there. (489) It was stated by the plaintiff's counsel that this action was

brought for the purpose of trying the right of fishing amongst the islands at the falls. The plaintiff deduced his title as follows: First by a grant from the Governor to Griffith for thirty-seven small islands; Griffith conveyed to P. Johnston, and she to the plaintiff. Also he produced a State grant for these islands, rocks and stands, issued under the act of 1787. He also produced a grant for an adjacent tract, the boundaries of which included one bank of the river. His counsel stated that the stand in question was in the middle of the river; that the plaintiff had a title to these islands, rocks and stands prior to 1787; also a title under the act of 1787, and a title to one of the banks by another grant.

The defendant's counsel rested his defense on the long possession the defendant had of this stand prior to the State grant; and that as the river above the falls was not navigable, the bed thereof, and the right of fishing, belonged to the proprietors of the adjoining lands on each side. He then gave evidence of the antiquity of this stand, and that the rock where it is has been rendered an excellent place for fishing, and stands two hundred yards from the islands, and on the south side of the river.

The counsel for the plaintiff grounded his argument on the following points: Observing that this rock or stand, as it was not opposite to any island claimed by the plaintiff, may render the judgment to be given in this case less decisive of the general question respecting the islands and stands adjacent to them than was at first intended, he proposed first to consider how the common law stood, and what right the plaintiff had, prior to the grant of 1787, as to which he sued. The soil or bed of a navigable river belong to the public. Doug., 429; 1 Mo., 105. And the correct idea of a navigable river is one which ebbs and flows, so far as it ebbs and flows. Doug., 427, 441; Cowp., 86. Yet, notwithstanding the general right is in the public in navigable rivers, a private man may acquire a right to a free fishery (4 Com., 448; 3 Term, 253; 4 Burr., 2162), and hence it follows that even in navigable rivers or arms of the sea one of our citizens may acquire an exclusive right of fishing by a grant from the State. Whoever is the owner of the soil or bed of the river has the exclusive right of fishing; and that ownership of the soil or bed of the river may be granted by the State, and has been conveyed to us under the grant of 1787. This secures the exclusive right of fishing to the grantee. 2 B. Com., 40; 1 Inst., 122. In this (490) country there is no such thing as title by prescription, and, therefore, it cannot be pretended that a title may be acquired by it to the overturning of our grant. 1 Inst., 122, note 7. A right, as it is sometimes acquired in England, by long usage, against the owner of the soil, cannot apply here. F. N. B., 200. And then there remains no other

means of acquiring an exclusive right of fishing but by a title derived under the owner of the soil (5 Burr., 2814), and this the defendant does not pretend to.

Counsel for the defendant: This river is either navigable or it is not. If it is a navigable river, the right of fishing in it is common to all the citizens; the bed or soil of it cannot be granted at this day, nor can any citizen be disturbed or restrained of his right by any State grant. The Crown in England was long ago restrained from making such grants. 6 Mo., 73; 4 Bac. Ab., 156; 1 Mod., 106. If it is not a navigable river, then the bed of the river belongs to the owners on each side, each claiming to the middle of the water (4 Burr., 2162; 4 Bac. Ab., 153; Doug., 427; 4 Bac. Ab., 156; Vattel 104, sec. 246), and then it is not subject to be granted by the State, being already appropriated. All that the Legislature can do with respect to the rights of fishing in navigable rivers is to pass laws prescribing the mode in which that right is to be exercised by the citizens. Vattel 104, sec. 246. In England a franchise of free fishery must have been granted before the charter of King John, for all such grants in future are prohibited by that charter.

Admit the islands may be granted, yet a grant of them will not pass the rock, which stands in the river at a great distance from either of them; but in truth the islands are not grantable; they belong to the owners of the nearest adjacent lands. Even the grant of 1753, comprising the islands, did not extend to this rock, nor was legally comprehended in the State grant issued under the act of 1787. That act says that all and every person and persons owning lands on said river at and against and contiguous to any rocks or islands not yet entered and taken up shall have the privilege and liberty of taking up the same agreeably to the laws for taking up land now in force, provided they enter and take up such islands, rocks and stands within six months, etc. The rock in question was nearer to the lands of another person than the grantee. His lands are not at, adjoining, and contiguous to this rock, in comparison with the lands of that other. The grantee was not a person intended by the act to have the right of preëmption. The grant has issued (491) upon wrong suggestions, and is therefore void. Bull., 76; 1 Co., 44, 45. The Governor was not authorized to execute such a grant. Thus the grant is not only void, because the rock belonged to the owner of the land nearest to it, but also for this other reason, that it issued without authority given by the State to issue it.

Counsel for the plaintiff: They rely upon their possession, but possession cannot ripen into title unless it be a continued and constant possession. The possession of the defendant has been for five or six weeks

only in a year. Therefore, it cannot avail him. It is admitted on the other side that no right can be acquired in this country by prescription. I shall therefore say nothing more on these points. It is argued that this is a navigable river, and therefore could not be granted, and 1 Bl. Com., 286; 2 Bl. Com., 39, is relied on. It is true, in England such grants were restrained by particular laws intending to restrain the prerogative; but these laws are not in force here. Our legislative body is only restrained and regulated by the Constitution. Acts passed by them for the public good, and not repugnant to that Constitution, must be enforced. It is not a true position that in case of private rivers, or rivers not navigable, the islands belong to the owners of the adjacent land. Such islands, either on navigable or unnavigable rivers, contain land and territory, and must be entered before they become private property. This appears by our entry laws, 1777, ch. 1, sec. 10, and if islands are to be entered and do not follow the adjoining lands, then upon the principle of the defendant's counsel the owners of the islands are entitled to a part of the bed of the river on each side of the islands. The act of 1787 is founded in good policy, and does not exceed the powers of the Legislature. It was made to prevent strangers, not citizens of North Carolina, from stopping up the river with their stands, and depriving the landholders of the benefit of fishing; such persons trespassed upon the adjoining lands, committed injuries and transgressed the laws of the country, and immediately withdrew themselves into Virginia before they were taken by process issued for the purpose; or if they were by accident apprehended, they were generally unable to make compensation.

PER CURIAM. Under the directions of the Court, the jury gave a verdict for the plaintiff.

NOTE BY REPORTER.—This case *ex relatione*, and I have been informed that the judgment of the Court (WILLIAMS, and MACAY, JJ.) proceeded upon the ground that the rocks in the river above the surface of the water were vacant property, and the subjects of our entry laws.

Cited: McKenzie v. Hewlett, 4 N. C., 615.

(492)

NEW BERN—SEPTEMBER TERM, 1797

SIMON BRIGHT v. ROBERT WHITE.

A purchaser of lands under a sheriff's sale cannot sustain an action for money had and received against the sheriff upon the ground that the title was bad, and the consideration had therefore failed.

ACTION on the case, for money had and received to the plaintiff's use, and the general issue pleaded. Upon the trial the evidence was that Oram obtained a judgment against Bright, the father of the plaintiff, whereupon execution issued, and the defendant, as sheriff, sold a tract of land to the plaintiff to satisfy it; that the plaintiff afterwards instituted an ejectment to recover possession, and there was a verdict and judgment against him; the defendant paid over part of the purchase money to Oram, and took his receipt; the residue he paid to Bright, the defendant in the action.

Badger for the plaintiff.
Davie for defendant.

WILLIAMS and HAYWOOD, JJ. If a man receive money to his own use and to his own benefit, upon a consideration which happens to fail, he is liable to refund; but if he receives it as agent for another, or act-
(495) ing for another, and pay it over, he is not liable to refund. It may not be so expressly laid down in any one case in the books, where the receiver to his own use is sued, but that this is the law may easily be ascertained by a comparison of the cases where a receiver to his own use is sued with those where the defendant has been sued as agent, or the like. The case in Cowper decides that he is not liable when sued as an agent. Another well known case is where letters of administration are obtained, and the administrator appoints his attorney, who receives money and pays to the administrator, and then the letters are repealed and granted to the next of kin, and he sues the attorney. The attorney is not liable to his action. This goes upon the same principle. Another case coming very near the present is where the executor sells a term for years, which he supposes to be the testator's and the vendee is ejected by judgment and sues the executor. He is not liable, because he may have paid over the moneys to creditors or legatees. Doug., 654, 656. The reason of these cases governs that of a sheriff selling land by virtue of an

execution. He receives the money not to his own use, but to the use of the plaintiff in the action; when he has paid it over he is not liable; for if he be, how is he to be recompenced? He cannot recover back of the plaintiff. The sheriff is not bound to warrant the property, for he is not benefited by the money as a private vendor is. No sheriff, executor, or the like would ever be safe were they bound to warrant the property sold. They frequently have not the means of knowing whether the title be good or bad. Their estate would be perpetually in danger. The property sold might at any distance of time after the sale be recovered of the vendee or his heirs, and the sheriff become liable thereby. No man, under such disadvantages, would become agent, executor, or sheriff. The doctrine contended for by the plaintiff in the present action would destroy all such agencies and offices, beneficial as they are to the public. It does not follow because the sheriff is liable to a stranger for selling his personal effects, that he is also liable to the vendee; but if it did, the argument fails when applied to lands. The sheriff is not bound to seize them. Lands do not pass as personal estate does, by sale and delivery. Movables are seized in order to their delivery. There is no occasion to seize lands for the same purpose. When sold, they need not be delivered to the vendee. The sheriff cannot expel the possessor (496) and put the vendee into possession, and therefore the sheriff is not liable for selling the lands of a stranger to the execution. The dispute lies in such cases between the vendee and the claimants. The vendee purchases at his own risk. The sheriff is not subject to the claimant's action, the conclusion drawn from his liability in cases of personal property fails. We are clearly of opinion the present action cannot be sustained.

Verdict and judgment for the defendant.

WITHERSPOON AND WIFE v. BLANKS.

Natural objects control course and distance.

WILLIAMS and HAYWOOD, JJ. If a line be to terminate at a natural boundary, as a mountain, pond, rock, etc., and the distance is completed before arriving at it, still the line must be continued on till that natural boundary be intersected. Also, if a natural boundary be mentioned in the patent or deed as terminating a line, and the course called for goes beside that point, the course shall be corrected, and such a course taken

as leads directly to it from the last termination. In such case there is as much reason for disregarding the course in the deed as there is for disregarding the measurement or length of the line as described therein; but in this case either line terminated at a natural boundary, which might be that mentioned in the patent; and there being evidence in favor of both, the jury found for the defendant. The Court, however, granted a new trial.

Cited: Cherry v. Slade, 7 N. C., 86.

FOREMAN v. TYSON.

State grants cannot be avoided by evidence in ejectment. Recourse must be had to equity for that purpose. Where two patents bear the same date, HAYWOOD, J., thought the priority of number might decide the preference in the absence of other proof; but WILLIAMS, J., *contra.*

EJECTMENT. Not guilty pleaded. On the trial Foreman produced in evidence a State grant, dated 21 October, 1782, to one James Lanoir, and then deduced the title regularly to himself. The defendant also produced a grant for the same land, dated on the same day. Thereupon the plaintiff stated, and offered to prove, that Tyson's grant was obtained against the provisions of the act of 1777, ch. 1, sec. 9, which declares all titles obtained otherwise than according to the directions of that act to be void.

Davie for defendant: The decisions of our courts ever since the act of 1777 have been that grants under such circumstances shall be avoided in a court of equity, not, indeed, by repealing the grant, but by decreeing the grantee to convey to him who should have had the
(497) title. These decisions will govern the present case, and operate to the rejection of the testimony offered.

Baker for plaintiff: Wherever an act of Assembly declares that a deed obtained under particular circumstances shall be void, a deed obtained under such circumstances is absolutely void to all purposes; and there need not be any direct judgment to make it void. It may be objected to, and its invalidity shown whenever it becomes material to show it in any action whatsoever. And he cited 2 Term 604, 515, 561, 568.

Davie, e contra: Grants of the State, or of the King in England, are of record, and cannot be avoided but by something of as high a nature.

Therefore it is that in England a judgment must be pronounced against them upon a *sci. fa.* brought to repeal them before they can be deemed invalid. They are like judgments, valid in law till repealed by competent authority. But if the cause of the invalidity of a grant appears of record already, there is no occasion for a *sci. fa.*, and the Court may proceed to vacate by judgment without any verdict upon the *sci fa.;* and for this he cited 4 Com., 397. In the present case no cause of invalidity appears of record, and the grant is valid and cannot be avoided in this action by parol testimony.

HAYWOOD, J. Were this *res integra,* I should be of opinion that such evidence as is now offered ought to be received; and this opinion would be founded as well upon the act of Assembly as upon the common law. The act says a grant issued under certain circumstances shall be void; it is now said, and I believe properly, that equity will not repeal the grant. The *sci. fa.* issues in England from the court of chancery on the law side, and is returned into that court for judgment, after a trial upon the issue of fact in the King's Bench; or, in case of a demurrer, judgment is given by the chancellor without sending the record out of his court at all. It would seem to follow from hence, that a *sci. fa.* to repeal a grant could not issue from this Court, and if it cannot, there remains no other mode of avoiding the grant but by showing its invalidity in an action. It is evident the act of Assembly intended that the grant should be avoided in a court of law; for at the time of passing the act of 1777, and for five years afterwards, no court of equity existed in this State. With respect to the common law, I have no doubt but that such evidence might be received; the authorities cited at the bar prove it; and there is a case of ejectment, 10 Co. Re., 109, in which the effect (498) of a grant was avoided by evidence given to the jury to show its invalidity. There are other cases in trespass, and other actions reported by the same author, where grants coming incidentally to be examined before the Court were avoided upon testimony given to the jury. There are two ways at common law of impeaching a grant: either upon a trial at law, where the validity of the grant comes in question, or where the party likely to be prejudiced by it, and apprehending a loss of evidence to prove its invalidity, brings a *sci. fa.* and obtains judgment of cancellation in repeal, and so destroys the grant itself; but there is no use of the latter proceeding, where the evidence to counteract the grant is as permanent in its nature as the grant itself; that is to say, where the evidence is of record. But though this would have been my opinion had no decisions taken place in our Court, I cannot now but consider myself bound by those adjudications which have

been made. It is better to adhere to them than to render the law uncertain by contrary decisions. I must, therefore, yield to the authority of the decisions, though I cannot concur with the reasons which have been given for them.

WILLIAMS, J. I am satisfied with the former decisions. I have heard many arguments upon this question, and I am every time more and more strengthened in the opinion, that the former adjudications are proper. To avoid a grant upon parol testimony would be dreadful indeed; the most valuable estates might be overturned by one or two corrupt witnesses at any time. It is far better to reject such testimony than let in such an evil with it.

So the evidence was rejected.

General Davie, for the defendant (the evidence being closed), insisted that the defendant, being in possession, cannot be deprived of it legally but by the plaintiff's showing a better title, which in the present case he has not shown. His grant is of the same date with ours. As to the number of his grant; that, indeed, is of an earlier number than ours, but the number of the grant is a circumstance of no materiality. The Secretary was examined in this cause last term, and he said the number was of no consequence in determining the priority; that the course of the office was to make out the deeds for execution in the Secretary's office, and send them in a bag or box to be executed, when they are signed by the Governor as they happen to come to hand; after which they are (499) returned to the Secretary's office all together in a bag or box, and recorded, and numbered as they are recorded. The course of the office is to be regarded, in like manner, as the course of business in mercantile transactions; and if it be to be regarded, then it is evident the circumstance of numbering the deeds is immaterial in a question of priority. It is not required by any law; it was introduced into practice to facilitate business in the Secretary's office. Men's titles are not to be decided by recurrence to circumstances so trivial; they cannot be regarded; and then there is nothing to determine the priority, the Court having rejected that of the priority of the survey.

Baker for the plaintiff: The date of the grant is what has hitherto been adopted as the rule of deciding upon the point of preference. That fails in the present case, and we must necessarily recur to some other circumstance or leave the point undecided, and the parties endless contention. The number proves that the deed first numbered was that which was first recorded, and recording is the circumstance which finally completes the grant. The priority of the number in our grant, is, there-

fore, a proof that it was complete before the other, and of course the title first vested and was complete in us. This point was decided by HAYWOOD, J., at Wilmington, some time ago, as I am informed.

General Davie: The case at Wilmington did not depend upon this point. It was decided upon the statute of limitations. I was concerned in it. As to what is argued, that the recording the grant is the completing circumstance, that is indeed necessary, but is of no weight in deciding priority of execution. The grant or deed, when recorded, relates to the date; the common case of deeds of bargain and sale proves this. If two deeds for the same land be granted to two different persons, and the deed of the latter date be first registered, that will not defeat the title of the first bargainee; but his deed, afterwards recorded, shall relate to the date thereof, and give him the preference. The time of recording, therefore, is immaterial.

PER CURIAM. The jury had better give a special verdict, that the law upon this point may be settled upon a deliberate decision.

Et per HAYWOOD, J. I am inclined to think the priority of number is of some weight in the decision of this case. It will not do to say, in case of two grants of equal date, that he shall prevail who is in possession. It should be decided by some rule more satisfactory. In common cases the date of the grant is resorted to, although it is (500) plain that gives no certain proof of priority of execution, for the grants are made out ready for execution, and dated a long time before the actual execution takes place. In fact, as the grants are sent in large numbers to the Governor's Secretary to be executed, and are executed as they happen to come to hand, it may, and no doubt frequently does, happen in fact that a deed of latter date is first executed. Or suppose they are dated by the Governor's Secretary as they come to hand, after the execution, still it may happen that a deed first executed may be the last dated. But as some circumstance must be taken, the courts have adopted that of the date, and where that is found not to answer the purpose, some other circumstance, by parity of reason, should be resorted to, and priority of number is some evidence, though not conclusive, that the deed which has that circumstance in its favor was first dated.

The jury found for the plaintiff, and a new trial being moved for, WILLIAMS, J., was for granting it; but HAYWOOD, J., would not now deliver an opinion upon the motion, saying a State grant might be suspended at any time before it was enrolled, which proved that before en-

rollment the grant was not complete; and this differed from the case of the enrollment of a deed of bargain and sale, which could not be prevented after the execution; that the point deserved consideration, and he would endeavor to form an opinion when it should be argued hereafter upon this motion.

NOTE.—As to the first point ruled in this case, see *Reynolds v. Flinn*, and the note thereto, *ante*, 106. Upon the last point, see *Andrews v. Mulford*, *ante*, 311, and *Riddick v. Legget*, 7 N. C., 539.

ANONYMOUS.

When a defendant in ejectment dies, the suit will abate, and cannot be revived by *sci. fa.* against the heirs.

EJECTMENT. The defendant died pending the action, and a *sci. fa.* issued against his heirs, who came in and pleaded the death of the defendant in abatement.

WILLIAMS and HAYWOOD, JJ. The acts for continuing suits on the death of either party extends only to such cases where before the act the executors by a new suit might sue or be sued after the abatement of the former action, not to those cases where after the abatement by death no new suit could be maintained by or against them. The intent of the act was to save the expenses of an abatement and the delay consequent upon it, and as ejectment before the act abated by the death of the defendant, and could not be supported against executors or heirs for the ouster in the lifetime of the deceased, it will abate since the act in the same manner as before. The act never meant to subject executors or heirs to actions which they were not liable to before the act.

So the action abated.

NOTE.—This was altered by the act of 1799, Rev., ch. 532.

(501)

CARRUTHERS v. TILLMAN.

In the first action for nuisance by milldam overflowing lands of another, only actual damages can be recovered; in subsequent actions, exemplary damages.

CASE for a nuisance and overflowing the lands of the plaintiff by erecting a milldam; and evidence was given of overflowing about 30 or 40 acres of low land, which before the erection was usually overflowed at high water.

WILLIAMS and HAYWOOD, JJ. This action lies for any overflowing of the plaintiff's land, the maxim being, "You must so use your own as not to prejudice another's property"; but the action may be continued from time to time till the defendant is compelled to abate the nuisance; every continuance thereof after a preceding action being considered as a new erection. The first action is regarded as a trial of the question whether a nuisance or not. Therefore, it is not proper, in the first instance, to give exemplary damages, but such only as will compensate for actual loss, as killing the timber or overflowing a field so as to prevent a crop being made upon it, and the like. But where the abating the nuisance will restore the lands to the same value and use as before the nuisance, and no real loss has been as yet sustained, the damages should be small; but if after this the nuisance should be continued, and a new action brought, then the damages should be so exemplary as to compel an abatement of the nuisance.

There was a verdict for the plaintiff, and sixpence damages.

NOTE.—*Vide* ———— *v. Deberry,* and the note thereto, ante 248.

Cited: Moore v. Love, 48 N. C., 218.

DEN ON THE DEMISE OF FAIRCLOTH v. INGRAHAM AND JONES.

In ejectment, if the demise laid expires, the declaration can be amended.

EJECTMENT, and not guilty pleaded, and the jury being sworn, the defendant's counsel disclosed that the demise laid in the declaration was expired, and moved for a nonsuit, insisting that though the demise might be amended, if prayed before the jury are sworn, it could not be done afterwards.

WILLIAMS and HAYWOOD, JJ. The demise is a mere fiction. The jury are not sworn upon that, but to try the title only. It may be amended at any time, or the exception may be overlooked, as it was in 2 Burr., 1159, where the demise after the trial was found to be laid upon a time not yet come.

The nonsuit was refused.

See *Young v. Erwin, ante*, 323.

BURROW v. SELLERS' EXECUTORS.

A plea in abatement that there are other executors is bad unless it avers they have qualified.

THE defendant pleaded in abatement that there were other executors not named in the writ.

(502) WILLIAMS and HAYWOOD, JJ. The plea is bad; it should have stated that those other executors were qualified as executors, and took upon themselves the burden of executing the will, as stated in the Office of Executors, 42, 43.

The plea was overruled.

Cited: Alston v. Alston, 25 N. C., 449.

BLOUNT v. FISH.

A *qui tam* action abates by death of defendant.

THIS was a *qui tam* action. The defendant had died pending the action.

PER CURIAM. The act continues no suit which before the act was not maintainable against executors; and as this action before the act would have abated by the death of the defendant, and could not have been afterwards commenced against his executors, it is abated now.

The action abated.

Same point decided in *Smith v. Walker*, 4 N. C., 223.

McKENZIE v. ASHE.

The law as to construction of bets upon races follows the custom of rules of racing.

THE defendant had agreed to run his mare against a horse of the plaintiff's and to pay $1,000 if he lost the race, or to pay $400 if he failed to run at the day and place appointed. His mare became by accident lame before, and continued to be so on the day of the race, and died in two days after. Two witnesses, the only ones examined to that point, said that such accident, by the rules of racing, could not excuse the defendant from the forfeiture.

PER CURIAM. Whatever the rules of racing decide in such a case should be the standard of decision now, the rule of law being that if he is entitled to the penalty by the rules of racing, he is so by law.

The jury were divided, and a juror withdrawn.

See *McKenzie v. Ashe*, 3 N. C., 161; *Hunter v. Bynum, ibid.*, 354.

NOTE BY REPORTER.—Upon inquiry after the trial, several persons well experienced in racing gave it as their decided opinion that no accident whatever could exempt the defendant from forfeiture in case of failure, unless he had expressly provided against it by his agreement.

NOTE BY ANNOTATOR.—All bets were made illegal. Laws 1810, ch. 796, now C. S., 2142, 2143; *Gooch v. Faucett*, 122 N. C., 270.

INDEX.

ABATEMENT.

1. The objection that a joint obligor is not sued must be made by plea in abatement at the proper time; it cannot be made at the trial of the cause. Such a plea cannot be made at all since the act of 1789, ch. 57. ———— *v. Kenon*, 216.

2. If a plaintiff procures a copy of his bill and a subpœna, and deliver them to the sheriff in time to be served on the defendant ten days before the term, and the sheriff neglects to make the service until ten days before the next term after that, the plaintiff's bill shall not be dismissed by a plea in abatement under the act of 1782, ch. 11, sec. 2. *Anonymous*, 286.

3. Under the acts of 1777, ch. 2, sec. 10, and 1793, ch. 19, sec. 1, it is held that a plea in abatement is not the proper mode to take advantage of the plaintiff's having brought his suit in the Superior Court for less value than £50. *McNaughton v. Hunter*, 454.

4. A plea in abatement that the plaintiff is an alien is not sustainable in the action of trespass *quare clausum fregit*. *Barges v. Hogg*, 485.

5. Where a defendant in ejectment dies, the suit will abate, and cannot be revived by *scire facias* against the heirs. *Anonymous*, 500.

6. A *qui tam* action abates by the death of the defendant. *Blount v. Fish*, 502.

7. A plea in abatement stating barely that there are other executors not named in the writ is bad. *Burrow v. Sellers*, 501.

Vide Jurisdiction, 1.

ADMINISTRATORS AND EXECUTORS.

1. Letters of administration need not remain in court, and are not demandable after issue joined. *Berry v. Pullam*, 16.

2. An administrator may sue as such, upon his own possession. It is better for him to sue in that manner, as the judgment will then be evidence against him of assets. *Ib.*, 16.

3. Objected by counsel that a summons, and not a *capias*, is the proper process to bring in an administrator, and that an attachment founded upon such *capias* is irregular. *Moore v. Suttril*, 16.

4. Former administrators removed and another appointed, but not made a party to this suit. The latter administrator will not be allowed to plead anything to this suit, and the former administrator cannot plead the repeal of their letters after the first term since the repeal. *Bailey v. Cochran*, 104.

5. An account stated and signed by one administrator is binding upon all, and will bear interest from the time it was signed. *Id.*, 104.

6. Where an executor declares as executor, then he makes profert of his letters testamentary, and they are to be objected to in pleading, upon *oyer* of them, or by demurrer, if any defect appears in the declara-

ADMINISTRATORS AND EXECUTORS—*Continued.*

tion; and after the first term they need not be produced again. But when an executor declares upon his own possession, the fact of executorship forms part of his title, and must be proved upon the trial by the production of the letters testamentary themselves, unless they have been lost, when, perhaps, other proof of executorship will be admitted. *Executors of* ———— *v. Oldham*, 165.

7. When "no assets" are pleaded, the plaintiff shall have judgment for the amount of the assets which he can show in the hands of the administrator, and judgment *quando* for the balance of his debt. *McRae v. Moore*, 182.

8. When an executor omits to plead "no assets," it is an admission of assets which he can never afterwards controvert; and in such case the proper judgment is that the principal sum recovered be levied *de bonis testatoris* in the hands of the executor, and the costs *de bonis propriis;* and upon the return of the sheriff that there are no goods of the deceased in the hands of the executor, then a *sci. fa.* issues to the executor to show cause why the execution for the principal should not be levied *de bonis propriis. Parker v. Stephens*, 218.

9. Administration granted when the next of kin are out of the country should be *durante absentia;* if otherwise, it is erroneous. *Ritchie v. McAuslin*, 220.

10. The next of kin residing in another country may appoint a person to take the administration here. *Id.*, 220.

11. The Court should not grant letters to a person not designated in the act, before the persons designated have refused. *Id.*, 220.

12. The Superior Court will repeal the letters when improperly granted, and make an *order* for the county court to grant them to the proper person. *Quere*, whether it should not have been a *mandamus*. *Id.*, 220.

13. Suit commenced against an executor returnable to the Superior Court, and suits afterwards commenced returnable to the county court which sat first; to these latter suits the executor put in such pleas as made the assets responsible for their payment, and to the suit in the Superior Court he pleaded that he had no assets except what was liable to the payment of the other suits. The latter plea is not good; he ought to have confessed judgment to the suits in the county court, and then pleaded those judgments to the suit in the Superior Court. *Anonymous*, 295.

14. The plea of *plene administravit* must be true when it is put in, and not at the time of trial. *Anonymous*, 297.

15. The administrator had failed to plead *plene administravit*, or any other plea showing a want of assets, and the plaintiff had obtained judgment, and upon execution issued, "*nulla bona*" had been returned: *Held*, that the administrator was bound to pay *de bonis propriis*, and for that purpose a special *fi. fa.* might issue reciting the return of *nulla bona*, and commanding the sheriff to levy *de bonis intestati* if to be found in the hands of the administrator; if not, *de bonis propriis. Hogg v. White*, 298.

ADMINISTRATORS AND EXECUTORS—*Continued.*

16. Letters of administration granted in another State cannot entitle the administrator to maintain a suit in this State. *Anonymous*, 355.

17. An administrator is bound to pay debts already due before those not yet payable. *Evans v. Norris's Admrs.*, 411.

18. An administrator cannot retain against debts of superior dignity. *Id.*, 411.

19. Voluntary payments after the teste of the writ are not allowable. They are certainly not if made after plea. *Id.*, 411.

20. A payment made after the teste of the writ is not good in support of the plea of *plene administravit*. *Quere* by HAYWOOD, J. *McNaughton v. Blocker*, 417.

21. Judgments obtained against an administrator after the teste of the writ, and before the time of pleading, may be pleaded at the proper time. *Id.*, 417.

22. Debts assumed by the administrator before the teste of the writ must be allowed him to the amount of his assumptions. *Id.*, 417.

23. When two judgments are obtained against an administrator, the first an absolute one, but the second a *quando* judgment, and assets afterwards comes to his hands, HAYWOOD, J., said that the assets must be applied to the first judgment; but STONE, J., seemed clear that they should go to the satisfaction of the second. *Anonymous*, 460.

24. When an administrator does not distinguish in his inventory the good from the bad debts, all will be presumed to be good until he can show that he brought suits for them and the debtors were unable to pay. *Anonymous*, 481.

25. The plea of *plene administravit* should be received at all times, provided the defendant does not come in with it at a very late period, to delay the trial. *Anonymous*, 484.

Vide Trover 1, 2, 5, 6; Limitations, Statute of, 1; Abatement 1; Joint Obligors, 1, 2; Husband and Wife, 3, 4; Detinue, 6.

ADMINISTRATION, LETTERS OF. *Vide* Administrators and Executors, 1, 9, 10, 11, 12, 16.

ACCOUNT.

1. The action of account will not lie for a legatee against an executor or the executor of such executor. *Anonymous*, 226.

2. When to a bill filed, stating errors in an account settled four or five years ago, defendant pleaded specially, denying each error and also all fraud, if the plaintiff does not take issue, and prove the error or fraud, the Court will not disturb the account. *Blackledge v. Simpson*, 259.

3. An account taken by the master, in the absence of one of the parties and without his having had notice of the time when it would be taken, shall be set aside. *Smith v. Estis*, 348.

4. When a report is regularly taken, but the items of the account are improperly allowed or disallowed by the master, exceptions filed to

ACCOUNT—*Continued.*

the report are proper; but if the report is irregularly taken, then the objection goes to the whole report, and may be made and supported by affidavits on motion. *Ib.*, 348.

Vide Administrators and Executors, 5; Limitations, Statute of; Payment, Plea of.

ACTS OF THE ASSEMBLY. *Vide* Evidence, 12, 14.

AFFIDAVIT.

1. An indictment upon an affidavit not signed is good. *State v. Ransom*, 1.
2. An affidavit of an agent, not a party in the suit, cannot be annexed to an answer to dissolve an injunction; but an order may be made to have the fact which the affidavit was intended to show tried by a jury at the next term. *Christmas v. Campbell*, 123.

AGENT. *Vide* Affidavit, 2; Evidence, 16; Partnership, 2.

ALIEN.

Plaintiff sued on a bond, and the plea, which was founded on sec. 101, act of 1777, ch. 2, stated in substance that the plaintiff had removed from the State to avoid assisting in the war of the Revolution; that he had attached himself to the enemy, etc.: *Held*, that if plaintiff was a citizen of this country, section 101, before referred to is repealed as to him, by several acts of the State Legislature; and if he was not a citizen, but a British subject, then by article 4 of the treaty of peace he is considered as an alien friend, and entitled to sue in our courts. *Crudèn v. Neale*, 338.

Vide Abatement, 4.

ALIMONY.

1. In a bill by a wife for alimony, it is most proper that the husband be held to bail at first; but if that has not been done, upon proper affidavits by the wife the husband's property may be sequestered until he gives security for the performance of the decree. *Anonymous*, 347.
2. In a bill for alimony the Court will not order a sequestration upon the ground that the defendant is wasting his property. *Spiller v. Spiller*, 482.

AMENDMENT.

1. Plea in abatement that defendant is sued as executor instead of administrator; motion to amend under the act of 1790 was refused. Nothing can be amended under that act but what the other party might have specially set down as the cause of demurrer. *Cowper v. Edwards*, 19.
2. A declaration in ejectment served on a tenant in possession cannot be amended so as to comprise more lands than those already described. *Carter v. Branch*, 135.
3. It is a practice among the bar to correct any mistake which the clerk may make in issuing writs. *Adams v. Spear*, 215.

AMENDMENT—*Continued.*

4. Where the demise in an ejectment is about to expire before a trial can be had, the plaintiff will be permitted to amend by extending the term. *Young v. Erwin*, 323.

5. A writ cannot be altered from covenant to debt except by consent of parties; but it is usual among practitioners to permit the amendment, when the mistake was occasioned by the clerk. *Anonymous*, 401.

6. An amendment cannot be permitted in an ejectment so as to embrace land not included in the declaration. *Troxler v. Gibson*, 465.

7. An amendment will be permitted to extend the term of the demise in ejectment, even after the jury are sworn, or the exception will be overlooked. *Faircloth v. Ingraham*, 501.

APPEAL.

1. Motion in arrest overruled and appeal, the case stands, not upon the reasons in arrest, but an issue to the country. *Snoden v. Humphries*, 21.

2. The neglect of bringing up an appeal under the act of 1777, ch. 2, sec. 84, in proper time is not relievable by *certiorari*, although occasioned by the neglect of the clerk; and the appellee may move for the affirmance of the judgment with double costs, either at first or any other term after the appeal. *Brickell v. Bass*, 137.

3. An appellee may move for an affirmance of the judgment with double costs either at the first or any other term after the appeal, per MACAY, J. But HAYWOOD, J., denied the propriety of it, and a rule upon the appellant to show cause at the next term was ordered. *Anonymous*, 171.

4. An appeal from the county to the Superior Court nullifies the judgment of the county court. *Davison v. Mull*, 364.

5. The appellant applied in time to the clerk for the papers, but could not procure them. The papers were, however, brought up after the fifteenth day before the term, and a motion was made to have them filed. Upon the motion being opposed by the appellee, it was refused upon the ground that the party had his remedy against the clerk. It seems if there had been no remedy against the clerk the papers might have been filed. *Robertson v. Stone*, 402.

6. The fifteen days before the term, in which appeals must be filed in the Superior Court, must be clear of the day of filing the papers and of the first day of the term; at all events, of the first day of the term. *Anonymous*, 402.

7. When in appeal from the county court, and a new trial had in the Superior Court, a verdict for as great a sum was obtained in the Superior Court as had been rendered in the county court, HAYWOOD, J., thought judgment might be entered up *instanter* against the appellant and his securities under the act of 1785, ch. 2, sec. 2. But STONE, J., was of opinion that in such case the act did not apply. *Yarborough v. Giles*, 453.

APPEAL—*Continued.*

8. The fifteen days before the term, in which appeals must be filed in the Superior Court, are inclusive of the day on which the appeal is filed, and also of the first day of the term. *Anonymous*, 462.

Vide Bail, 1.

APPEARANCE.

A motion to dismiss a cause brought up by a *certiorari* was made upon the ground that the notice which had been ordered at the last term to be given to the defendant had not been given; but it appearing that the defendant had entered an appearance by the initials of his attorney's name being placed on the docket the motion was refused. *Anonymous*, 405.

ARBITRAMENT AND AWARD.

1. Award made and returned into court; exceptions to it were filed in writing; the answer to the exceptions was also filed in writing; both supported by affidavits. Judgment was given upon hearing them. This is the usual practice in such cases. *Cain v. Pullam*, 173.

2. An entry, "Referred to A, B, and C," means a general reference of the cause, and not merely to audit and state the accounts. *Cleary v. Coor*, 225.

3. The award of arbitrators ought not to be set aside unless in cases where their decision is plainly and grossly against law; not where the point decided might be doubtful. *Id.*, 225.

4. In an appeal from the court below upon exceptions filed to the award of arbitrators, a new trial is not to be had in the Superior Court, but it will examine into the errors of law in the court below. *Burton v. Sheppard*, 399.

5. A decree will be entered on an award at the term at which it is returned, if no exceptions be made to the award at that time. *Southerland v. Mallet*, 461.

ASSAULT.

Upon assault with intent to kill, the Court may punish by fine only. *S. v. Roberts*, 176.

ARREST.

1. A warrant that does not state that the sum demanded is over £5, but only that it is under £20, will not authorize an arrest. *Lutterloh v. Powell*, 395.

2. If a justice of the peace issue a warrant for a matter within his jurisdiction, although he may have acted erroneously in the previous stages, the officer should execute it; but if it be for a matter not within his jurisdiction, the officer ought not to execute it. *S. v. Curtis*, 471.

3. If the officer be a known officer in that district in which he is acting, he need not show his warrant when he makes the arrest; but if he is an officer appointed for a special purpose, he ought to show his warrant, if demanded. *Id.*, 471.

ARREST—*Continued.*

4. When he makes the arrest, he should briefly inform the party arrested of the cause, as, "I arrest you at the suit of A" or "in behalf of the State." Otherwise, the arrest is not good. *Id.*, 471.

5. If a warrant want a seal, it is void. And a person arrested under a warrant without seal, and without being told for what purpose he was arrested, is justified in resisting and beating the officer. *Id.*, 471.

Vide Escape, 2.

ASSIGNMENT.

1. A witness may be introduced to explain the condition of an assignment. *Greenlee v. Young*, 3.

2. Though a judgment is not negotiable, yet the law will so far take notice of an assignment as to protect it against the acts of the assignor. *Smith v. Powell*, 452.

ASSIGNMENT OF ERRORS. *Vide* False Judgment, 1.

ASSUMPSIT, ACTION OF.

1. Assumpsit will not lie for a sum for which there is a subsisting judgment. *Tune v. Williams*, 18.

2. An action upon the case in assumpsit, will lie for the use and occupation of a house, at least upon an express promise. *Anonymous*, 485.

Vide Extinguishment.

ATTACHMENT.

1. An original attachment is only intended to compel an appearance, and where sureties are given they are exactly as bail, and may surrender. *Hightour v. Murray*, 21.

2. An attachment bond is good without attestation. *Oneal v. Owens*, 365.

3. An attachment must issue, if the plaintiff makes the proper affidavit, whether it be true or not. *Id.*, 365.

Vide Administrators and Executors, 3.

AVERAGE.

When the vessel is lost, the goods that are saved are not liable to average. *Ferguson v. Fitt*, 239.

BAIL.

1. Suit in the county court and judgment for plaintiff; appeal by defendant to the Superior Court, with A and B securities to the appeal bond; before judgment in the Superior Court the bail below surrendered the defendant and he was committed; after judgment in the Superior Court, the defendant being gone, *sci. fa.* issued to the sureties in the appeal bond, and it was held that the surrender by the bail did not discharge them. *Cooke v. Little*, 168.

2. The plea of "surrender" by bail must state whether the surrender was made to the court or to the sheriff out of court, else it will be bad in form. *Davison v. Mull*, 364.

BAIL—*Continued.*

3. Under our act of 1777, ch. 2, secs. 19, 20, 79, the bail may surrender at any time before final judgment against them. *Id.*, 364.

4. The plea, *puis darrein continuance* of the surrender, may be refused by the Court in cases of hardship unless the defendant will submit to the terms of paying costs. *Id.*, 364.

Vide Attachment, 1; Escape, 1; Sheriff, 14.

BILLS OF EXCHANGE, PROMISSORY NOTES, ETC.

1. An assignee, two years after the assignment, sues the drawer and takes him in execution by a *ca. sa.*, from which he is discharged by an insolvent act; recourse to the assignor is gone by the delay (*Quere*, whether one year would not be too long) also by the *ca. sa.*, and discharge therefrom. *Greenlee v. Young*, 3.

2. An obligee, who has possession of a bill or bond, may scratch out any endorsement upon it and bring suit in his own name. *Dook v. Caswell*, 18.

3. The negotiability of a bill or note may be restrained by endorsement, or by special words in the body of the note. *Smith v. St. Lawrence*, 174.

4. Endorser may sustain an action in his own name, either striking out the endorsement or without it, possession of the note being *prima facie* evidence of payment to endorsee. *Id.*, 174.

5. A bond payable partly in money and partly in specific articles is not negotiable under the act of 1786, ch. 4. *Jamieson v. Farr*, 182.

6. An endorser may sustain an action in his own name, the possession of the note being *prima facie* evidence of payment to the endorsee. *Strong v. Spear*, 214.

7. Notice need not be given under the act of 1762, ch. 9, sec. 5, to the drawer, if he has no effects in the hands of the drawee. ——— *v. Stanton*, 271.

8. The receipt of part of the money from the drawee does not discharge the drawer, and as to the balance he is entitled to notice only where he would be so in case of the whole being unpaid. *Id.*, 271.

9. A negotiable instrument in the hands of an assignee is not subject to any payments that do not appear endorsed, if it was assigned before or at the time it became due; but if it was assigned after it became due, then all such payments as it can be presumed the assignee had notice of shall be good against it. *Black v. Bird*, 273.

10. If one of two joint payees endorses all his interest to the other, that other may maintain an action in his own name for the whole debt. *Sneed v. Mitchell*, 289.

11. A note was given by the plaintiff to Watkins for lands, which it turned out Watkins never had. Watkins cannot recover on the note; and as the note, being for the delivery of specific articles, was unnegotiable, Pickett is subject to the same objection. *Welsh v. Watkins*, 369.

BILLS OF EXCHANGE, PROMISSORY NOTES, ETC.—*Continued.*

12. A note payable in tobacco is not negotiable, and being unnegotiable, cannot be made so by any *ex post facto* circumstance. *Tindall v. Johnston*, 372.

13. Where a person receives evidences of debt from his debtor for the purpose of collecting the money and applying it to the credit of his debtor, he is bound to the same degree of diligence in attempting to procure payment and in giving notice of nonpayment, though such evidences of debt be not negotiable, as if they were negotiable and had been endorsed—Per WILLIAMS, J. But per HAYWOOD, J.—The creditor would not be liable for any loss in such case, unless his debtor could show that the loss happened by his, the creditor's neglect. *Brown v. Craig*, 378.

14. WILLIAMS, J., inclined to change the opinion expressed in the preceding case of *Brown v. Craig*, and to hold that unnegotiable paper, though endorsed, does not bind to the same diligence as negotiable instruments. *Alston v. Taylor*, 381.

15. Bonds made in Virginia and assignable by the laws of that State, but not assignable by our laws, must be subject to our laws when the contract of assignment is made in this State. *Id.*, 381.

16. A bond upon which is an endorsement purporting that it may be discharged by the payment of so much tobacco, is not negotiable under the act of 1786, ch. 4. *Campbell v. Mumford*, 398.

Vide Partnership, 4; Injunction.

BOND. *Vide* Debt, Action of; Attachment, 2.

BOUNDARY.

1. In the case of boundaries expressed in deeds and patents, the courses and distances mentioned in such deeds or patents must be observed, except where a natural boundary is called for and shown, or where marked lines and corners can be proved to have been made at the original survey. *Bradford v. Hill*, 22.

2. The last line of a boundary was from a white oak (which stood half a mile from the river) "thence along the river to the beginning": *Held*, that the river is the boundary. *Sandifer v. Foster*, 237.

3. General reputation is admissible as evidence in cases of boundary. *Standen v. Bains*, 238.

4. Marked lines and corners may be established as the true ones, although variant from the courses and distances mentioned in the deed. *Id.*, 238.

5. When a natural boundary and courses and distances are all given in a deed, the natural boundary will prevail in case of a variance; and in doubtful cases a regard to this preference must always be observed. *Pollock v. Harris*, 252.

6. One line of a boundary was from a poplar on a swamp thence down the swamp to the beginning: *Held*, that the swamp and not a straight line from the poplar to the beginning is the boundary. *Hartsfield v. Westbrook*, 258.

BOUNDARY—*Continued.*

7. If a course and distance be called for in a deed terminating at a natural boundary, *there* the line must terminate, whether it exceed or fall short of the distance mentioned in the deed. If a course and distance be called for, and there is no natural boundary nor marked line, the course, and distance will prevail; but if there be a marked line and corner variant from the course and distance, the marked line and corner must be pursued. ———— *v. Beatty*, 376.

8. When a natural boundary is mentioned in a patent or deed, it will control both course and distance if variant from it. *Witherspoon v. Blanks*, 496.

9. Where there are two natural boundaries, either of which will answer the description, parol evidence may be received to show the true one. *Id.*, 496.

BURGLARY.

1. If an outhouse be so near the dwelling-house, that it is used with the dwelling-house, as appurtenant to it, burglary may be committed in it. In this case the outhouse was 17½ feet from the dwelling-house. *S. v. Twitty*, 102.

2. A burglary may be committed in a storehouse, standing 24 yards from the dwelling-house, and separated therefrom by a fence, if the owner or his servants sometimes sleep therein. *S. v. Wilson*, 242.

Vide Indictment, 1.

CARRIER.

A person who did not make it his ordinary employment undertook to carry goods for hire. He is not to be taken as a common carrier, and liable to the same extent, but is bound only to common prudence. ———— *v. Jackson*, 14.

CAVEAT. *Vide* Grants, 9; Possession, 4.

CERTIORARI.

1. *Certiorari* lies, and indeed seems the only proper writ, where a garnishee seeks to reverse an erroneous judgment against him. *Allen v. Williams*, 17.

2. The word writ, in the act of 1787, extends to *certiorari* as well as to bills in equity, and security must be given for prosecuting them, or they will be dismissed. *Waller v. Brodie*, 28.

3. Motion to dismiss a cause by the plaintiff in a *certiorari*, who had been defendant in the court below, upon the ground that the plaintiff in the cause had not given security in this Court for costs in pursuance of a notice served upon him for that purpose. *Per Curiam:* If the suit is now dismissed, we must order the court below to proceed to judgment. *Dawsey v. Davis*, 280.

4. When a cause is removed by *certiorari* granted by a judge out of court, it must be placed upon the argument docket, and defendant's affidavits will be received to show the impropriety of granting a new

CERTIORARI—*Continued.*

trial. If the *certiorari* be obtained in court upon a rule made upon the other party to show cause, the case when removed shall be put upon the trial docket without further argument. *Id.*, 280.

5. If a *certiorari* be obtained to remove a cause upon the ground that an appeal had been refused in the court below, the case shall be placed upon the trial docket without showing any other cause. *Anonymous*, 302.

6. Any omission, neglect, or delay of the clerk, or any contrivance of the adverse party, or the improper conduct of the county court in granting an appeal when properly applied for, is sufficient to entitle the party to a *certiorari*, and a new trial will be immediately granted in the court above. *Chambers v. Smith*, 366.

7. Where a writ of *certiorari* is granted by a judge out of court, the cause is placed upon the argument docket; where it is obtained in court upon an affidavit and a rule to show cause, it is placed immediately upon the trial docket; but if obtained in court without a rule, etc., it must be placed upon the argument docket. *Anonymous*, 367.

8. Where a *certiorari* issues, the adverse party has notice to appear on the return day of the *certiorari*, and if the writ is not then returned, nor any proceeding had to continue it in court, it is like other writs discontinued, and a *procedendo* ought to issue. *Anonymous*, 420.

Vide Appeal, 2; Appearance.

CHOSE IN ACTION.

1. A slave wrongfully taken out of the possession of A and sold to B, and while in the possession of B sold by A to C, may be recovered by C in a suit in his own name. *Robertson v. Stewart*, 159.

2. The purchaser of a chose in action for a valuable consideration will be protected in equity. ————*v. Arrington*, 164.

3. A bare right of entry cannot be transferred. *Slade v. Smith*, 248.

Vide Set-off, 4.

CONDITION. *Vide* Variance, 2.

CONFESSIONS. *Vide* Evidence, 7, 21, 22, 25.

CONSIDERATION. *Vide* Money, 4.

CONSIGNEE. *Vide* Factor.

COSTS.

1. Upon *nulla bona* returned, the clerk may issue execution for the plaintiff's costs against the plaintiff himself. *Merritt v. Merritt*, 20.

2. The Court cannot order the State to pay costs as a condition of getting a continuance; nor, indeed, it seems, in any case. *S. v.* ————, 221.

3. A surveyor and jury, who were appointed under separate orders in several distinct suits, shall be paid full costs in each suit, although

COSTS—*Continued.*

from the locality of the lots sued for the same labor answered for all the surveys. *Wilcox v.* ————————, 223 and 484.

4. An order that each party shall pay his own costs means the costs accruing from the process issued for each, and not half the whole costs. The copy of the bill served on the defendant is for plaintiff's benefit, and he must pay for it. *Anonymous*, 487.

Vide Witness, 4; Continuance, 1, 2; Grants, 9.

CONTINUANCE.

1. Where a cause has been depending three years in the county court, and five years in the Superior Court, and the plaintiff for the last three years had been uniformly ready for trial, the Court ordered the defendant to pay the costs of the plaintiff's witnesses during the term as the condition of another continuance. *Tyce v. Ledford*, 26.

2. A party who has been guilty of neglect may, upon seeking a continuance, be compelled to pay the costs of the term as the condition of the continuance, and these costs are not to be refunded, even though he should succeed in the cause. *Park v. Cochran*, 178.

CORPORATION. *Vide* Ejectment, 6.

COVENANT TO STAND SEIZED.

1. A deed which is in form a bargain and sale except that the consideration is expressed to be love and affection, instead of money, may be construed a covenant to stand seized. *Slade v. Smith*, 248.

COVENANT, ACTION OF. *Vide* Debt, Action of, 1, 2.

DEBT, ACTION OF.

1. Where there is no subscribing witness to a deed or bond, case and not covenant or debt is the proper action. *Clements v. Eason*, 18.

2. A bond for payment of money without a subscribing witness can only be declared upon as a sealed instrument. *Ingram v. Hall*, 193.

Vide Money, 7.

DECLARATION.

There is a difference between laying a fact after the time it really happened and before the time it really happened; in the first case the declaration is supportable; in the second, it is not. *Quere* by HAYWOOD, J., *Witherspoon v. Isbell*, 12.

DEED.

A, seized in fee of the premises in question, executed a deed to his son, in which he stated that for the preferment of his son he conveyed the land to him and his heirs forever: *Provided*, that this deed shall not take effect during the lives of the grantor and his wife, but the premises should remain first to him for his natural life and then to her for her life: *Held*, that the last clause of the deed was a good reservation of the life estates, and that the fee is a good remainder upon them. *Sasser v. Blyth*, 259.

Vide Evidence, 1, 2, 6, 8, 9, 13, 20; Grant 1; Covenant to Stand Seized.

DELIVERY. *Vide* Gifts, 1; Evidence, 9.

DEMAND. *Vide* Detinue, 1, 2, 3, 5; Limitations, Statute of, 4.

DEMURRING OF THE PAROL.

The demurring of the parol does not hold in this State. *Baker v. Long*, 1.

DEPOSITIONS.

1. Notice to take a deposition at a certain place in Tennessee on the 5th or 6th days of a particular month, held good. *Kennedy v. Alexander*, 25.
2. Depositions taken in the absence of a criminal shall not be read against him. *S. v. Webb*, 103.
3. A deposition not signed by the deponent may be read in evidence. *Murphey v. Work*, 105.
4. It is usual to read depositions where it appears that they have been read in the court below, unless it can be shown that there is an irregularity in them, and the want of deponent's signature is not sufficient to reject them. *Rutherford v. Nelson*, 105.
5. When a party moves away, without leaving an attorney upon whom a notice to take depositions may be served, such notice may be given in a public gazette by an order of the Court for that purpose. *Maxwell v. Holland*, 302.
6. When either party has filed his depositions, he shall apply to the master, who shall issue notice to the other party to attend on a particular day, which shall be served a convenient time before the day appointed; upon which the master is to examine all matters relative to the depositions, and his decision upon them shall be conclusive, unless objections to it are made at the time and an appeal to the Court taken. If these precautions are not observed, objections to the reading of depositions may be made at the hearing. Rule of the Court, 349.
7. A deposition certified to have been taken on the day and in the county in South Carolina as specified in the notice, but without stating the particular place, cannot be read. *English v. Camp*, 358.
8. Notice to take a deposition at the house of John Archelaus Elmore, but the deposition certified to have been taken at the house of John Elmore, held good, as they will be presumed to be the names of the same person. *Elmore v. Mills*, 359.
9. It is the common practice to receive the depositions of those public officers (as the collectors of imports) the duties of whose office require their attendance at a particular place. *Mushrow v. Graham*, 361.
10. A deposition expressed to have been taken at the house of Manning at Halifax (Va.) Courthouse, when the notice was to take it at Halifax Courthouse, was rejected, although it was proved that Manning's house stood only about 80 yards from the courthouse. *Alston v. Taylor*, 381.
11. Per WILLIAMS, J.: A notice to take a deposition ought to be served upon the person of the other party. HAYWOOD, J.: Leaving the notice at the residence of the adverse party is a sufficient service. *Kennedy v. Fairman*, 404.

DEPOSITIONS—*Continued.*

12. The notice was to take a deposition in Houser town, and the caption of the deposition expressed that it was taken in that town. The deposition was rejected. *McNaughton v. Lester*, 423.

DEPRECIATED CURRENCY. *Vide* Money, 2, 5, 6, 7.

DETINUE.

1. Detinue will lie against one of whom the negro had been demanded, although before the commencement of the action the negro had been returned to the person of whom he had been hired. *Merritt v. Warmouth*, 12.

2. Demand is necessary to sustain the action of detinue, and it must be made by the claimant himself, or by some one for him, and so made known at the time of the demand. *Elwick v. Rush*, 28.

3. On demand previous to bringing detinue, defendant acknowledges that the negroes were in his possession. Proof that he had given one of the negroes to his son-in-law, who was in possession of him at the time of the demand, shall not prevent the defendant's liability to the action. *Flowers v. Glasgow*, 122.

4. In detinue the jury should assess the value of different articles separately. HAYWOOD's note to *Lewis v. Williams*, 150.

5. Demand previous to bringing detinue is not necessary, or if so, only for the purpose of enabling the jury to decide upon the justice of allowing or disallowing damages for the detention. *Idem*, 150.

6. The action of detinue will not lie against executors for the detainor of their testator, 398.

DESCENT CAST. *Vide Strudwick v. Shaw*, 5.

DISCONTINUANCE.

Five defendants in trespass, of which four are taken and plead to issue; if the process is not continued against the fifth for several terms, it will be a discontinuance as to all. *Cobbs v. Fowler*, 12.

DOWER.

1. A widow since the act of 1784 can claim dower only out of the lands of which the husband died seized or possessed. *Winstead v. Winstead*, 243.

2. A levy upon lands in the lifetime of the husband divests the widow's claim for dower upon those lands, though they may not be sold until after his death. The case was not decided, but HAYWOOD, J., was clear upon the points above. WILLIAMS, J., differed at first, but afterwards seemed inclined to change his opinion. *Idem*, 243.

Vide HAYWOOD's note to *Lee v. Ashley*, 186.

EJECTMENT.

1. In 1728 the land in dispute was granted to A, who in 1730 conveyed to B, who soon afterwards went to England. B sold to C, who in ——— came to this country, but soon went back again. In ——— C returned to Carolina, where he remained, and in 1787 brought suit.

EJECTMENT—*Continued.*

One D settled on the lands in question in 1751, lived upon them thirteen years, and died in possession, leaving a son. The son assigned to some person, who assigned to the defendant, who had lately procured a grant. Under these circumstances it was held that the plaintiff's *jus possessionis* was lost. *Strudwick v. Shaw*, 5.

2. In ejectment, the word tenement with metes and bounds is sufficiently certain. *Osborne v. Woodson*, 24.

3. The defendant in an ejectment will not be allowed to defend only as to so much as the plaintiff can prove him in possession of. *Carter v. Branch*, 135.

4. Articles for the conveyance of land upon the payment of money will not create such a trust on the part of the plaintiff (at least, before the money is paid) as to prevent his recovering in ejectment from the person to whom the articles were made. *Anonymous*, 331.

5. A claimant by escheat may enter and therefor may sustain ejectment. *University v. Johnston*, 373.

6. A corporation must make its leases under seal, but the lease which is stated in an ejectment by a corporation is not to be proved, and will be presumed a legal one. *Idem*, 373.

Vide Exclusive or Inclusive; Amendment, 2, 4, 6, 7; Grant, 7, 8, 10; Abatement, 5.

EMBLEMENTS.

Baron of *feme* who had a life estate is sued for use and occupation by the tenent in fee. The *feme* had died after the baron had prepared the land for cultivation, but before planting. It was held that the plaintiff was entitled to recover, but compensation must be allowed for the labor of the defendant in preparing it for cultivation. *Gee v. Young*, 17.

ENTAILS.

1. Tenant in tail in remainder is entitled, under the act of 1784, to the fee. *Quere by* HAYWOOD, J. *Patterson v. Patterson*, 163.

2. The act of 1784, ch. 22, sec. 5, will bar a remainder dependent upon an estate tail in possession of tenant in tail at the time of passing the act. *Lane v. Davis*, 277.

3. Tenant in tail sells lands in 1778, and dies leaving a larger estate of land to his son, the present plaintiff. He is bound by the warranty of his ancestor and assets descended. He is also bound by the express words of the act of 1784, ch. 22, sec. 5. *Minge v. Gilmour*, 279.

ENTRY.

Rocks in a river above the surface of the water are vacant property, and the subjects of our entry laws. *Jones v. Jones*, 488.

Vide Execution, 1; Possession, 4.

EQUITY.

1. A negro, whose life was forfeited to the public for murder, was sold under execution without that fact being then known. A bill in equity by the purchaser praying to stand in the place of the judgment creditors for the amount of the purchase money was sustained by the Court. *Conner v. Gwin*, 121.

2. After injunction dissolved, the plaintiff in the injunction must take further steps within two terms after, or his bill will be dismissed for want of prosecution. *Anonymous*, 162.

3. Since the act of 1786, in case of complainant's death, the bill is continued in court two terms, in either of which terms the legal representatives may apply and be made parties without a bill of revivor; and the application of a person not the legal representative may be resisted the same as if there were a bill of revivor. A person who may become interested otherwise than as legal representative must state the circumstances by a bill for that purpose. *Idem*, 162.

4. A person made a party defendant in a bill, who is not compellable to answer and against whom no relief is sought, may have the bill dismissed as to him. *Patterson v. Patterson*, 167.

5. When the Court feels any doubt about deciding upon a plea, it can overrule it and suffer the defendant to insist upon the same in his answer. *Ingram v. Lanier*, 221.

6. Where the law can give complete redress, equity will not interfere. *Glasgow v. Flowers*, 233.

7. Equity cannot change established rules of law, nor act as a court of errors to correct erroneous decisions of law. *Idem*, 233.

8. Where a matter is properly determinable at law, and the law can give complete redress, equity will not interfere. *Perkins v. Ballinger*, 367.

9. Plaintiff has two terms after the dissolution of an injunction in which he must take some steps, or his bill will be dismissed. *Avery v. Brunce*, 372.

10. The two terms within which the plaintiff must proceed after the dissolution of his injunction are exclusive of the one in which the dissolution takes place. *Anonymous*, 451.

Vide Injunction; *Vide* Sheriff, 14.

ESCAPE.

1. An action will not lie against the sheriff for an escape upon *mesne* process. He ought to be proceeded against as bail under the act of 1777, ch. 2, secs. 16 and 76. *Swepson v. Whitaker*, 224.

2. An action for an escape will not lie against an officer who had made arrest when he had no authority to do so. *Lutterloh v. Powell*, 395.

Vide Sheriff, 14.

ESCHEAT: *Vide* Ejectment, 5.

EVIDENCE.

1. Where a party has lost his deed, or is out of possession of it, he himself, and no other person for him, must swear to such loss before a copy can be received in evidence. *Blanton v. Miller*, 4.

2. Proof of the acknowlegment of a deed is no proof of the sealing of it. *Clement v. Eason*, 18.

3. Proof of the handwriting of the wife of the obligor is not admissible. *Nelius v. Brickle*, 19.

4. The mark of a subscribing witness who is dead may be proved to let in testimony of the obligor's handwriting. *Idem*, 19.

5. Upon proof that the subscribing witness could not be found upon search, his handwriting was admitted to be proved and the bond given in evidence. *Jones v. Brinkley*, 20.

6. If a deed be lost and its former existence proved, a copy, or, if no copy, parol evidence may be given of its contents. *Baker v. Webb*, 43.

7. Confessions before a justice of the peace may be admitted in evidence, although not reduced into writing. *State v. Irwin*, 112.

8. Plaintiff may prove the loss of his deed by his own oath, but not that the plat offered in support of his title was part of the deed lost. *Seekright v. Bogan*, 176.

9. Proof of the obligor's handwriting, where there is no subscribing witness, will be admitted as proof of the seal; but proof of the seal is not evidence of the delivery, which is to be inferred from other circumstances. *Ingram v. Hall*, 193.

10. The indisposition of a witness whose deposition had been taken *de bene esse* and was now offered to be read cannot be proved by the oath of the party producing it, ——— *v. Brown*, 227.

11. When the subscribing witness to a bond is dead and his handwriting cannot be proved, proof of the handwriting of the obligor may be received. *Jones v. Blount*, 238.

12. It seems that judicial proceedings speaking of an act of the Assembly may be evidence of such act when it is lost by time. *Slade v. Smith*, 248.

13. A copy of a registered deed, certified by the clerk of the county court in Virginia, which was certified by the Governor to be clerk of that court, is admissible. *Elmore v. Mills*, 359.

14. Acts of the General Assembly of Virginia must be certified by the Secretary and not by the clerk of the House of Delegates. *Id.*, 359.

15. Upon proof that a person of the name of the defendant executed the bond, the signature to the bond may be shown to be his handwriting to prove the identity. *Mushrow v. Graham*, 361.

16. When the wife acts as servant or agent of the husband, her admissions against his interest are admissible. *Hughes v. Stokes*, 372.

EVIDENCE—*Continued.*

17. The receipt of an attorney now deceased is admissible to prove the time when bonds were put into his hands for collection. *Alston v. Taylor*, 381.

18. A record of court testified properly, except a want of the seal of the court, is not admissible unless it be certified that the court had no seal. *Ib.*, 381.

19. The declarations of the father that his conveyance to his child was fraudulent are not admissible against the child. *Arnold v. Bell*, 396.

20. A copy of a deed cannot be read unless the plaintiff will swear that he has not the original, and that he cannot procure it. *Park v. Cochran*, 410.

21. A confession in an answer to a bill in equity may be given in evidence against the defendant in an action by a third person. *Kiddie v. Debrutz*, 420.

22. Naked confessions, unattended with circumstances, are not sufficient to convict of a capital crime. *S. v. Long*, 455.

23. Proof of the clerk's handwriting in entries made in the plaintiff's books shall not be admitted while the clerk is living, although he may be absent from the country. *Kennedy v. Fairman*, 458.

24. In an indictment for horse-stealing, the jury may infer from circumstances that the horse was taken by the prisoner in the district in which he is tried, although he was never seen with the horse in that district. *S. v. Adams*, 463.

25. Confessions, whether extorted or not, that relate a number of circumstances, all of which are proved by other testimony actually to exist, are admissible against the prisoner. *S. v. Moore*, 482.

Vide Witness *passim.*

EXCHANGE, COURSE OF.

Virginia money contracted for in this State, and payable here, must be determined by legally established rates and not by the course of exchange. *Montfort v. Alston*, 2.

EXCHANGE.

A person who has a chattel in possession belonging to another, and exchanges it for another article, acquires no property in the article taken in exchange, if the real owner thinks proper to approve of the transaction. *Cox v. Jackson*, 423.

EXCLUSIVE AND INCLUSIVE.

"From the day of the date," and "from the date," signify the same thing; and, according to the intent, are either inclusive or exclusive. *Houser v. Reynolds*, 114.

Vide Appeal, 6, 8.

EXECUTION.

1. It is doubtful whether an entry can be sold by execution. *Reynolds v. Flinn*, 106.

2. Execution upon a judgment after a year and a day, and after death of the defendant, without taking any *scire facias*, is irregular; and if in the county court, may be avoided by writ of error, or, if it was in the Superior Court, by evidence in ejectment, if land was sold under it. *Perkins v. Ballenger*, 367.

3. A debtor cannot dispose of his property to avoid an execution after it is issued. *Arnold v. Bell*, 396.

4. Execution shall not issue during the term at which the judgment was entered, although the defendant may be about to move away. *Pettiford v. Sanders*, 399.

Vide Lands; Judgment, 2; Fine, 1.

EXECUTORS: *Vide* Administrators and Executors, 6, 7, 8, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 25.

EXTINGUISHMENT.

The giving of a note is no extinguishment of the prior cause of action; and where there is a count upon a note, as well as the general counts, a recovery may be had upon the general counts, although the note is alleged to be lost. *Kiddie v. Debrutz*, 420.

EXTORTION.

In an indictment for extortion in taking more than the legal fee, it is no excuse that the defendant did the act through mistake or under improper advice. *S. v. Dickens*, 406.

Vide Indictment, 4, 5.

FRAUDS AND FRAUDULENT CONVEYANCES.

1. Fraud is not barely to be suggested, but must be proved. *Bell v. Hill*, 72.

2. The acts against conveyances to defraud purchasers means conveyances by individuals, not grants from the State. *Reynolds v. Flinn*, 106.

3. A disposition of any part of his property to a child by a father indebted more than he is worth will be presumed fraudulent, unless the child can prove the purchase to have been made for a full and fair value actually paid. *Arnold v. Bell*, 396.

4. Property sold remaining in the possession of the vendor, where there is an absolute bill of sale, is evidence of fraud; so is the not registering the bill of sale till long after it is made, coupled with an offer on the part of the vendor to antedate. *Hodges v. Blount*, 414.

5. Where the possession of a chattel does not follow the conveyance, it is a strong circumstance to show fraud, though it may be explained or rebutted. *Cox v. Jackson*, 423.

FACTOR.

A consignee was instructed to exchange the consigned produce for that of Surinam: when he arrived there, he found it impracticable to make the exchange for anything but sugar and coffee, which were contraband by the law of that country; but still such kind of traffic was usual, and the law had not been enforced against it for many years. The consignee ventured to make the change for the contraband articles, but owing to an attempt to enforce the law, he had to resort to a subterfuge, in the doing of which some of the sugars were damaged: *Held*, that he was not responsible for the loss. *Hagan v. Paine*, 272.

Vide HAYWOOD'S note to *McNaughton v. Moore*, 190.

FALSE JUDGMENT, WRIT OF.

1. A writ of false judgment differs from the assignment of errors: it is to be obtained upon affidavits and may be opposed by affidavits, on the other side. *Rhodes v. Brownlow*, 16.

2. In a writ of false judgment, after a *sci. fa.* to the defendant to come in, etc., if the defendant does not appear, the judgment will be reversed without inquiring into the facts, if facts only are assigned; but if matters of law are assigned, the Court will look into them to see whether it is proper or not to reverse the judgment. *Anonymous*, 398.

3. A writ of *recordari* was moved for. HAYWOOD, J.: A writ of false judgment is a writ of right, and we cannot deny it. It is like a writ of error, which the party may bring without leave of the Court. STONE, J.: The writ of false judgment and the writ of *recordari* are not the same. When a *recordari* is moved for, we have power to refuse it. *Anonymous*, 469.

Vide HAYWOOD'S note.

FERRY.

Per HAYWOOD, J.: The county court, after establishing one ferry at a particular place, has no right to establish another so near the former as to draw away its profits. But per STONE, J.: The county court is empowered to establish ferries where necessary, and may establish two at the same place, if it is deemed proper to do so. *Anonymous*, 457.

FINE.

1. When a defendant in court is ordered in custody for a fine it will be improper to discharge him, and order a *fi. fa.* to issue for the fine. *S. v. Johnson*, 293.

2. The Court will not permit independent facts, for which the party would be liable to another prosecution, to be given in evidence to enhance a fine. *Id.*, 293.

GIFT.

1. In a gift of personal chattels a symbolical delivery is sufficient. *Arrington v. Arrington*, 1.

GIFT—*Continued.*

2. If a father at the time of the daughter's marriage puts a negro or other chattel into the possession of the son-in-law, it is *prima facie* a gift. *Farrell v. Perry*, 2.

3. Negroes sent with a daughter upon her marriage, or with a son-in-law and daughter, is *prima facie* evidence of a gift; and if the property remains any length of time with them, very strong proof will be required to show that only a loan and not a gift was intended. *Carter v. Rutland*, 97.

4. The word creditors, in the act of 1784, ch. 10, sec. 7, respecting parol gifts of slaves, means as well those who have become creditors since the parol transfer as those who were such before. *Knight v. Thomas*, 289.

5. A parol gift is good between the parties, notwithstanding the act. *Ib.*, 289.

6. Where a father, upon the marriage of his daughter, sends negroes or other property with her in marriage, it is *prima facie* a gift. *Parker v. Phillips*, 451.

GARNISHEE: *Vide Certiorari*, 1.

GRANTS.

1. A grant from the State without the seal appendant offered in evidence. WILLIAMS, J., thought that the deed was destroyed by the seal being torn off; but ASHE, J., was clearly of opinion that where an interest once passed and vested in the grantee, the destruction of the deed could not affect the interest before passed by it. *Steele v. Anthony*, 98.

2. The act of 1777, ch. 1, sec. 9, voiding titles, etc., means void as to the State, which proceeds to avoid by *scire facias*. *Reynolds v. Flinn*, 106.

3. Grants from the State cannot be avoided for any cause in any other manner than by proceedings in a court of equity. *Sears v. Parker*, 126.

4. It is the first patent or grant, and not the first entry in the land office, that gives the best title. *Seekright v. Bogan*, 176.

5. In the case of lapped patents, where both are in possession of their respective tracts, but neither actually settled on the lapped part, the oldest grantee will be considered as having the legal possession of that part. *Ib.*, 176.

6. When two patents or grants bear date on the same day, the number of the patents must determine their priority. *Andrews v. Mulford*, 311.

7. In an ejectment the first grant is the only thing to be inquired into, without any regard to the entry or survey. *Dickey v. Hoodenpile*, 358.

8. HAYWOOD, J., was of opinion that a State grant of lands which had been granted by Lord Granville, and which had escheated to the State, was void as not being unappropriated lands, and that this fact might be shown in the action of ejectment; but he reserved the question. *University v. Johnston*, 373.

GRANTS—*Continued.*

9. In a *caveat*, a verdict was found against the plaintiff, which was confirmed in the county court, before which time, however, the plaintiff had obtained a grant from the State for the land, and now, in the Superior Court, it was held that the grant could not be impeached at law, but as the defendant appeared to have had the justice of the case on his side, he shall have the costs of the *caveat*. *Cupples v.* ————, 456.

10. State grants cannot be avoided by evidence in ejectment; recourse must be had to equity for that purpose. *Foreman v. Tyson*, 496.

11. Where two patents bear the same date HAYWOOD, J., thought the priority of number might decide the preference in the absence of the other proof; but WILLIAMS, J., *contra*. *Ib.*, 496.

Vide Frauds and Fraudulent Conveyances, 2.

GUARDIAN.

Since the act of 1762, ch. 5, the courts may exercise a discretionary power in the appointment of guardians. *Mills v. McAllister*, 303.

HUSBAND AND WIFE.

1. A note given to *feme covert* living separate belongs to the husband, although he never assented to the gift. *Swann v. Gauge*, 3.

2. Objected by counsel that the wife ought to be joined with the husband, where he is sued in her right as administrator. *Moore v. Sutrill*, 16.

3. If the husband dies before administration taken upon his wife's choses in action, her administrator, and not his, is the proper person to administer them, but the husband's representative will be entitled to the surplus after the payment of her debts. *Whitbie v. Frazier*, 275.

4. Negroes are devised to wife for life, and after her death to their children equally; one of the daughters marries L., who dies leaving the mother and daughter living; the mother dies and then the daughter marries again: *Held*, that the executors of L. and not the second husband, are entitled to the negroes. *Quere* by HAYWOOD, J. *Lewis v. Hynes*, 278.

Vide Evidence, 3, 16; Witness, 8.

HANDWRITING: *Vide* Evidence, 3, 4, 5, 9, 11, 15, 23; Witness, 5.

HORSE STEALING: *Vide* Larceny, 1; Evidence, 24.

INDICTMENT.

1. In an indictment for burglary, a charge for larceny may be made, and a conviction for the larceny may be had, although the party be acquitted of the burglary. *S. v. Grisham*, 12.

2. In an indictment for trespass in taking and carrying away negroes out of the possession of one may be sustained, although it may have been done at the command of the party who had the real title to the property. *S. v. White*, 13.

INDICTMENT—*Continued.*

3. Submission cannot be made upon one count without all, unless *nol. pros.* is entered as to the others. *S. v. Roberts*, 176.

4. An indictment for extortion in the county court, stating the day on which the offense was committed in *figures*, and also omitting the word *extorsively* in charging the taking the unlawful fee, may be supported under the act of 1784, ch. 31, sec. 3. *S. v. Dickins*, 406.

5. It is not necessary to state what the lawful fee is, in an indictment of this kind. *Id.*, 406.

Vide Affidavit, 1; Jurisdiction, 3.

INFANCY.

A deed for land was executed by an infant; after arriving at full age, he used these words, "I will never take advantage of my having been an infant at the time of executing the deed, and it is my wish that you should keep the land." These words ratify the conveyance made by the infant, notwithstanding that, after he used them, he conveyed the land to another. *Houser v. Reynolds*, 143.

INJUNCTION.

A and B settled accounts, and a balance of £47 was found due to B, and A signed a writing to that effect, which B assigned to a third person, who sued and recovered judgment. A filed a bill for injunction, setting forth errors in calculation, and stating that by the agreement of the parties the paper which he had signed was not to be deemed a promissory note. The answer denied all the parts of the bill but the errors. HAYWOOD, J., consented with WILLIAMS, J., that the injunction should be dissolved as to all but the errors, but HAYWOOD, J., said that it should be dissolved in *toto*, for the law would have admitted every defense which could be made to the recovery on the instrument; as that it either was unnegotiable in its nature or the assignee had notice of the defense previous to the assignment. And if the assignee had not such notice, there could be no defense either at law or in equity where the instrument was negotiable. *Martin v. Spier*, 369.

Vide Affidavit, 2; Equity, 2, 9, 10.

INNKEEPER.

A common innkeeper is liable for any loss which his guest may sustain in his property, except it be by the agency of a servant or companion of the guest himself, or when the guest is admitted upon terms in case the inn is full. *Quinton v. Courtney*, 40.

INSOLVENT DEBTOR.

1. Ten days notice must be given to the creditors before taking the insolvent debtor's oath. *Kennedy v. Fairman*, 408.

2. An insolvent debtor shall not be discharged if he will not account for property proved to have been in his possession shortly before, and sold to one who had acted as his partner in trade. Note to the same case, 408.

INSOLVENT DEBTOR—*Continued.*

3. A discharge under the insolvent debtor's act, ordered by the proper officers, will be presumed to have been regularly done until the contrary be shown. *Pearle v. Folsome*, 413.

4. Under the first insolvent act the defendant was discharged only as to those who had commenced suits against him, and had notice given them of the debtor's petition. *Ib.*, 413.

Vide Bills of Exchange, Etc., 1.

INTEREST.

1. Whenever one person has the money of another and knows what sum he ought to pay, he must pay interest for the same. *S. v. Blount*, 4.

2. Where a person indebted to another knows what sum he is to pay, and the time he is to pay it, he must pay interest. *Hunt v. Jucks*, 173.

3. Interest is to be calculated upon the principal from the time of its commencement up to the first payment. If the payment just equals the interest, it must extinguish it: if it is more, it must, after extinguishing the interest, be applied towards the diminution of the principal; if it is less, the balance of interest not discharged by it must be kept for the next payment. Interest must then be calculated upon the principal remaining, to the time of the next payment, which is to be applied in the first place to the whole of the interest then due; and so *toties quoties*. *Bunn v. Moore*, 279.

Vide Administrators and Executors, 5.

INVENTORY. *Vide* Administrators and Executors, 24.

JOINT OBLIGORS.

1. Under the act of 1789, ch. 57, sec. 5, the first part of the section, the action is to be brought against both the survivor and the administrator of the deceased joint obligor. *Brown v. Clary*, 107.

2. By the act of 1789, ch. 57, sec. 5, the surviving obligor and the executors of the deceased may be sued jointly. *Davis v. Wilkinson*, 334.

3. A writ issued against two jointly, and one plead in abatement: plaintiff was suffered to take judgment against the other. *Quere* by HAYWOOD, J. *Anonymous*, 487.

Vide Abatement, 1; Process.

JOINT OWNER. *Vide* Trover, 4.

JUDGMENT.

1. A judgment by default upon a tobacco bond is not final. *Bell v. Hill*, 72.

2. A judgment (final) binds land from the time of its rendition, as to purchasers from the defendant, but not so as to defeat the title of one purchasing under the execution of a subsequent judgment. As between creditors, it is not the first judgment, but the first execution, that gives the preference. *Ib.*, 72.

3. Recognizances bind lands from the time at which they are entered into; but a *fi. fa.* only from its teste. *S. v. Magniss*, 99.

Vide Assumpsit, Action of, 1; Appeal, 4; Assignment, 2.

JURISDICTION.

1. A plea to the jurisdiction of the Court under the act of 1793, ch. 19, is to be decided, as to the amount for which the suit is brought, only by the writ and declaration. *Allen v. Stokes*, 122.

2. Indictment containing three counts, the first of which the Court had no cognizance of. To submit on the first count (the others not to be considered) would oust the Court of jurisdiction. *S. v. Roberts*, 176.

JURY AND JURORS.

1. After a verdict in an indictment it is too late to object that one of the jurors was not a freeholder in this State. *S. v. Greenwood*, 141.

2. If a jury in a capital case separate without returning a verdict, the prisoner shall not be tried again for that offense. *S. v. Garrigues*, 241.

3. The act of 1779, Rev., ch. 157, sec. 2, respecting the appointment of jurors, is only directory, and does not apply to grandjurors. *S. v. Oldham*, 450.

JUS POSSESSIONIS: *Vide* Ejectment, 1.

LANDS.

Per MACAY, J.: The statute of 5 George II., ch. 7, provides for the sale of lands for debts, and the making them liable for all just debts in the hands of the heir, but does not alter the distinction between real and personal estate. Real descends to the heirs; personal goes to executors. The lands in the hands of the heirs cannot be affected by a judgment against the executors, no more than the personal estate in the hands of the executors can be affected by a judgment against the heirs. But per ASHE, J.: The statute meant to make lands liable to the payment of debts; and as to the payment of debts, are to be proceeded against as personal chattels. They descend to the heir chargeable with all such debts as may be recovered against the executor. WILLIAMS, J., on a previous case expressed an opinion similar to MACAY, J. *Baker v. Webb*, 43.

Vide Scire Facias, 1.

LARCENY.

1. A horse stolen in one State or Territory and carried into another will not make it a felony in the latter State. *S. v. Brown*, 100.

2. A special verdict which states the felonious taking in one State, and the taking continued into another, cannot be supported as a felonious taking in the latter. *Ib.*, 100.

3. HAYWOOD and WILLIAMS, JJ., were of opinion that the taking which is to constitute a felony must be a trespass. ASHE and MACAY, JJ., thought a borrowing with a fraudulent intent might be the ground of a felonious act. *S. v. Long*, 154.

Vide Indictment, 1.

LEGACY.

A devise to the plaintiff of cash sufficient in the opinion of the executors, not exceeding £1,000, to purchase a tract of land; in a following clause the following devise, "I give to my wife all the negroes I obtained in marriage with her and their increase; also, one-third of stock, etc., and the residue I give to my children by my present wife." The estate is exhausted except the negroes contained in the residuary clause to the wife and children, and debts to a large amount remain unpaid. Plaintiff claims his £1,000. Decided that the plaintiff's legacy is general, but still entitled to be paid out of the residuary part devised to the wife and children, which, as a residium, can never be specific; that the children's part is to be first applied, as the wife's part, though general and residuary as to the plaintiff, is specific in reference to theirs; that as the testator in mentioning the sum of £1,000 for the plaintiff, contemplated a full enjoyment by the legatees of their respective legacies of slaves; therefore, under the discretionary power given to the executors of fixing the amount to be paid to the plaintiff, his legacy shall be abated from £1,000 in proportion to the value of the negroes that shall be required to pay the debts. *Nash v. Nash*, 228.

Vide Account, 1.

LIEN.

A boat is drifted away from a landing, and taken up by a stranger, who sells to defendant: *Held*, that the stranger's right to salvage is a demand upon the plaintiff, to be enforced by detention, and that the right is not transferable to a purchaser of the property. *Winslow v. Walker*, 193.

LIBERUM TENEMENTUM, PLEA OF: *Vide* HAYWOOD'S note to *Lee v. Ashley*, page 186.

LICENSE: *Vide* Nuisance, 3.

LIMITATIONS, STATUTE OF.

1. Per WILLIAMS, J.: An acknowledgment made to an executor will prevent the operation of the statute of limitations, as well as if made to the testator. But ASHE, J., *contra*. *Billews v. Bogan*, 13.

2. The act of limitations will not run but from the time that it is known where the chattel is, and that it is adversely claimed. *Berry v. Pullam*, 16.

3. Acknowledging that a debt is not paid is not an acknowledgment of the debt, so as to prevent the effect of the statute of limitations. *Ferguson v. Taylor*, 20.

4. Said by the judge, *arguendo*, that the statute of limitations runs from the time the plaintiff knew where the negroes were, and that the defendant claimed them, although no demand had been made. *Elwick v. Rush*, 28.

5. The statute of limitations runs from the date of the last article in an account, where the account has been running on from its commence-

LIMITATIONS, STATUTE OF—*Continued.*

ment; but where it is once deserted or ended between the parties, then from that time. *McNaughton v. Norris*, 216.

6. These words in a letter from a defendant to the plaintiff, "I would rather come to a settlement, although I should allow the account as insisted on by you, than wait the event of a lawsuit," are sufficient to take the case out of the statute of limitations. *Ferguson v. Fitt*, 239.

7. The words of a will directing all just debts to be paid will prevent the bar of the statute of limitations. *Anonymous*, 243.

8. When the act of limitations once begins to run, none of the impediments mentioned in the act will stop its course. *Andrews v. Mulford*, 311.

9. The statute of limitations begins to run from the time the negroes come into the possession of the defendant, unless entrusted with them by the plaintiff for an indefinite time (for then the act will not begin to run till demand made), or unless the defendant removed himself so that the plaintiff could not find him to bring suit, or had the negroes without the knowledge of the plaintiff. *Elmore v. Mills*, 359.

10. When the act of limitations begins to run against a *feme sole*, her marrying will not suspend its operation. *Anonymous*, 416.

11. No person can plead the statute of limitations except the defendant, as, for instance, a garnishee cannot. *Anonymous*, 459.

12. The statute of limitations will run against the plaintiff, although the defendant may be out of the country. *Id.*, 459.

Vide Possession, 1, 2, 3, 4.

LIMITATION OF ESTATES: *Vide* Slaves, 1; Deed.

MAIMING.

1. Malice aforethought is express or to be implied from circumstances: intent to maim or disfigure may likewise be implied from circumstances: and it is not necessary to prove antecedent grudges, threatenings, or an express design. *S. v. Irwin*, 112.

2. When an outrageous act, as a maim, is proved, the law presumes that it was done with that disposition of mind which the law requires to constitute guilt, until the contrary is shown. *S. v. Evans*, 281.

MASTER.

1. The master does not lose his wages by the loss of the vessel. *Ferguson v. Fitt*, 239.

2. Making a man master and not giving him command of a ship is *ipso facto* giving him power to take a load of freight in a foreign port; and his contract in such case binds the owner. *Murfree v. Redding*, 276.

MONEY.

1. The possession of money gives the property of it, as to any disposition which the possessor may make of it. *Quinton v. Courtney*, 40.

MONEY—*Continued.*

2. Bond for payment of £100 Virginia money, to be paid in Proc. at 33 1-3 per cent. Jury gave a verdict for the equivalent in the present currency. But *Per Curiam:* The verdict should be for £133 6s. 8d. But upon a second trial, the same verdict being given, the counsel did not press it any farther. *Peete v. Webb*, 96.
3. Whoever has the possession of money has the property of it. *Clary v. Allison*, 111.
4. Money deposited by one person to be paid to another upon a contingency cannot be recovered by that other, but must be sued for by the person who makes the deposit. *Ib.*, 111.
5. Payments made in the depreciated currency prior to 1783 shall discharge the same numerical sum as their nominal value. *Anonymous*, 183.
6. In an action of covenant for a certain sum in silver or Spanish milled dollars the jury are at liberty to give the real value in our currency as damages, notwithstanding the act of 1783, ch. 4, sec. 2. *Winslow v. Bloom*, 217.
7. In an action of debt two things are recoverable, the numerical sum mentioned in the bond and damages for the detention of the debt; and these damages are generally the interest of the money mentioned in the bond; but if the currency of the country is depreciated, the jury may give such damages as will afford the plaintiff the real value of his debt and interest thereon. *Anonymous*, 354.

Vide Exchange, Course of.

MORTGAGE.

After a conditional decree of foreclosure, but before absolute decree entered, a person who has acquired an interest in the property mortgaged may be allowed to come in and file a bill in order to get the benefit of redemption. *Anonymous*, 482.

MURDER.

1. A motion to postpone a trial for murder on account of the great public excitement was refused. *S. v. Norris*, 429.
2. WILLIAMS and HAYWOOD, JJ., differed as to the question whether a juror could be asked on oath whether he had expressed an opinion unfavorable to the prisoner. *Id.*, 429.
3. A person who was violently abused and beaten, made his escape, ran to his own house 80 yards off, got a knife, ran back, and upon meeting with the deceased, stabbed him. It seems that he is only guilty of manslaughter. If, upon the second meeting, the prisoner had disguised the fact of having a weapon, for the purpose of inducing the deceased to come within his reach, the killing would have been murder. *Id.*, 429.

NEW TRIAL.

1. A verdict against evidence is not sufficient for a new trial, if justice is done by it. *Billows v. Bogan*, 13.
2. If it appears, upon another trial of the same cause in which the perjury is assigned to have been committed, that the person convicted

NEW TRIAL—*Continued.*

did not swear falsely in the first trial of the cause, a new trial will be granted him upon that ground. *S. v. Greenwood*, 141.

Vide Arbitrament and Award, 4.

NONSUIT.

HAYWOOD, J.: A nonsuit may be taken at any time before the verdict is recorded. But the case went off upon another ground. *McNaughton v. Mosely*, 331.

NUISANCE.

1. An action for nuisance will lie for every fresh continuance after a former action. ———— *v. Deberry*, 248.
2. Only nominal damages are, usually, given in the first action. *Id.*, 248.
3. A verbal license by which a man's land is to be affected is not good. *Id.*, 248.
4. The action on the case for a nuisance lies for any overflowing of the plaintiff's land by another. *Carruthers v. Tillman*, 501.
5. In this action the first suit is generally to try the question of nuisance or not, and only the real damages sustained are to be given; but if a second suit be necessary on account of the continuance of the nuisance, exemplary damages are given to compel its abatement. *Id.*, 501.

ORPHANS' BONDS.

1. Under the act of 1762, ch. 5, sec. 20, which directs the bonds taken on binding out orphans to be made with the chairman of the Court and his successors, the bond is good although the *successor* be not named; and a suit may be sustained in the name of the *successor*. *Anonymous*, 144.
2. After the plea of conditions performed, no advantage can be taken of any inconsistency in the indentures of apprenticeship, as where, in a part of the instrument, the name of the apprentice is put for that of the chairman. *Id.*, 144.

PAROL EVIDENCE TO EXPLAIN WRITTEN INSTRUMENTS: *Vide* Assignment, 1; Boundary, 1, 4, 7, 8, 9.

PAYMENT, PLEA OF.

An account against the plaintiff cannot be given in evidence under the plea of payment. *Evans v. Norris*, 411.

PERJURY: *Vide* New Trial, 2; Variance, 3.

PLENE ADMINISTRAVIT, PLEA OF: *Vide* Administrators and Executors, 14, 20, 25; Retainer.

PARTIES.

Where a person concerned in interest is stated in the bill to be moved away and not since heard of for many years, so that he cannot be served with process, that shall be a good reason as between third persons for not making him a party; and the Court will proceed to a hearing notwithstanding. *Ingram v. Lanier*, 221.

Vide Money, 4; Equity, 4; Husband and Wife, 2; *Scire facias*, 2.

PARTITION: *Vide* Partnership, 3.

PARTNERSHIP.

1. General reputation is not sufficient to charge a particular person as a partner. There must be some confession of his or some overt act to prove it. *Hunt v. Jucks*, 173.

2. Per HAYWOOD, J.: Death of one partner dissolves the partnership, and a clerk or agent who has been appointed by the company cannot after such dissolution, do any act to affect the interest of the company, as to receive payments, etc. The jury found otherwise. *Vide* HAYWOOD'S note, *McNaughton v. Moore*, 189.

3. A partition in a partnership concern is matter of right, and may be called for at any time. *Collins v. Dickinson*, 240.

4. An assignor and assignee are both members of a particular company; a bill is made payable to the assignor, expressed to be for a debt due the firm. A payment to the company will be a good payment against either the assignor or assignee members of that company. *Black v. Bird*, 273.

Vide Set-off, 3.

POSSESSION.

1. In this country no actual entry is necessary until an adverse possession commences. *Park v. Cochran*, 178.

2. A possession to bar an entry must be a continued one. *Id.*, 178.

3. An actual possession is not necessary to prevent the operation of the statute of limitations until an adverse possession commences, which adverse possession must be a continued one for seven years to bar the plaintiff. *Slade v. Smith*, 248.

4. No possession except an actual one by the claimant himself or his tenant, commenced *bona fide* under a patent or grant, adverse and continued for seven years, will give title under the act of limitations. *Andrews v. Mulford*, 311.

5. The caveator was settled upon a tract of unappropriated land for many years, and supposed the land in dispute to be included within his boundaries, when in fact it was not. The possession is stated to have been upwards of twenty-one years. It was decided that the caveator was not entitled by the entry laws of 1777, ch. 1, sec. 16, and 1779, ch. 7, sec. 2, as not having claimed within the time limited by the acts; nor by the statute of limitations, 1715, ch. 27, sec. 3, which applies only to claimants under patents; nor yet by the act of 1791, ch. 15, limiting the claims of the State, as that act is bottomed upon the presumption of a former grant, and is not applicable to vacant lands. *Anonymous*, 466.

Vide Money, 1, 3; Grants, 5.

PRINCIPAL AND ACCESSORY.

Command, as applied to principal and accessory, means the ordering a thing to be done by a person who has the legal control over another, as a master over his servant. *S. v. Mann*, 4.

PROCESS.

If, in an action against two defendants for a joint contract, one cannot be taken after the *pluries* writ, the other may be proceeded against alone. *Sherrod v. Davis*, 282.

Vide Discontinuance; Administrators and Executors, 3; Sheriff, 6, 13.

PUIS DARREIN CONTINUANCE, PLEA OF.

1. A plea *puis darrein continuance* is a waiver of all former pleas, and an admission of the declaration. *Greer v. Sheppard*, 96.
2. The Court must be satisfied of the probable truth of the plea, *puis darrein continuance*, before they will permit it to be pleaded. *McNaughton v. Naylor*, 180.
3. At the pleading term certain pleas were put in; at another term afterwards another plea was added, but not expressed to be a plea *puis darrein continuance*. The Court will not take the last plea to be *puis darrein continuance*. *Pearle v. Folsom*, 181.

QUI TAM ACTION: *Vide* Abatement, 6.

RACING.

The rules of racing are to be consulted in deciding upon racing contracts. *McKenzie v. Ashe*, 502.

RECEIVERS OF PUBLIC MONEY, SUMMARY JUDGMENT AGAINST.

The act of 1793 authorizing the Attorney-General to take judgments against the receivers of public money, by motion, and that their delinquencies should be sufficient notice to them, was declared to be unconstitutional and void by WILLIAMS, J., but was afterwards allowed by MACAY and ASHE, JJ. *S. v.* ————, 28.

RECOGNIZANCES: *Vide* Judgment, 3.

RECORD.

1. A copy of a record should be *verbatim*, and not be certified by the clerk that such things appeared to him from the record. *Wilcox v. Ray*, 410.
2. The loss of a record must be proved by the oath of some person, and not by the certificate of the clerk. *Id.*, 410.

RECORDARI: *Vide* False Judgment, Writ of.

REHEARING, PETITION FOR: *Vide* Review, Bill of.

RETAINER.

A retainer may be either pleaded or given in evidence under the plea of *plene administravit*. *Evans v. Norris*, 411.

Vide Administrators and Executors, 18.

REVIEW, BILL OF.

An injunction against a judgment at law had been dissolved, and upon the coming out of the execution the defendants at law exhibited their bill praying a reconsideration of the sentence of dissolution, and an injunction, in the meantime, against the execution. This injunction

REVIEW, BILL OF—*Continued.*

was granted by a judge in vacation, and the bill was filed and answer put in. This is not a bill of review, but the Court will support it as a petition for rehearing. *Kennon v. Williamson*, 350.

REVIVOR, BILL OF: *Vide* Equity, 3.

SALVAGE: *Vide* Lien.

SCIRE FACIAS.

1. Where there is judgment and execution against the ancestor in his lifetime, no *scire facias* is necessary against the heirs or devisees. *Baker v. Long*, 1.
2. Where the defendant dies, his representatives must be made parties by *scire facias;* but when the plaintiff dies, his representatives have two terms under the acts of 1786, ch. 14, and 1789, ch. 57, sec. 7, to come in and be made parties without any process. *Anonymous*, 455.

SEQUESTRATION: *Vide* Alimony, 1, 2.

SET-OFF.

1. A set-off against the State was allowed in the case of the *State v. Tatom* cited in *S. v.* ————, 221.
2. Unliquidated damages cannot be set off; but when they are reduced *in rem judicatam* they may be. *Hogg v. Ashe*, 471.
3. In an action brought by two partners a debt due from one of them cannot be set off; but if one of the partners dies, then in a suit by the survivor a debt due from him may be set off. *Id.*, 471.
4. When a chose in action is assigned for value received, no debt contracted subsequently shall be allowed even at law, as a set-off against the assignee, especially if there be an act of the Legislature taking notice of the assignment and enabling the assignee to sue in his own name. *Id.*, 471.

SHERIFF.

1. A sheriff cannot legally purchase property at his own sale, and is punishable for so doing. *Anonymous*, 2.
2. Sale of land by sheriff where there is sufficient personal property is good as to the purchaser. *Osborne v. Woodson*, 24.
3. The want of forty days advertisement, or the land's not being sold until a day or two after the day appointed, will not vitiate the sale. *Id.*, 24.
4. Dictum by the Court: If the sheriff sells real, when there is sufficient personal property, he will be liable to an action by the party grieved, unless the party does not show personal property sufficient to satisfy the execution. *Id.*, 24.
5. One bidder at a sheriff's sale is sufficient, and a return of "No sale for want of bidders," in such case, will subject the sheriff to an indictment for a false return. *S. v. Joyce*, 43.
6. Process returned by the deputy sheriff should be in the name of the high sheriff, and not in the name of the deputy for the high sheriff; but a return in the latter mode was supported. *McMurphey v. Campbell*, 181.

SHERIFF—*Continued.*

7. Judgment upon a sheriff's bond is to be entered for the real amount recovered not for the penalty to be discharged by the payment of the real recovery. *Mostler v. Patterson*, 216.
8. One bidder at a sheriff's sale is sufficient; but the bidder must be one who is able to advance the money which he offers as his bid. *S. v. Johnston*, 293.
9. A return in the name of the high sheriff by his deputy, if false, will render the sheriff liable *criminaliter*. *Id.*, 293.
10. A sheriff who levies upon property is bound to sell it, although the term of his office be expired. *Anonymous*, 415.
11. A sheriff must sell, although no *venditioni exponas* issue. *Id.*, 415.
12. The Court will issue a writ of *distringas* to the new sheriff to compel the late sheriff to raise the money, and deliver it to the new sheriff to be brought into court. *Id.*, 415.
13. A recovery in ejectment was had against the sheriff of a county and there was no coroner; the writ of possession may issue to the sheriff of an adjoining county under the act of 1779, ch. 5, sec. 3. *Anonymous*, 422.
14. If the sheriff returns an escape to a *capias ad respondendum*, he may be sued for the escape, and not be proceeded against as bail. *Tuton v. Sheriff of Wake*, 485.
15. A purchaser of lands under a sheriff's sale cannot sustain an action for money had and received against the sheriff, upon the ground that the title was bad and the consideration had therefore failed. *Bright v. White*, 492.

Vide Escape, 1.

SHERIFF'S SALE. *Vide* Sheriff, 1, 2, 3, 4, 5, 8, 15.

SLANDER.

Words in an action of slander bear that signification which they have in common parlance; therefore, to say one has sworn false in court implies malice, and also, in this country, must mean such a court as has power to administer an oath, and it is therefore actionable. *Hamilton, v. Dent*, 116.

SLAVES.

1. Where slaves are given to one for life, remainder over, the increase born during the life interest will go with the principal to the remainderman. *Tims v. Potter* cited in *Glasgow v. Flowers*, 233.
2. The action of trespass and false imprisonment is the usual and proper remedy for one who is held in bondage to try his right of freedom. *Evans v. Kennedy*, 422.
3. Where the plaintiff in an action of this kind is not ready, and obtains a continuance, the defendant must give bond and sureties for the plaintiff's appearance at the next term, and in the meantime to treat him with humanity. And by HAYWOOD, J., also to allow plaintiff time to procure evidence, but WILLIAMS, J., was of a different opinion. *Id.*, 422.

Vide Gifts, 4, 5.

SPECIAL PROPERTY. *Vide* Trover, 3.

SUCCESSOR. *Vide* Orphans' Bonds, 1.

SURRENDER. *Vide* Bail, 2, 3, 4.

SURVEYOR. *Vide* Costs, 3.

TENDER.

1. In this case the jury could not agree upon the evidence, and a juror was withdrawn; but it seemed to be agreed by all the bar and MACAY, J., that if the jury had found for the defendant on his plea of "tender and refusal at the day and place" where he was bound by a sealed writing to deliver a certain parcel of cattle, that the plaintiff would have been forever barred of any recovery on the covenant. Questioned by HAYWOOD, J. *Mehaffey v. Spears*, 142.

2. A tender of a specific article (as a negro boy), where no particular place is appointed for delivery, is not sufficient if only made at the house of the person who is bound to make it. *England v. Witherspoon*, 361.

TROVER.

1. Trover, trespass, deceit, or any other action of the like nature will lie against executors for a conversion by the testator, where the thing goes to increase the estate, but not where it is only destroyed. *McKinnie v. Oliphant*, 4.

2. Trover will lie against executors for a conversion in the time of their testator. *Decrow v. Mone*, 21.

3. A and B both have bills of sale for a horse from a person who had borrowed him for a particular purpose; A, whose bill of sale is the oldest, has him in possession; B by some means gets him from A and sells him to C. A is entitled to recover him of C in the action of trover. *Hughes v. Giles*, 26.

4. If one of two joint owners of a vessel forcibly take possession of her, and send her to sea, without or against the will of the other; and she is lost, he will be liable in trover for her. *Lowthorp v. Smith*, 255.

5. The action of trover may be supported against executors for a conversion in the lifetime of their testator. *Clark v. Hill*, 308.

6. The action of trover will lie against executors for a conversion in the lifetime of their testator, although the estate may not have been benefited by such conversion. *Avery v. Moore*, 362.

TRESPASS. *Vide* Indictment, 2; Larceny, 3; Slaves, 2; Abatement, 4.

TRUST. *Vide* Ejectment, 4.

USURY.

Defendant had been awarded to pay to plaintiff a certain sum, but at the day of payment, not having the money, he agreed with plaintiff to give more than 6 per cent for indulgence; and a bond was given for the principal sum, and the amount above the legal interest was

USURY—*Continued.*

paid partly in money and a note given for the balance. Upon an action on the bond, it was held that the transaction was usurious and the bond void. *Glisson v. Newton*, 336.

USE AND OCCUPATION. *Vide* Assumpsit, Action of, 2.

UNCONSTITUTIONAL ACTS. *Vide* Receivers of the Public Money.

VARIANCE.

1. After verdict it is too late to take advantage of a variance between the writ and declaration. HAYWOOD'S note to *Lewis v. Williams*, 150.
2. The condition is no part of the obligation, and a bond with a condition would not support a declaration for the sum mentioned in the condition. *Adams v. Spear*, 215.
3. The words assigned in an indictment for perjury were that "Gatling did not interrupt the constable in driving the cattle to Gatling's house," and the words proved were that "Gatling did not assist in driving the cattle from the officer." It was held that the words charged and those proved must be clearly and evidently of the same meaning, without the help of any implication or anything extrinsic; and that in this case the variance was fatal. *S. v. Bradley*, 403 and 463.
4. The declaration stated an undertaking by two with a third, to run a race with him and to pay him if he won. The evidence was of a race made between one of the two and the third, for performance whereof the other of the two became his surety on the day of the race. It is a fatal variance. *Anonymous*, 488.

Vide Orphans' Bonds, 2.

VERDICT.

1. No point can be raised in a special verdict except what appears upon the record. *Anonymous*, 459.
2. A verdict, finding, among other things, an issue not submitted to the jury, is void as to such finding. *Anonymous*, 144.

Vide Larceny, 2; Jury and Jurors, 1, 2.

WARRANT.

A warrant of a justice which does not appoint a day and place within the thirty days for the defendant to appear is erroneous. *Anonymous*, 398.

Vide Arrest, 1, 2, 5.

WARRANTY.

1. *Caveat emptor* applies where a man purchases personal property not in the possession of the vendor. It also applies where there is a visible defect in the thing sold; and in each of these cases no implied warranty will be raised. *Galbraith v. White*, 464.
2. If a man sell an unsound horse whose disorder is not kown, and receives full value, the sound price implies an assumpsit that the horse is sound. *Id.*, 464.

WITNESS.

1. Interest in the event of the question, but not of the cause, will not exclude a witness. *Farrel v. Perry*, 2.

2. A person entitled to a reward offered by the General Assembly upon the conviction of an offender is a competent witness against such offender. *S. v. Coulter*, 3.

3. Interest in the event of the question will exclude a witness. *Madox v. Hoskins*, 4.

4. Motion to prevent the taxing the defendant with the costs of two witnesses who were not sworn, as only one fact was to be established and two other witnesses had been called upon for that purpose: Motion denied, as the defendant had summoned a witness who was absent, and they might have been introduced to counteract his testimony. *Hayle v. Cowan*, 21.

5. MACAY, J., inclined to think that the handwriting of a subscribing witness who had voluntarily become interested in the bond could not be proved; but the case was adjourned. *Hamilton v. Williams*, 139.

6. The interest to exclude a witness to a will must be either an express legacy directly to him, a legacy with an express use for him, or a secret trust and agreement on the part of the legatee for his use; and a declaration by witness that legatee holds for his use will not exclude, unless it be proved that the legatee had made an engagement to hold for his benefit. *Rogers v. Briley*, 256.

7. Though a fact be positively sworn to by one or two witnesses, and they agree pretty well in their testimony, yet the jury, either from their character or the circumstances of the case, may disbelieve them and find against their evidence. *Id.*, 256.

8. The wife of a person interested in the event of the question, but not of the cause, is admissible as a witness. *Porter v. McClure*, 360.

9. The State may discredit its own witness by proving that the witness on former occasions had given a different account of the transaction from that which he relates in court. *State v. Norris*, 429.

Vide Evidence.