NORTH CAROLINA REPORTS

VOL. 20

CASES AT LAW

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

FROM JUNE TERM, 1838, TO DECEMBER TERM, 1839

REPORTED BY
THOMAS P. DEVEREUX AND WILLIAM H. BATTLE
(VOLS. 3 AND 4)

ANNOTATED BY
WALTER CLARK

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* Appointed 10th February, 1840, *vice* JUDGE SAUNDERS, *resigned.*

CASES REPORTED

CASES CITED

CASES AT LAW

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE TERM, 1838

(3 DEV. AND BATTLE)

E. L. & W. WINSLOW v. JOHN ANDERSON AND ALEXANDER DUCKWORTH.

Irregular Judgment—Return Day of Writ.

1. Where a *ca. sa.* was issued from the Spring Term of a Superior Court returnable to the ensuing Fall Term thereof, and was executed upon the defendant within less than twenty days of such Fall Term, and the sheriff thereupon took bond and surety from the defendant under the act of 1822 (1 Rev. Stat., c. 58, sec. 7), which bond was dated more than twenty days before such term, and was conditioned for the defendant's appearance "at *the next* Superior Court of law to be held, etc., on the *seventh Monday after the fourth Monday of March next*, then and there," etc., and at the next Spring Term, which sat on the sixth instead of the seventh Monday after, etc., upon the defendant's not appearing a judgment was taken upon the bond against him and his surety: *It was held* that the judgment was irregular, and that whether the bond was to be prepared by the sheriff or the defendant made no difference, as the judgment taken was against the surety as well as the defendant, and there was no default of appearance according to the bond, and also that the words "next court" would not control the specified time of the *"seventh Monday after the fourth Monday of March next."*

2. It seems to be a necessary function of every court, and particularly of a court of the highest jurisdiction to which no writ of error lies, as our Superior Courts, to set aside an irregular judgment, that is, one rendered contrary to the course and practice of the court, at a subsequent term, provided application for that purpose be made in proper time.

3. The Supreme Court will reverse a judgment of the Superior Court refusing to act upon a discretionary power, where such refusal proceeds not upon the exercise of its discretion, but upon the ground of a want of power to act.

4. In general, judgment taken without service of process, signed out of term, or by default before the proper period of the term, are irregular.

5. Whether it is the duty of the officer or the defendant to prepare the bond to be given for the defendant's appearance to take the benefit of the Act of 1822 for the relief of insolvent debtors, *Qu.?*

6. The bond for the defendant's appearance, under the Act of 1822, connected with the execution, is in the nature of process to compel an appearance, and the return day thereof must be certain.

7. If a judgment by default, interlocutory or final, be signed according to the course of the court, then it is the judge's judgment; because it is entered according to his directions. And, although the former is always under the control of the court, yet, from its nature, the court ought not and will not interfere with the latter, that is, a final judgment after the term at which it is taken.

8. Until set aside, an irregular judgment must, in general, be regarded as a subsisting and regular judgment as to all the world.

9. The cases of *Crumpler v. The Governor*, 12 N. C., 52, and *Bender v. Askew*, 14 N. C., 150, approved.

E. L. & W. WINSLOW obtained a judgment in the Superior Court of Cumberland against John Anderson, on which they issued a *capias ad satisfaciendum* tested on the sixth Monday after the fourth Monday of March, 1836, and returnable to the next term of the court, to be held on the seventh Monday after the fourth Monday of September, 1836, those being the days on which the Spring and Autumn terms of that court, respectively, begin. The writ was delivered to the sheriff of Burke, who executed it by arresting Anderson on 9 November, 1836. The sheriff, however, did not imprison him, but discharged him under the Act of 1822 (1 Rev. Stat., c. 58, sec. 7) on his giving a bond prepared by the sheriff, with Alexander Duckworth as his surety, bearing date 9 October, 1836, and with condition for the appearance of Anderson "at *the next* Superior Court of Law to be held for the county of Cumberland on the *seventh Monday after the fourth Monday of March next,* then and there, etc." The ninth day of October was more than twenty days before the term of the court to which the writ of execution was returnable; but the ninth day of November was within twenty days of that term.

(3) The sheriff returned the execution and bond to the Spring Term, 1837, of the court, which began on the sixth and not on the seventh Monday after the fourth Monday of March; and at that term, upon the failure of Anderson to appear, the plaintiffs took a judgment by default on the bond for the penalty, to be discharged by the payment of the execution debt and costs. On the next Monday, that is to say, on the day mentioned in the condition of the bond, Anderson, believing that to be the court day, attended at the courthouse for the purpose of taking the oath of an insolvent debtor, but found that judgment had been taken against him the preceding week, at which time the court sat. The foregoing facts appearing upon the record and by affidavits at the next term of the court, which was held in November, 1837,

before his Honor, *Judge Bailey,* the defendants Anderson and Duckworth thereupon moved the court to vacate the judgment rendered on the bond at the preceding term. But his Honor, although he thought the judgment both erroneous and irregular, refused the motion, as he conceived that the Superior Court had no power to correct the proceeding on motion, but that it could only be done by writ of error. From that decision the defendants appealed.

Caldwell for defendants.
Strange for plaintiffs.

RUFFIN, C. J., after stating the case as above, proceeded as follows: With any terms which his Honor might in his discretion have imposed as a reasonable condition of vacating the judgment, this Court would have as little inclination as it has authority to interfere, and we wish it further understood that if the Superior Court had refused the motion upon an exercise of its discretion, we should not undertake to revise it here. But the record conclusively repels a presumption of that sort, since it explicitly states that the proceeding was irregular, and consequently ought to be corrected, and would have been corrected but for the want of power in the court to do so on motion. Our attention is therefore confined to the questions intended to be presented upon the record, which are, whether the judgment was irregular, and, if it be, whether the Superior Court had the power to set it aside on motion.

An irregular judgment is one rendered contrary to the course and practice of the court. (4)

We take it that this was an *ex parte* judgment by default, signed in the office for want of an appearance. So much is to be implied from the nature of the proceeding itself, and from the course of all the courts of the State. But in this case the presumption is established by the declaration in the record that the judgment was irregular as well as erroneous; for a judgment rendered by the judge himself cannot in a legal sense be *irregular,* however erroneous—since the course and practice of the court is established by the acts of the judge, and unless prescribed by statute can be altered from time to time by him. Could it then be regular in the course of any court to take, without the actual interposition of the court, a judgment for the nonappearance of a party on a bond, when the judgment was taken on a day prior to that prescribed for his appearance in the bond? In general, a judgment taken without service of process, one signed out of term, one by default, before the proper period of the term, may be stated as well understood instances of irregular judgment. *Skinner v. Moore, ante,* 2, vol. 138. It is true, in this case no process is necessary under the statute, but judg-

ment may be entered up *instanter* in case of failure to appear. But certainly the failure to appear must be a failure to appear on that day specified in the condition; for not appearing on any other day is not a default within that bond. To take a judgment by default before the day is therefore the same as signing judgment at one court when the process is returnable to the next, or without service of process at all.

It is said, however, that it was the debtor's own fault that the proper period was not inserted in the bond, as it was his duty to tender the bond; and, further, that as he was bound by the terms of the instrument to attend at the *next* term, he was obliged, at his peril, to take notice of the proper time, and the particular day mentioned in the condition may be treated as surplusage. In answer to this, it may be remarked, in the first place, that it cannot be yielded to be the debtor's duty to tender the bond. He is certainly bound to tender the sureties; but, notwithstanding the words of the statute, it may be incumbent on the officer to prepare the bond. If so, it was not the fault of the debtor but that of the sheriff; and the latter ought to be responsible—as, indeed, he
(5) is—for discharging the debtor from custody upon an insufficient bond, whether the one or the other was legally bound to prepare a proper one. But, supposing it be the debtor's duty, the judgment will not be helped thereby. He may be arrested again on the original judgment, or the sheriff may be sued; but this judgment by default on the bond cannot stand, because it is against both the debtor and his surety, and according to the bond there was no default on which judgment could be signed. The surety was in no fault, and has a right to insist on the terms of his contract; and this is his motion as well as the debtor's. Neither can the day mentioned in the bond for the appearance be rejected, as overruled by the words *"next court."* In a writ the return day must be certain, and that specified would certainly control the general terms "at the next term of our court, etc."; and this bond, connected with the execution, is in the nature of process to compel an appearance to answer, and therefore seems to stand on the same reason. But if this be not so, another insuperable difficulty in the way of the plaintiffs presents itself in the fact that the plaintiffs themselves did not appear at *the next* term after the date of the bond to demand the debtor, and the process and bond were *not* returned to *the next* term, but to that succeeding it. If the particular day stated in the condition can be rejected and the bond is to be read as stipulating for an appearance simply, at *the next term,* that was in November, 1836, and the whole was discontinued, as the return was to May, 1837; in which case, also, the judgment by default is irregular. The Court, therefore, is entirely satisfied that the judgment was irregular and unjust and ought in some way to be dealt with so as to admit the defendants to be heard on the merits. If it

were to stand, as to the surety, he would be fixed without laches and against his contract, and, as to the principal, he would be deprived of the benefit of the Act of 1822 by its express provision, although he be an honest insolvent debtor. The creditors may undoubtedly have remedy for their debt; but they ought not to get it in this short-hand way—against the law, the course of the court and fair practice, and to the prejudice of the legal rights of the other parties.

Of the power of the court to vacate an irregular office judg- (6) ment, no doubt is entertained by us. It has been exercised in innumerable instances, for the purpose of justice, and to allow to both parties the opportunity of being heard. It proceeds on the ground that a judgment has been signed on the record, which was not in fact the judgment of the court, which the court ought not to have rendered, and which the plaintiff or his attorney knew the court would not at all give or allow, or would not then give or allow. It supposes a judgment, as respects the period and circumstances of rendering it, and its conclusiveness on rights which have not been investigated, not only without the authority of the judge, but against and in spite of his opinion and will, as declared or evinced in the settled practice or, as it is called, the course of the court. If judgment by default, interlocutory or final, be signed according to the course of the court, then it is the judge's judgment; because it is entered according to his directions. And, although the former is always under the control of the court, yet, from its nature, the court ought not and will not interfere with the latter, that is, a final judgment after the term at which it is taken. If the judgment be taken against the course of the court, then it is in no sense the judge's judgment; and it belongs to him as a right of his own, to make the record speak the truth, by vacating the entry of what purports to be his act, but was not his act in reality. It is incident also to his duty of administering justice between parties. It is true that, until set aside, it must, in general, be regarded as a subsisting and regular judgment, as to all the world. But any person affected in interest may claim, *ex debito justiciæ,* the exercise of this power of the court to vacate a judgment entered without an actual or implied adjudication; and this motion was made in due time, being at the first court after the judgment. The text writers are full of instances in which irregular judgments by default have been set aside at a subsequent term. Tidd's Prac., 614; Bingham on Judgments, 21, 22. There have also been many accordant adjudications in this State. Among them are the cases of *Crumpler v. The Governor,* 1 Dev. Rep., 52, and *Bender v. Askew,* 3 Dev. Rep., 150. For the reasons given, this seems to be a necessary function of every court. Much more is it incident, from extreme neces-

sity, to the court of the highest jurisdiction, to which no writ of error lies as is the case with our Superior Courts of Law.

The Court concludes that the decision of his Honor is erro-
(7) neous inasmuch as the Superior Court of Cumberland had power to vacate the judgment in question, if irregular; and as this Court deems the same irregular and it was also so declared by his Honor on the motion before him, in the opinion of this Court the Superior Court ought to have allowed the motion and set aside the judgment. Wherefore, the decision of the Superior Court on the motion must be reversed with costs and *this* judgment certified to that court, in order that the said motion may be there allowed, and the entry of the judgment against Anderson and Duckworth vacated.

PER CURIAM. Judgment reversed.

Cited: State v. Melton, 44 N. C., 427; *Cohoon v. Morris,* 46 N. C., 220; *Powell v. Jopling,* 47 N. C., 401; *Arrowood v. Greenwood,* 50 N. C., 415; *Griffin v. Hinson,* 51 N. C., 156; *Hervey v. Edmunds,* 68 N. C., 245; *Vick v. Pope,* 81 N. C., 27; *Perry v. Adams,* 83 N. C., 269; *Henderson v. Graham,* 84 N. C., 497; *Gilchrist v. Kitchin,* 86 N. C., 22; *Welch v. Kingsland,* 89 N. C., 181; *Moore v. Hinnant,* 90 N. C., 166; *Williamson v. Hartman,* 92 N. C., 242; *Dobbin v. Gaster,* 26 N. C., 74; *Bryan v. Brooks,* 51 N. C., 581; *State v. Swepson,* 83 N. C., 589; *S. c.,* 84 N. C., 828.

DEN EX DEM. DAVID MILLER ET AL. *v.* ROBERT G. TWITTY.

Judgment on Scire Facias.

1. A *scire facias* to repeal a patent under the act of 1798 is to some purposes a proceeding *in rem,* but when issued at the instance of a private individual it is *essentially* an act of *inter partes,* and a judgment therein vacating the patent will only bind those who are parties or privies.
2. A proceeding *in rem* which binds all persons is confined to the proceedings of a court "exercising some peculiar jurisdiction which enables it to pronounce on the nature and qualities of a particular subject-matter of a public nature and interest, independently of any private party."

(8) A PATENT for a tract of 220 acres of land in the county of Rutherford was granted by the State on 26 November, 1789, to David Miller, who conveyed fifty acres, part thereof, to Peter Mooney and afterwards devised the residue to John and Andrew Miller. At the March Term, 1817, of Rutherford Superior Court (but whether before or after the death of Miller did not appear) James L. Terrill

filed a petition setting forth that the aforesaid grant had been obtained irregularly and fraudulently, without and against the forms required by law to be observed in the entry, surveying and granting of vacant lands; and that a subsequent grant had been made by the State to the petitioner of a tract of 350 acres, comprehending the land contained in the former grant, and praying that process should issue to Peter Mooney, the tenant in possession of the land, or of a part of the land, covered by the grant to Miller, and claiming to hold under the said grant, to show cause wherefore the said grant should not be repealed, cancelled and vacated. Upon this petition a *scire facias* issued, and Peter Mooney, having been duly served with notice thereof, appeared and pleaded various pleas, upon which issues of fact were joined and tried by a jury, and upon the facts found by the jury the court decreed that the patent to Miller should be annulled, repealed and vacated. A copy of the record of these proceedings was carried by the said Terrill to the office of the Secretary of State, where the same was recorded, and the Secretary thereupon noted in the margin of the original record of the grant to Miller the judgment so rendered, with a reference to the transcript thereof in his office.

John and Andrew Miller, the devisees of David Miller, died and a controversy arose between their heirs-at-law and the defendant as to the right to the possession of the residue of the tract granted to David, which had not been conveyed to Mooney, and thereupon this action of ejectment was brought by those heirs. Upon the trial, the plaintiff having exhibited in evidence the patent to David Miller as the foundation of the title in his lessors, the defendant produced the record of the petition and *scire facias,* and of the proceedings therein, and final sentence of the court, and entry in the Secretary's office on the margin of the record of that patent, and contended that by force thereof the patent was annulled altogether, and therefore furnished no evidence of any (9) grant from the State. But his Honor held, and so instructed the jury, that as the lessors of the plaintiff were neither parties nor privies to the said petition and *scire facias,* they were not bound nor their rights in any manner affected by the proceedings thereon. The plaintiff obtained a verdict and the defendant appealed.

No counsel appeared for defendant.
Caldwell for plaintiff.

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

The act of 1777, establishing offices for receiving entries of claims for land and pointing out the mode of obtaining grants therefor, had declared that titles set up or pretended to such land, not obtained in the manner therein prescribed, or obtained in fraud of its provisions, should

be utterly void. But in what manner or in what court the validity of a grant might be impeached because of an alleged violation or evasion of the requisitions of this act was for several years a vexed question. It was indeed well settled that when a patent was exhibited in an action of ejectment or trespass as evidence of title and it appeared to have issued in a case where the officers of the State had the *authority* to make a grant, it could not on the trial be impeached by testimony *dehors* the grant of irregularities in the entry, survey or other matters preliminary to the issuing of the grant. Among other and perhaps more conclusive reasons for this doctrine it was held to be dangerous to permit a claimant to land under a patent, having every external solemnity, to be surprised by objections which he could not reasonably anticipate, of which the forms of pleading did not apprise him, and which he might not be prepared to meet with opposing testimony. Therefore, until the grant was declared void on a formal proceeding bringing its validity before the court *ex directo,* it was to be regarded as authentic and conclusive evidence of all that it testified. But what was to be this formal proceeding was by no means settled. Some suppo[illegible] that it was a fit case for an information, or a bill in equity, while others con-
(10) tended that our courts of equity had no jurisdiction over the subject. The former urged that the Legislature had expressly conferred on these courts all chancery powers, while the latter insisted that from the purview of the statute organizing these courts it was apparent that no part of the common-law powers of the chancellor was intended to be delegated. In this state of things, the General Assembly passed the act of 1798, the great purposes of which appeared to be to establish a court with jurisdiction to examine into the validity of patents, and to indicate the mode by which the State, proceeding to vindicate her violated rights, might cause to be vacated and annulled patents obtained by false suggestions, surprise or fraud. By this statute, however, it was further enacted that *any individual* who might consider himself *aggrieved* by such a grant might file *his* petition in the Superior Court of the county where lay the land granted, with an authenticated copy of the grant, briefly stating the grounds whereon the grant ought to be repealed, and vacated, that a writ of *scire facias* should thereupon issue to the person, owner or claimant under the grant, to show cause wherefore it should not be repealed and vacated, and that if upon verdict or demurrer it should appear to the court that the grant was made against law, or was obtained by fraud, surprise or upon untrue suggestions, the court might vacate the same, that an authentic copy of these proceedings should be filed by the petitioner in the Secretary's office and be there recorded, and that the Secretary should note in the margin of the original record of the grant the entry of the judgment, with a reference

to the record in his office. It was under these provisions of the act of 1798 that the proceedings were had which were offered in evidence by the defendant.

It is very obvious that the judgment in question was at least erroneous. The case of *Terrell and Alexander v. Logan,* 3 Hawks, 319, has established that the grantee, or those who have succeeded to *all* his rights under the grant, must be made a party or parties to the *scire facias.* The cases of *Crow v. Holland, Hoyle v. Logan,* and *Featherston v. Mills,* 4 Dev. Rep., 417, 495, and 596, have settled that a junior patentee is not, within the meaning of the act of 1798, a "person aggrieved" by the issue of an elder grant, and is, therefore, not entitled to sue out a *scire facias* to vacate it. But, however erroneous may be the (11) sentence, it is nevertheless the final decree of a court, and if the court had jurisdiction over the subject-matter of the decree, it must receive all the respect which it could claim if exempt from every imputation of error.

Perhaps it might be contended that the sentence was altogether null, because on the face of the proceedings it appears that all the parties necessary to give the court jurisdiction over the subject-matter were not brought before it. As this objection, however, has not been urged, and as the determination of the case does not require a decision of this point, we shall give no opinion upon it.

It is not on the ground of a want of jurisdiction that the plaintiff resists the force of the sentence. But it is insisted for him that admitting the sentence to have been pronounced by a court of competent jurisdiction, it is binding upon and between those only who were parties, or who claim in privity with those who were parties to the suit in which the decree was rendered. It cannot be denied but that, *in general,* judgments are evidence as to the truth of the matter thereby decided only between parties and privies; and the principle upon which this rule is founded, that no man ought to be concluded by an inquiry in which he could not interpose and had no means of vindicating his rights and showing the truth, is so manifestly just and reasonable that exceptions from it should be very cautiously allowed. One class of exceptions is established upon the ground that the *principle* of the rule does not apply to them. Thus a judgment against a tenant for life in a real action will not, in general, bind the reversioner, because the tenant is seized in his own right, and the reversioner has not the legal means to defend that seizin; but if the tenant, when sued, pray the aid of the reversioner, and the prayer is allowed, the reversioner shall be bound by the judgment, because he had the legal means to defend the tenant seizin. Har., 462; Yel., 32. The present case certainly does not come within the reason of this exception. The lessors of the plaintiff had no power to

interpose in the proceedings on the *scire facias,* or to make any defense whatever against it. There is, however, another class of cases which are admitted to be exceptions from the general rule, viz., cases tech-
(12) nically called "proceedings *in rem,*" or "against the thing," in which the judgments rendered are receivable in evidence against *all persons,* as conclusive of the truth of what is therein declared. What for this purpose are to be regarded as proceedings *in rem* has not been anywhere precisely defined. It is obvious that all actions which demand a thing specifically, if they can be called "proceedings *in rem,*" do not therefore come within the scope of this exception, for certainly a judgment in a real action or in an action of detinue is not evidence of the right of the matter decided against strangers to such actions, although the judgment is for the thing demanded. A text writer of great respectability, if not with absolute accuracy, yet with a near approach to it, has upon a view of all the authorities confined this exception to the proceedings of a court "exercising some peculiar jurisdiction which enables it to pronounce on the nature and qualities of a particular subject-matter of a public nature and interest, independently of any private party." 1 Star on Evi., 241. He considers the exception as founded on two considerations: first, that it is essential to the efficacious exercise of such a jurisdiction that its judgments should be binding on all other courts and in all cases, because none of these courts can see whether the proceedings were regular and according to the usages and rules of the special tribunal or not, and, secondly, for that in general all persons interested in such proceedings *in rem* may usually be heard in assertion of their rights. *Ibid.,* 240, 241. To us it seems that the proceedings in question are not brought within the operation of this exception thus understood. They are the proceedings not of a court of *peculiar* jurisdiction, whose usages and rules are unknown to the common-law courts of the country, and acting on a particular subject of a public nature independently of any private party, but the proceedings of a common-law court acting either according to common-law usages or to rules defined by the Legislature, upon a subject indeed of a public nature, but brought before it by one individual seeking redress against another for a private grievance in relation to that subject. The very court in which the sentence was rendered is that which is to pronounce whether the sentence ought to bind those not before it when rendered—
(13) and the Court judicially knows that according to its usages and rules those not before it could not have been heard in assertion of their rights, and if bound by that sentence will have lost those rights without any opportunity of legally vindicating them. If it were dangerous to allow such rights to be assailed where there might not be a *deliberate* opportunity to defend them, it is abhorrent from justice to

permit them to be annulled without *any* opportunity to assert them. If the *scire facias* be, as certainly to some purposes it is, a proceeding *in rem,* it is, nevertheless, at least when sued out by an individual, *essentially* an action *inter partes.* It is indispensable to the constitution of the action that there shall be parties, petitioner and defendant. It cannot be doubted but that the judgment rendered would have been a nullity had there been *no* defendant brought before the court. The jurisdiction is not derived, therefore, from the seizure of a particular thing, which the court is to dispose of according to right as against all who may set up title thereto—nor is it founded upon the peculiar qualities of the subject which unfit it for the consideration of any but a peculiar tribunal. It is not a jurisdiction independent of parties—but a jurisdiction which cannot be called into action but through parties. In such a case to secure the bringing of proper parties before the court, and to prevent the monstrous injustice of depriving men of their rights unheard, it must be held that the sentence does not bind strangers to the action. *Mankin v. Chandler,* 2 Brock, p. 128.

This conclusion derives support, too, we think, from the special provisions made by the Legislature in relation to the return of the judicial proceedings into the Secretary's office. It is required that a copy of these proceedings shall be there filed and recorded in full; and the Secretary is directed not actually to *cancel* the record of the grant, but merely to note in the margin of that record the sentence of the court, with a distinct reference to the full record of the proceedings on the petition in his office. The object seems to have been to annex inseparably the record of the sentence to the record of the grant—so that the latter and all claims under it might be left to the operation, whatever it might be, which the sentence on such a petition and between such parties as are exhibited in the proceedings ought by law to produce thereon.

It is the opinion of this Court that there is no error in the (14) instruction excepted to, and that the judgment of the Superior Court should be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Carter v. White, 101 N. C., 34; *McNamee v. Alexander,* 109 N. C., 246.

HAUGHTON & BOOTH v. THOMAS H. LEARY.

Commencement of Suit—Set-off.

1. The time of the commencement of a suit, upon a plea of set-off *before and at the commencement of the suit*, is the time when the writ was sued out from the proper officer, or filled up by the plaintiff's attorney, and not when it is delivered to the sheriff.

2. The only proper plea of a set-off is one due *before and at the time of the commencement of the suit*, because only mutual debts subsisting at the time of action brought, as debts to and from the plaintiff and defendant, can be set off; hence a plea of set-off in bar to the further prosecution of the suit is not sustainable.

3. Generally where matter subsequent bars an action, it consists of some act or agreement on the part of the plaintiff himself, as in the case of a payment received after the action is commenced.

4. A tender and refusal after suit brought is, as a plea, no bar. However, by the modern equitable practice, upon the defendant's paying principal, interest and costs into court, the plaintiff is laid under a rule to receive it or proceed at his peril. But that has been confined to cases of payment, and has never been extended to a set-off.

THIS was an action of ASSUMPSIT to which the defendant pleaded a *set-off:* First, *before and at the commencement of the suit,* and, secondly, *in bar of the further prosecution of the suit.*

On the trial at Chowan on the last circuit, before his Honor, *Settle, J.,* the defendant admitted that he was indebted to the plaintiffs in the sum of $310.63 unless he was entitled to a set-off upon the following facts: The plaintiffs were indebted to one William Bullock and one Thomas Gregory by negotiable notes, before the commencement of this suit, in a larger sum than the amount of the plaintiffs' claim.

On 8 May, 1837, the plaintiffs called upon an attorney to issue
(15) a writ against the defendant, returnable to the next ensuing August term of the county court. The attorney on that day filled up the writ and left directions for it to be given to the plaintiffs if they should call for it. The writ, however, was not delivered to the sheriff until 21 July following, when it was executed and returned to August Term of the County Court of Chowan. The notes due from the plaintiffs to Bullock and Gregory were endorsed to the defendant on 8 July, 1837, for valuable consideration. The plaintiffs, the attorney and the sheriff all resided in the town of Edenton.

Upon these facts, his Honor being of opinion that the defendant was not entitled to a set-off for the notes, gave judgment for the plaintiffs, from which the defendant appealed.

A. Moore and M. Haughton for defendant.
Heath and Kinney for plaintiffs.

RUFFIN, C. J. In our opinion the defendant is not entitled to the set-off under either plea. The first is, that the notes were endorsed to the defendant *before and at the commencement of this suit.* This is not true in point of fact. The assignment was on 8 July and the suit, we think, was commenced on 8 May preceding, on which day the writ is dated, and as stated in the case, truly dated and filled up. The suing out the writ from the proper officer, or purchasing it, as it is called sometimes, is so universally deemed the bringing suit that no exception is recollected by the Court. It is unquestionably so within the Statute of Limitations, which uses the very words "that all actions shall be *commenced* or brought within the time and limitation expressed, and not (16) after." While the *teste* of the writ on the one hand is not the commencement of the suit for the benefit of the plaintiff, so, on the other, the service of it, or its delivery to the sheriff, or any such thing, is not requisite to the commencement of the suit for the benefit of the defendant; but only getting the writ—*impetratio brevis, Johnson v. Smith,* 2 Bur., 950. There are many cases to that effect. The form of pleading also establishes it. The constant form is, "that the defendant did not assume within, etc., *ante impetrationem brevis.*" Why? Because obtaining the writ, sealed and complete in form, is in fact and law the commencing suit. If this standard were departed from it would be altogether uncertain what would amount to bringing suit—a point that cannot be remaining to be settled at this day. The plaintiff has proceeded on that very writ and brought the defendant into court under it as the leading process in this action. Its date would determine the commencement of the suit in reference to the Statute of Limitations, if the defendant had pleaded it. For the like reasons it determines it for the purposes of the present plea.

The second plea presents a question which is not so free of doubt. The plea is not *actio non;* but that the plaintiff ought not *further* to prosecute his suit, *because since the commencement of this suit* the notes made by the plaintiff were endorsed to the defendant. None of us remember such a plea in practice; nor have we been referred to any such precedent, or an adjudication giving color for it. The counsel for the plaintiff relied entirely on a passage in a modern treatise, Babington on Set-off, 82; and insisted on the reasonableness and propriety of the plea. That author does seem to suppose that a defendant may avail himself of a set-off obtained after action brought by a plea in bar to the *further* prosecution of the suit. But he cites no authority for the position. He assumes that such a demand is a legal set-off; and if that be so, the author infers that it must be pleaded in this form, because it had been decided in the cases to which he refers that it could not be by way of *actio non* generally, that is to say, in reference to the commencement of

the suit, nor in the more limited form, "that the plaintiff before and at *the time of the plea pleaded* was indebted." That consequence is
(17) logical, if the proposition assumed be true; but otherwise not. It does not follow that it can be pleaded in this way because it cannot be pleaded in either of the others; for it may not be a set-off within the statute, and therefore is not pleadable in any form. Our researches and reflections induce us to adopt the latter opinion. We think it is not merely a question as to the proper form of the plea, but that according to the principle of the statute this is not a set-off.

It was formerly held on demurrer in the case of *Reynolds v. Beerling,* stated in a note, 3 T. R., 188, that the plea of a judgment, recovered by the defendant against the plaintiff after suit, and before plea, was good. It does not appear certainly, nor can it be collected from observations on it in subsequent cases, what was the form of the plea. There is reason, however, to say that it was *actio non;* because in no other case is there an attempt to support the decision upon the ground that the plea was in bar of the further prosecution of the suit. The decision itself professes to be founded on the authority of *Sullivan v. Montague,* Dong., 108, which established as a general principle that *actio non* goes to the time of the plea. The inference is, that under a plea *actio non* it was held to be sufficient if the demand of the defendant existed at the plea pleaded. As an authority to that point, it is precisely opposed by two subsequent cases. In *Evans v. Prosser,* 3 T. Rep., 186, the defendant had a set-off, which in fact subsisted before action brought, and so appeared in the plea, but he pleaded it as one "before and at the time of plea pleaded." Upon demurrer it was adjudged against the defendant, though he was afterwards allowed to amend by stating the set-off according to the truth, as one "before and at the commencement of the suit." Before delivering the opinion, time was taken to look into the cases; and Mr. *Justice Buller,* speaking for the Court, said that *Reynolds v. Beerling* could not be supported in this point. In *Hanky v. Smith,* 3 T. Rep., 507, *Lord Kenyon* said, if the bill had come to the defendant's hands *ex post facto, as after action brought,* there would have been no mutual credit, and consequently there could be no set-off.

The observation is obvious upon those cases that there is not the slightest intimation that the plea of set-off may be pleaded in bar
(18) to the *further* prosecution of the suit; and if there had been an idea of that sort, it is difficult to suppose it would have been overlooked, especially as it might have sustained *Reynolds v. Beerling* and excused the Court in *Evans v. Prosser* from expressly overruling their own decision, made four years before. But if either of those cases turned on the form of pleading in *Hankey v. Smith,* which was on non-assumpsit and notice of set-off, the remark of *Lord Kenyon* is general,

that where the matter arises after action brought it is not a case of mutual credit, within the act. That observation seems to us to present the question in its true point of view.

The statute was made to prevent multiplicity of suits. That is the object of it. As the means by which that end is to be attained, it enacts that where there are mutual debts subsisting between the plaintiff and the defendant, "one debt may be set against the other." The intention was not merely to give the defendant the benefit of his debt in the action brought against him, without putting him to the delay and expense of a cross action. If it had been, then he ought to be permitted to plead a set-off acquired *at any time* after plea pleaded, by way of plea since the last continuance, as he would plead a payment made pending the suit. But this has never been done; and the plaintiffs' counsel admits that a set-off accruing after plea cannot be pleaded *puis darrein continuance.* We believe that is true; and it seems to furnish a strong argument against this plea; for it is in the nature of a plea since the last continuance. Why may not a plea of that sort be put in? Because no injustice is done to the defendant by denying him the plea, since he does not lose his debt thereby, but may recover it by action; and because the statute did not mean that the plaintiffs' action should be barred in any case in which it was at first properly brought. This shows, as was just said, that the scope of the act is not merely to dispense with an action on the part of the defendant. What, then, is it? The great purpose was to effect a liquidation of mutual debts, without resorting to suits, not only by each, but by either party. The statute looks at the balance as the debt; and therefore if one of two persons, having mutual dealings, will sue the other, instead of exchanging discharges, the party sued is allowed to set-off his debt against the other as (19) a bar to the action. In other words, the plaintiff is made to pay the costs as a penalty for his wanton and obstinate litigation. But this is applicable only where upon the state of facts both debts existed at the time of suit brought. For in no other is a plaintiff to blame for suing; and therefore in no other ought he to be barred or pay costs. With this the words of the act before quoted agree. "Mutual debts subsisting." *Subsisting*—when? Manifestly subsisting at a point of time when the parties mutually gave credit—trusted to each other; and when, that is to say at the same point of time, the purpose of the act might be fulfilled by satisfaction to each party without any suit by either. This must necessarily be before and at the commencement of the suit. If it be objected that this will exclude negotiable instruments from the operation of the act, although held by the defendant at the commencement of the suit, unless the plaintiff had notice thereof, the answer is, not so. Such instruments are embraced in the act without doubt, whether the plaintiff

knows or not in whose hands they are. The form of the security imports an agreement by the plaintiff that the defendant might take it; and when he sued, he either knew, or might have known by inquiry, that his debtor was also his creditor. Every debtor is bound to seek his creditor. The plaintiff is therefore culpable if he sues when there is really no debt due to him; and is justly subjected to the costs. But it is entirely the other way when the plaintiff becomes the defendant's debtor after he brought his own suit. It is to be recollected that the only real subject of controversy is the costs of the action; for the defendant has other remedies for his debt. Why should the plaintiff be condemned in the costs, or even lose his own costs? He could not before suit give a credit to the defendant for a debt which he did not then owe; and he did no wrong in bringing the action; and he has done no act since to bar it. He has therefore in justice and law as much right to the costs as to the debt. Generally, where matter subsequent bars an action, it consists of some act or agreement on the part of the plaintiff himself, and is not constituted, as this is, by the mere act of the defendant. If the plaintiff
(20) release the debt or receive payment after action brought, it may be pleaded in bar to the further prosecution of the suit, if before plea pleaded; or, if after, since the last continuance, technically. In those cases there is judgment against the plaintiff for the costs, because it was his folly to extinguish his demand without receiving his costs. But a set-off is not a payment; it is only made to amount to a satisfaction by operation of law. Now, the law works no wrong, and therefore will not deprive the plaintiff of the costs to which he was once entitled, and in abandonment of which he has since done no act. The case resembles that of a tender more than any other. If made before suit, it may be pleaded in bar, and the plea supported by bringing the money into court. The costs then are alone in contest; and if the full sum was tendered, the plaintiff pays them, because his suit was unnecessary. But tender and refusal after suit brought is, as a plea, no bar; because it admits the necessity of the suit, as well as the justice of the demand, and the plaintiff ought therefore to have costs. By the modern equitable practice the defendant in such a case pays principal, interest and costs up to the time into court, and the court lays the plaintiff under a rule to take the money, or proceed further in the suit at his peril. But that has been confined to cases of the payment of money, and has never been extended to a set-off in actions—at all events, not in the stage at which the question is raised on this record.

Upon the whole the Court is of opinion that only mutual debts subsisting at the time of action brought as debts to and from the plaintiff and defendant can be set off. Whether a debt from the plaintiff to the defendant subsisting at the time when the writ is sued out, but becoming

payable afterwards, and before plea pleaded, may be availed of as a set-off by a plea to the further prosecution of the suit, is a question not necessarily involved in this case, and therefore not decided by it.

PER CURIAM. Judgment affirmed.

Cited: Murray v. Windley, 29 N. C., 203; *Mizell v. Moore, id.,* 257; *Thompson v. Red,* 47 N. C., 412; *Winningham v. Redding,* 51 N. C., 127; *Brumble v. Brown,* 71 N. C., 516.

CAROLINE SAMPSON v. GEORGE W. B. BURGWIN. (21)

Evidence—Judgment.

1. In an action by a negro brought to try his right to his freedom, if evidence of his being reputed to be a freeman is offered, it is admissible to show in reply acts of ownership inconsistent with such reputation.
2. A record of the county court stating that "upon the petition" of the master "it is ordered" that the slave "be emancipated and set free from slavery" is sufficient evidence under the act of 1796, Rev. c. 453, of the emancipation, without showing any petition in writing.
3. An order of the county court emancipating a slave under that act without stating that the slave had performed meritorious services, is conclusive, being the act of a court of exclusive jurisdiction, and cannot be impeached by evidence that the slave had not or could not have performed such services.

THIS was an action of trespass *vi et armis,* brought by the plaintiff to try the question whether the defendant had a right to hold her as a slave. Before his Honor, *Judge Dick,* at NEW HANOVER, on the last circuit, it was admitted that the plaintiff was once the slave of the defendant, but she alleged that the defendant, in November, 1809, procured her mother and herself, then one or two years old, to be emancipated by the county court of New Hanover, and in support of this allegation she produced in evidence a copy of the record of that court in the following words: Upon the petition of George W. B. Burgwin, ordered that a female negro slave by the name of Marian, and her child, called Caroline, the property of said petitioner, be emancipated and set free from slavery—the said George giving bonds, etc.

The plaintiff proved by the clerk of the county court, who was in office in 1809 and had continued so ever since, except during the years 1832 and 1833, that he had no recollection of ever having seen in his office any petition in writing upon which the above order was made, and that after the most diligent search he had been unable to find one. The

plaintiff proved further, by several witnesses, that they had known her from eight to twenty years, and had always considered her as a free woman.

(22) The defendant then proved by the sheriff of New Hanover that in the year 1820 he saw the plaintiff, then about twelve years old, in the possession of the defendant; that he levied an execution against the defendant, then in his hands on her, and sold her at the house of the defendant, when one John R. London became the purchaser at a fair and full price; that he afterwards saw the plaintiff in the possession of the defendant several times, at his residence, eight miles from Wilmington, and that he never heard that she was free, or pretended to be so, until about the time when this suit was brought. This witness also proved that some time after the sale to London, as before stated, she was levied upon by some person as the property of the defendant, when London interfered and claimed her as his property, upon which she was released. This declaration of London was objected to by the plaintiff, but was admitted by the court. The defendant proved, further, by a witness, that in the year 1833 the witness was requested by the mother of the plaintiff to become her security to the defendant for the hire of her daughter, the defendant; that he became surety as requested and afterwards paid the money to the defendant. This evidence was also objected to by the plaintiff, but was admitted by the court.

His Honor, in charging the jury, told them that it was incumbent on the plaintiff to show that she had been emancipated in the manner prescribed by law; that she must show that the defendant had filed his petition in writing alleging meritorious services on the part of the plaintiff, and expressing a wish to emancipate her; that it was further necessary for her to show that the court had adjudged that she had performed meritorious services, and had given license to the defendant to emancipate her; that the law would then presume that she was emancipated. His Honor further told the jury that there was no evidence that any written petition had been filed by the defendant, and consequently no evidence of its contents; neither was there any evidence that the county court of New Hanover had passed any judgment that the plaintiff had performed meritorious services; that the court was not bound to presume from what appeared on the record of the county court that a written petition was filed by the defendant expressing a wish then to

(23) emancipate the plaintiff; nor that the county court had adjudged that the plaintiff had performed meritorious services, particularly as it appeared in evidence that she was not more than one or two years old when the record was made, and could not have performed such meritorious services as the law required. The jury found a verdict for the defendant and the plaintiff appealed.

Devereux & Strange for the plaintiff.
Badger and W. H. Haywood for the defendant.

RUFFIN, C. J. It is unnecessary to say much on the objections taken to the defendant's evidence. It was offered to repel the evidence of the reputation of freedom given on the part of the plaintiff. If the plaintiff claiming under a particular act of liberation from the defendant, of record and of recent occurrence, being within the lives of these parties, could offer evidence of reputation—of which we do not stop to inquire—such evidence might be met by the proof of acts of ownership inconsistent with the reputation and accompanied by declarations and claims of title by the defendant and others claiming on his title. The evidence of the sheriff might have been proper for another purpose, even if the plaintiff had been in legal form emancipated. She was sold under execution against the defendant, and doubtless that sale would pass the title to Mr. London if the defendant were unable to pay his debts at the time of the emancipation, in the same manner that any other voluntary conveyance is void against creditors. In that case the plaintiff would be the slave, not indeed of the defendant, but of London; and therefore could not bring this or any other action. But it does not appear that any such view as this was taken on the trial; and no doubt the evidence was directed to the other point; as to which we think it proper as evidence in reply.

But upon the principal question in the case our opinion differs from that of his Honor. We think the transcript of the record of the county court, which is set out in the exception, is evidence of an actual emancipation of the plaintiff, provided her identity and that of the defendant with the supposed subject and actor in the county court be established. It purports to order that the plaintiff, *in presenti,* "be (24) emancipated and set free from slavery," and to be made on the petition of the defendant, then the owner of the plaintiff. The objections taken to this, as an act of emancipation, are that there is no adjudication of the court that the plaintiff had performed such services; that, being proved on the present trial to have been in November, 1809, only two years of age, it is apparent that the plaintiff could not have performed such services, and that the court did not and could not adjudge that she had; and that the order was inoperative unless there was a petition in writing of the defendant alleging such services of the plaintiff and expressing a wish then to emancipate her.

It may be assumed—and indeed we think properly—that there was no evidence of the existence of a petition in writing, or consequently of its contents; as a record is proved by itself, and by nothing else. But the law does not require a petition, as it appears to us. Emancipation is the

act of the master, by which he renounces his right to the services of his slave, and sets her free from him. Any act which purports to have been done with that view would, upon common-law principles, suffice; and in favor of liberty the intention might be inferred from slight acts. The Legislature has, however, upon a ground of public policy, interposed in restraint of the power of the master. It is, perhaps, a matter of doubt in the construction of our statutes whether the owner of a slave may not emancipate without the leave of the court, so as to be an effectual renunciation of his own dominion, although it may be a forfeiture of the slave to the public, and the proper authorities may seize and sell it. That seems to have been the law, at all events up to the year 1796; and perhaps is not altered by the act of that year. But supposing any attempt of the master to liberate a negro to be void, even as to himself, unless it be done in the mode prescribed by the Legislature to vest in a liberated slave all the right and privilege of a free-born negro, it yet remains to be inquired what mode is prescribed by the Legislature. Upon recurring to the statute it is found to be silent as to the means or manner of emancipation, so far as respects the agency of the owner, except only that such "liberation shall be entered of record." Neither a previous
(25) nor subsequent deed or writing of emancipation is requisite; nor is a written petition to the court for a license mentioned before the act of 1830. The only memorial mentioned in the act is the record—the usual, indeed indispensable, memorial of whatever is transacted in a court of record. It is convenient and orderly to put into writing a statement of the facts upon which the court is asked to act, and to pray specifically for the order the court is asked to make. It is useful to restrain attempts at imposition, and also to identify the parties. But so far as regards the form which an act of emancipation by the master is to assume so as in strict law to be valid, there is no regulation whatever in the statutes. It may be by petition, by deed, or by bare writing, or it may be oral, only it is to be recorded, whatever it may be, and that is to perpetuate it. It seems to be supposed that a petition of the owner is requisite, otherwise the act of emancipation is not his, but altogether that of the court. But that is entirely a mistake. The petition is only one mode of showing the consent of the owner. The record, the entry of what he said and did in court, is another mode equally explicit with the other, and of precisely the same grade as evidence. The only difference is that in one case the petition shows his act only, and the minutes show that of the court; while in the other minutes state both what he did and what the court did. Here, their united act as appearing of record, and admitting of no contradiction, is expressly an immediate emancipation of the plaintiff. If the record does not speak the truth the court in which it is can alone make it do so. It imports verity upon the trial of

an action of trespass between these parties, and while it stands cannot be construed into less than a liberation of the defendant's slave by license of the court, granted at his instance.

We are also of opinion that its efficacy is not impugned by its silence as to meritorious services, and that it cannot be impeached by presumption or evidence that the plaintiff had not, or could not, perform them. The acts of a court on a subject within its jurisdiction are presumed to be right, and that presumption cannot be contradicted when the court is one of exclusive jurisdiction, whose judgments are not subject to revision. Such was the county court when this transaction took place. The law forbade it to allow emancipation, except (26) for meritorious services. If the court corruptly granted the license in an improper case the judges were punishable; but the act was valid, because the court had the power. If it was done through error of judgment it is still valid, because the law left it to the judgment of that court. Had the record found the meritorious services, it is clear it could not be disputed upon evidence in this cause. It is, of course, unnecessary that the record should state a fact, as the reason of the judgment, which is not re-examinable elsewhere. There is little doubt that this jurisdiction was often abused; and that for that reason it was established, or rather transferred exclusively to the Superior Courts. But while it existed it was exclusive, and the decision final. The Legislature thought proper to entrust the public security thus far in the hands of that tribunal, and the community was necessarily to abide by its acts. It is worthy of observation, too, that the question is not raised between the plaintiff and the public, although the latter alone has a right to complain of a wrong decision obtained from the county court on this point. The defendant can no more complain of it than of his own act of emancipation; for it was at his instance the court was betrayed into the error.

PER CURIAM. Judgment reversed and a *venire de novo* ordered.

Cited: Stringer v. Burchem, 34 N. C., 43; *Allen v. Allen,* 44 N. C., 62; *Craige v. Neely,* 51 N. C., 173.

A. BORDEN & CO. v. RICHARD SMITH ET AL. (27)

Execution—Justice's Judgment.

1. Where an execution upon a justice's judgment is levied upon land, and returned to the county court under the act of 1794 (1 Rev. Stat., c. 62, sec. 19), it is essential to the validity of the order, which the court is authorized to make, to sell the land levied on, that the land should be particularly described; and a levy generally upon the defendants' "lands," without further specification or description, will not support such order, nor the sale made under it.

2. When an execution upon a justice's judgment is levied upon land and returned to the county court, and it appears that the defendant has not had five days notice in writing, as required by the act of 1828 (1 Rev. Stat., c. 45, sec. 19), the court has no power to order a sale of the land levied upon, and any such order will be entirely null, unless the defendant appears and waives notice.

3. When a justice's execution has been levied upon land and returned to the county court, the plaintiff may apply to court and have a judgment *there* rendered in his behalf for the sum recovered before the justice and costs, under the act of 1822 (1 Rev. Stat., c. 45, secs. 8 and 9), and it seems that a *venditioni* may issue upon such judgment to sell the land levied upon, with a special *fi. fa.* to levy generally for any unsatisfied balance of such judgment; but the power of the court to render such judgment and issue *fi. fa.* thereon depends upon the fact whether a levy sufficiently special has been made, and also whether the defendant has had five days' notice in writing before court, or has waived it; and if no such judgment has been rendered, a writ to the sheriff commanding him to sell the land levied on cannot have the effect of a *fi. fa.*

THE sheriff of Wayne County, at the February Term, 1836, of his county court brought into court the sum of $437, the proceeds of the sale of a tract of land of a certain Fennel Sauls, sold under sundry executions; and therewith returned also the executions, and prayed the direction of the court in the application of the money. The court made an order whereby it was to be applied in the first instance to the satisfaction of such of the executions as purported to be *venditionis* issued from the court upon levies made by constables under *fi. fas.* directed to them by single justices, and the residue towards the discharge of a *fi. fa.* issued from the said court upon a judgment therein, in favor of
(28) the plaintiffs. The *fieri facias* under which the plaintiffs claimed the money thus made bore *teste* the third Monday, viz., 16 November, 1835, commanding the sheriff of the goods and chattels, lands and tenements of Fennel Sauls, he cause to be made the sum of $500 which A. Borden & Co. had recovered against the said Sauls, by the judgment of said court. *Venditionis* that claimed preference to this *fi. fa.* were eight in number, of which two purported to be founded on levies made on 14 November, 1835, and the others on levies made the 16th of the same month. In the two first of these *venditionis* Richard Smith was the plaintiff. In one the warrant was issued on 14 November against Fennel Sauls and Jesse Smith, and a judgment rendered the same day for $81.60 in favor of the plaintiff therein. An execution was thereupon issued immediately, which was returned on the same day "Levied on cart, steer, household furniture and land." It then appeared that without any further proceedings an execution issued from the county court *tested* third Monday of November, 1835, which recited that an execution upon a judgment for $81.60, obtained by Richard

Smith against Fennel Sauls and Jesse Smith, had been returned to the court by William Smith, a constable, "Levied on the lands of said Fennel Sauls," and therefore commanded the sheriff that of the lands and tenements of the aforesaid Fennel Sauls, levied on as aforesaid, he cause to be made the said sum of $81.60 and costs, and if a balance of said judgment and costs remain due, then make the said residue out of the other goods and chattels, lands and tenements of the said defendant. The other judgment of Richard Smith was for $59.13, rendered on 14 November, against Fennel Sauls and Willis Pealer. The justice's execution was dated on the same day and returned forthwith, "Levied on land only." An execution from the court tested the third Monday of November thereupon issued reciting the judgment and execution and that the constable had returned on the justice's execution aforesaid "Levied on the lands of Fennel Sauls," and commanding the sheriff that of the lands and tenements of the said Fennel levied on as aforesaid he cause to be made the said judgment and costs, with a similar command, in case a balance should nevertheless remain due, to cause the same to be (29) made out of the other goods and chattels, lands and tenements of the said defendant. The six other executions were issued on 16 November, the day of the *teste* of the *fi. fa.* from the court, and were on that day levied upon "land" without any further specification or description.

From the order of the county court directing the money in the hands of the sheriff to be applied to the satisfaction of the *venditionis* issued upon the levies made by constables under the justice's executions in preference to the *fi. fa.* on the judgment obtained in court, the plaintiffs appealed to the Superior Court, where, on the last fall circuit, before his Honor, *Judge Dick,* the order of the county court was modified so as to confine the preference to those *venditionis* which purported to issue upon levies made before the *teste* of the *fi. fa.* of the plaintiffs, and to direct the payment of the residue of the money to the satisfaction of that *fi. fa.* and the other *venditionis* pro rata. From this judgment the plaintiffs appealed.

Badger for the plaintiffs.
J. H. Bryan, contra.

GASTON, J., after stating the case, proceeded as follows: The claims of the two *venditionis* purporting to be founded on levies made 14 November will be first considered. Many objections have been made to the regularity of these proceedings, two of which apply to both the *venditionis,* and are so decisively fatal as to render it unnecessary to consider of the others.

Executions on justices' judgments command the officer to make the money recovered out of the goods and chattels of the party cast, and for want of goods and chattels to levy on his lands and tenements, and make return of such levy to the justice. It is required that this levy shall set forth "the lands and tenements levied on, where situate, on what water course, and whose lands adjoining." It is the duty of the justice to whom such return is made to return the execution to the county court with all the papers on which the judgment shall have been ren-
(30) dered, and the land so levied upon, or so much thereof as shall be sufficient to satisfy the judgment, shall, by order of the court, be sold by the sheriff, and the clerk shall record the whole of the papers and the proceedings had before the justice (see 1 Rev. Stat., c. 62, sec. 16). The plaintiff *may* also apply to the court to enter up a judgment in court for the amount of his recovery before the justice and the costs, and on such judgment being rendered, if a sale of the lands so levied on shall not produce a sufficient sum to satisfy the judgment and costs, the plaintiff may sue out execution for the unsatisfied part thereof (see 1 Rev. Stat., c. 45, secs. 8 and 9). No order of the court and no judgment was shown, and we are not at liberty to presume any other than that which the writs issued from it necessarily establish. These writs which are in the nature of *venditionis* recite that the executions from the justice were levied "on the lands of Sauls" and command the sheriff to sell "the lands and tenements levied on as aforesaid." The command thus far is inefficient, because it nowhere appears from the writ, nor from any of the proceedings wherewith the writs are connected, what lands and tenements have been so levied on. The authority of the court in enforcing levies on executions upon justices' judgments is special. It may order all the land levied on to be sold— or a part of it only—but it can order none to be sold to satisfy the *justice's judgment* but what has been levied on under the justice's execution. The court in the first part of these writs professes to execute this authority, and commands the whole of the land so levied on to be sold; but the writs in no way show forth or enable the sheriff to find out what is the land which he is commanded to sell. It is manifest from the provisions above recited—the *specifications* required in the constable's return with respect to the land levied on, and the order of the court thereon with respect to the sale either of the whole of the land so levied on, or such part of it as shall be deemed necessary—as well as from the very nature of the writ of *venditioni exponas,* that it is indispensable to the efficacy of such a writ that the thing to be sold should be set forth in it either expressly or by reference to some matter of record. The sheriff owes active obedience to the writ, but he cannot under the pretence of obedience do what
(31) it commands not. Where an order of sale has been regularly

made of land levied on under a justice's execution, that order effectuates the levy by distinct relation to it. The sale when consummated under the order takes effect as from the levy. The sale, the order, and the levy are all constituent parts of a legal transfer—of the seizure and application of the debtor's land to the satisfaction of his creditor. The sale must correspond with the order, and the order with the levy. What is there to show that the *land sold,* the proceeds whereof are the subject of dispute, is that land which the constable had levied on under Smith's executions and which the court ordered to be sold in pursuance of such levy? It is impossible, we think, under this view of the subject, to allow a priority to these executions.

There is another view of the subject which, on account of the interest of the question that it presents, we deem it our duty to notice, although it is not *essential* to the determination of the case. The act of 1828, c. 9, sec. 6 (1 Rev. Stat., c. 45, sec. 19), requires, whenever a justice's execution shall be levied on land, that the defendant shall have five days notice in writing of the levy before any order of sale can be made, with a proviso in case of concealment or removal from the county, or a residence in another state, that a publication in some newspaper may, by order of court, be substituted for such actual notice in writing. It is indispensable, we think, to the effectual execution of this legislative requirement to hold that an order of sale, made without notice—unless the defendant appear and waive notice—is altogether null. The sheriff may not be a trespasser for selling under such an order, because he is always justified in obeying a writ issued to him by a court possessing jurisdiction over the subject-matter on which it acts; but the sale transfers no title to the purchaser—the thing sold remains the property of the defendant, and is liable to be seized, notwithstanding such sale upon a general *fi. fa.* of one of the defendant's creditors. The notice of the levy required by the act of 1828 was not given, and could not be given in time to support the order of November Term, and the record does not show that Sauls appeared at that term and waived notice.

Our next inquiry with respect to the executions in favor of (32) Richard Smith is whether they cannot claim to be satisfied *pari passu* and ratably with the *fi. fa.* from court in facor of A. Borden & Co. We think not. When a justice's execution is returned to court it is in the power of the plaintiff, supposing the levy to have been sufficiently special, to apply to the court and have a judgment *there* rendered in his behalf for the sum recovered before the justice and costs, and we incline to the opinion that upon a fair construction of the statutory provisions he may, after obtaining such a judgment, sue out a *venditioni* to sell the land so levied upon with a special *fi. fa.* in case the amount of the judgment and costs be not made by such sale, to levy generally for the

unsatisfied part of the judgment. But unless a judgment be rendered in court, if the recovery remain altogether a justice's judgment, the authority of the court extends no further than to enforce the sale of the land levied upon by the constable. It is a general rule that an execution cannot issue from any court but that in which the judgment has been rendered; and wherever a departure from this rule is authorized, it must be confined within the prescribed limits. Besides, the county court derives all its jurisdiction to act upon such subjects from the levy made and returned to it, and the *first step* which it is authorized to take is to order the land levied upon to be sold. We have seen that this step cannot be taken without a notice to the defendant in execution unless he appear and waive notice. If *this* be an indispensable requisite to the first action of the court, it is necessarily prerequisite also to further action. The court has no *original* authority to issue a *fi. fa.*, but one dependent upon and suppletory to its authority to sell what has been returned to it as levied. With every disposition to view with indulgence proceedings in which a strict adherence to form is not often observed, we must nevertheless be cautious in upholding those fundamental rules which the Legislature has deemed necessary for the security of property. We are obliged, therefore, to hold *these* executions invalid as *fi. fas.*

If we are correct in the conclusion that the *fi. fa.* from the court has priority over these two executions, there is no difficulty in assigning to it a preference over the six other executions. These were issued
(33) on 16 November, the day of the *teste* of the *fi. fa.* from the court, and were on that day levied upon "land" without any further specification or description. No judgment nor order of court is shown, nor notice to the defendant nor appearance by him, but writs issued from the court on the same day, reciting levies "on the lands and tenements of Fennel Sauls," and following the language used in the executions in favor of Richard Smith, which have been before examined.

It is the opinion of this Court that the judgment of the Superior Court of Wayne is erroneous, and that the whole of the money brought into court by the sheriff ought to be applied towards the satisfaction of the judgment in favor of the plaintiffs.

PER CURIAM. Judgment reversed.

Cited: Huggins v. Ketchum, post; Jones v. Austin, 32 N. C., 22; *Morrisey v. Love,* 26 N. C., 41; *Burke v. Elliott, id.,* 358; *Hamilton v. Henry,* 27 N. C., 270; *Presnell v. Landers,* 40 N. C., 256; *Powell v. Baugham,* 31 N. C., 155.

PENELOPE MATHEWS v. GIDEON C. MARCHANT.

Witness—Will.

1. A "credible witness" to prove a nuncupative will, under the 15th section of the act of 1784 (1 Rev. Stat., c. 122, sec. 2), means one who is competent according to the rules of the common law; and if he be incompetent from interest, such incompetency may be removed by a release.
2. A party cannot, by refusing his assent to a release or surrender tendered by a witness on the other side, exclude his testimony. The depositing the release in the clerk's office will be sufficient to enable the witness to testify.
3. The case of *Allison v. Allison,* 11 N. C., 141, approved.
4. The case of *Perry v. Fleming,* 4 N. C., 344, approved.

THIS was an issue of *devisavit vel non,* as to a paper writing propounded for probate as the nuncupative will of Penelope Mathews the elder. Upon the trial of the issue at Pasquotank on the last circuit before his Honor, *Judge Settle,* the jury found a verdict (34) establishing the will, subject to the opinion of the court upon the following facts.

Penelope Mathews, during her last sickness, duly made her will without writing, and called upon a competent number of persons to bear witness thereto; it was reduced to writing in proper time, and all other ceremonies which the law requires were duly complied with. The only question presented to the court was whether the witnesses were competent.

One witness was admitted to be competent, but the other witness was a legatee in the nuncupative will, but duly executed and offered a release to the distributees, which they refused to accept, whereupon he delivered the same to the clerk of the court, absolutely for their benefit. It was admitted by the parties that if the legatee could in any way render himself a competent witness by any release that could be executed by him, without the assent of the distributees, that such release should be taken as executed.

Upon these facts his Honor was of opinion "that although in a will of real estate the competency of the witness is referable to the time of execution, and that policy would seem to require the same qualification in the witness to a nuncupative will, yet it is competent in the Legislature to prescribe different qualifications, and that in the proof of a nuncupative will the statute uses no language that does not apply to a witness competent at common law." His Honor, therefore, held that the will was well proved, and the defendants appealed.

The case was submitted without argument by

A. Moore for the defendants, and
Kinney for the plaintiffs.

DANIEL, J. The 11th section of the act of 1784 (see 1 Rev. Stat., ch. 122, sec. 1) requires a will of *lands* to be subscribed by two witnesses in the presence of the testator, no one of which shall be interested in the devise of the said lands. This Court determined in the case of *Allison v. Allison,* 4 Hawks, 141, that a witness to such a will, who was interested at the time of attestation, was incompetent to prove the will; and
(35) that no subsequent release would render him competent. This decision arose upon the peculiar phraseology of the 11th section. The 15th section of the same act (1 Rev. Stat., ch. 122, sec. 2) is couched in different terms; it declares that no nuncupative will in any wise shall be good where the estate exceeds two hundred dollars, unless *proved* by two *credible* witnesses, present at the making thereof. The section in our act is mainly taken from the 19th section of the English statute of frauds. That section in the statute of frauds declares "that no nuncupative will shall be good, when the estate thereby bequeathed shall exceed thirty pounds, that is not *proved* by the oaths of three witnesses." This statute having said nothing as to the qualifications of these witnesses, it was afterwards thought proper to declare (Stat. 4 Anne, ch. 16, sec. 14), "that all such witnesses as are and ought to be allowed to be good witnesses upon trials at law, by the laws and customs of this realm, shall be deemed good witnesses to prove any nuncupative will, or anything relating thereto." This legislative interpretation is, we think, just such a one as a court of common law necessarily must have put upon the section, had the explaining statute never been passed. Witnesses, disinterested at the *time* they are called on to *prove* the nuncupative will, must be considered to be *"credible,"* within the meaning of the 15th section of the act of 1784, or in other words *competent* according to the course of the common law. We see nothing in the wording of this section (it being confined to wills of personal property) to induce us to believe that the Legislature intended to interfere with the rules of proof established at common law. The objection to competency on the ground of interest is removed by an extinguishment of that interest, by means of a release. And a party cannot, by refusing his assent to a release or surrender, tendered by a witness on the other side, exclude his testimony. 1 Stark. on Ev., 125, 126; 3 Term Rep., 27. The depositing the release in the clerk's office was sufficient to enable the witness to testify. *Perry v. Fleming,* 2 Car. Law Repos., 458. We think, after the release given, the witness was competent to prove the nuncupative will mentioned, and the opinion of the court was correct.

PER CURIAM. 28 Judgment affirmed.

JAMES W. HUNT, ADMINISTRATOR, v. ANTHONY DAVIS. (36)

Deed for Slave.

1. A gift, by a deed, of a slave, reserving a life estate in the donor, passes no interest to the donee at common law. And a deed of bargain and sale of a slave for the life of the bargainee, in consideration of an annuity to the bargainor, conveys the entire interest to the bargainee.
2. The cases of *Graham v. Graham*, 2 Hawks, 322; *Foscue v. Foscue*, 3 Hawks, 538, and *Sutton v. Hallowell*, 2 Dev. Rep., 186, approved.
3. A lease for life of a chattel, if made by deed, is subject to the same construction as a conveyance for life, and no remainder is left, at common law, in either case.

DETINUE for a negro slave by the name of Enoch, tried at Carteret on the last circuit before his Honor, *Judge Saunders,* when the jury returned a verdict for the plaintiff, subject to the opinion of the court upon the following facts:

Blandinah Morse, the intestate of the plaintiff, being the owner of the slave in controversy, on 27 October, 1809, executed a deed to her daughter Susan, whereby, in consideration of natural affection, she gave, granted and confirmed the said negro slave to her said daughter Susan, *after her* (the said Blandinah's) *death,* thereby reserving the use and benefit of the said negro during her, the donor's, life. On 6 May, 1822, Blandinah Morse executed a deed to Jacob Rumley, whereby, in consideration of the sum of eight dollars per annum, she bargained, sold, and delivered unto the said Jacob the said negro slave during her natural life. Blandinah Morse died in February, 1827, and shortly before her death Susan Morse made an exchange of a negro girl with Rumley for the negro boy Enoch, and in September, 1831, conveyed Enoch to the defendant. The plaintiff administered upon the estate of Blandinah Morse in 1836, and soon afterwards instituted this action.

The defendant claiming thus under both the deeds aforesaid of the plaintiff's intestate, two question of law arose, the first whether the gift to Susan Morse was not invalid, because made to take effect after a life estate in the donor; and the second whether the deed to Rumley transferred the whole legal estate of the bargainor. His (37) Honor was of opinion for the plaintiff upon the first question, and for the defendant upon the second, and thereupon the plaintiff was nonsuited and appealed.

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

GASTON, J., after stating the case as above, proceeded as follows: According to the settled law of the land, before the act of 1823, sec. 1 (Rev.

Stat., ch. 37, sec. 22) making certain limitations of slaves by deed valid, a conveyance of a slave by deed, after a life estate, or with a reservation of a life estate therein, was void. *Graham v. Graham,* 2 Hawks, 322; *Foscue v. Foscue,* 3 Hawks, 538; *Sutton v. Hollowell,* 2 Dev. Rep., 186. These decisions were founded avowedly on the principle that there could not be any remainder in a slave, after a life estate granted by deed. The opinion of the judge upon the operation of the first deed is in conformity with these decisions, and the principle which sustains them necessarily leads also to the opinion given by him upon the operation of the second deed. If a remainder after a life interest in a chattel be null, because the life interest is the whole estate, then a conveyance of that chattel for life must pass the whole estate. It is insisted, however, that this principle is not to be applied to the deed made to Rumley. It is said that because the *consideration* of that conveyance is declared to be the rendering of an annual sum, it is to be inferred that the contract was in the nature of a lease. I do not see how this inference would help the plaintiff, unless we can also infer that the lease was to be short of a lease *for life*—as the lease of a chattel for life, as well as the conveyance of the same for life, if made by deed, is subject to the direct operation of the principle that it leaves *no remainder* in the lessor or bargainor. It is very clear that we cannot infer that this was a lease for any certain number of years, and still less that it was a lease from *year to year,* determinable by the death of the lessor. If a lease, it is certainly one during the life of the lessor. But I am at a loss to conceive why it is called a lease. It
(38) purports in direct terms to be "a bargain and sale and delivery" of the negro himself, and an annuity furnishes as fit a consideration for a sale as a sum in gross. It purports to be a sale of the negro during her life, because it was no doubt supposed by her that she had a life estate only to dispose of, the residuary interest being in her daughter. If the legal operation of this deed be to transfer her entire estate, contrary to her actual intent, there is less cause to regret it, as thereby is corrected the inconvenience of disappointing the intent of the intestate in the conveyance of this ulterior interest to her daughter, as was no doubt contemplated by the former deed. The Court sees no error in the judgment rendered below, and directs it to be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Lance v. Lance, 50 N. C., 414; *Dail v. Jones,* 85 N. C., 225.

JACOB PHIPPS v. JOHN W. GARLAND.

Action for Seduction—Father.

In an action by a father for the seduction of his daughter, the relation of master and servant must subsist actually or constructively; and if the daughter be of full age and do not reside with her father, the action cannot be maintained, although she occasionally visits him and is seduced while she is going to his house on one of these visits.

THIS was an action of trespass on the case brought to recover of the defendant damages for the seduction of the plaintiff's daughter. Plea, not guilty.

The case was tried at Yancey, on the last fall circuit, before his Honor, *Judge Settle,* when the daughter was introduced as a witness for the plaintiff and testified that her father's house was her home; that her bed and furniture and all her other property, except some clothing, remained there; that she, with her father's consent, went to live in the house of the defendant's father, who was a relation, as a hireling, and remained there three or four years, performing such services as (39) were required; that she was about thirty years old when she went to live with defendant's father, and that occasionally during the period of her residence there she returned to her father's house and performed the ordinary duties in his family of washing, cooking, and milking; that she was seduced by the defendant while she was on her way home to her father's house; that on that occasion she remained with her father's family eight or ten days, when she returned to the house of the defendant's father, where she continued to live until within four or five months of the birth of her child, when she was carried home by her father, with whom she had since remained. She further testified that she had not been at her father's house for seven or eight months previous to her seduction. Upon this testimony the defendant's counsel moved that the plaintiff should be nonsuited, but his Honor refused the motion and instructed the jury that if they believed the testimony of the daughter they must find a verdict for the plaintiff, which they did, and the defendant appealed.

Caldwell for the defendant.
Burton for the plaintiff.

DANIEL, J. If the relation of master and servant does not subsist, actually or constructively, at the time, the father cannot maintain either an action of trespass or an action on the case for the seduction or the debauchery of his daughter. The rule is settled that if the daughter be of age she must be in her father's service, so as to constitute in law and in fact the relation of master and servant, in order to entitle her father

to a suit for seducing her. *Nickleson v. Stryker,* 10 John. Rep., 116; *Postlethwaite v. Parks,* 3 Bur. Rep., 1878. These were actions of trespass, but the rule is the same if the action be case. In *Satterthwaite v. Dewhurst,* 26 Eng. Com. Law Rep., 378, *Lord Mansfield,* in delivering the opinion of the Court, said: "This is an action on the case for debauching the plaintiff's daughter, by means of which the daughter was unable to maintain herself, and the plaintiff was obliged to maintain her." After looking into the case we find there is no precedent of such an
(40) action, unless upon a *quod servitium amisit.* The case of *Russell v. Corne,* 2 Lord Rayne. Rep., 1031—Salk. 119, is in point. This is an action brought by a third person for the incontinence of two people, both of whom may possibly be of age; at least it does not appear that they are otherwise. We are of opinion that this action cannot be maintained. The case in 5 Cowen's Rep., 106, relied on by the plaintiff's counsel, whether it be law or not, is not apposite. It only goes the length of declaring that if the daughter be under age at the time of seduction she will be presumed to be under the control and protection of her father, so as to entitle him to the action to recover the expenses attending her confinement and the loss of her services, whether she actually resided with him or not at the time of the seduction. In the case now before us the daughter was of full age and did not live with her father at the date of the debauchery. At that time there was no legal obligation on the father to maintain and take care of her, either in sickness or in health. In no way was the relation of master and servant shown to subsist between them. Therefore the charge of the judge to the jury that if they believed the testimony of the daughter the plaintiff was entitled to recover we think was erroneous, and there must be a new trial.

PER CURIAM. Judgment reversed.

Cited: McDaniel v. Edwards, 29 N. C., 410.

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(41) HENRY GRAY, ET UXOR ET AL. *v.* ABRAM MAER, ADMR. OF JOHN PEARCE ET AL.

Re-probate of Will—Lapse of Time.

Where, upon a petition for the re-probate of an alleged will, it appeared that the instrument was attested by subscribing witnesses, but was not written or subscribed by the testator, that it disposed of the whole of the testator's estate from the next of kin in favor of a person who was present at the making, and that it was proved the day after it was made: *It was held* that probate ought to be revoked; that the lapse of nine or ten years would not raise a presumption of acquiescence on the part of the next of kin, when it appeared that they were numerous and were much

dispersed, and several of them were infants and married women. On a petition for the re-probate of an alleged will, if it appear that one of the defendants lives beyond the limits of the State, notice by publication is sufficient as to him.

THIS was a petition filed in the county court of Martin at its October Term, 1835, by the next of kin of John Pearce against the administrator, with his will annexed, and his legatees praying for a re-probate of that will. It appearing to the court that the administrator was not a resident of the State, publication was ordered as to him, and upon his not appearing the petition was subsequently taken *pro confesso* as to him and the cause was heard upon the petition, answers and proofs, when the following appeared to be facts.

The will purported to be executed 11 September, 1826, the day on which the alleged testator died. It was written altogether by another person and was not subscribed by the alleged testator, but was attested by three subscribing witnesses. It purported to convey the testator's whole estate (which it was proved consisted entirely of personalty) to his wife for life, and afterwards to Henry Slade, who was present when the alleged will was made. On the day after its execution it was offered for probate in the county court of Martin, and a probate thereof had in the following words: "This paper-writing, purporting to be the last will and testament of John Pearce, was produced in open court and proved according to law, and on motion was ordered to be recorded." Henry Slade, the legatee in remainder, was not one of the next of kin of the testator. The next of kin were several in number, lived at a (42) distance from each other, and some of them were under the disabilities of coverture and infancy. Upon these facts the county court ordered a re-probate, and the defendants appealed to the Superior Court, where, on the last circuit before his Honor, *Judge Pearson,* the cause coming on to be heard, it was objected by the defendants that Abram Maer, the administrator with the will annexed, had not properly been made a party, and that the petitioners had by their delay acquiesced in the probate; but both objections were overruled by his Honor, and a re-probate ordered and the defendants appealed.

Heath for the plaintiffs.
Badger and Iredell for the defendants.

GASTON. J. We are of opinion that the Superior Court did not err in calling in the probate of the alleged will of John Pearce and ordering a re-probate thereof. Without intimating any opinion upon the merits of the controversy, upon which we have neither formed nor have a right to form one, we must see that the former probate was made under circumstances fitted to excite doubts of its propriety. The will purports to be

attested by several subscribing witnesses, but not to be signed by the testator. If attested after his death, then it must have been offered as a nuncupative will, and by law ought not to have been proved as such until after process to the next of kin. If attested in the testator's presence, it is a singular circumstance that there should be attestation without subscription. The will disposes of the whole estate from the relations of the testator, in favor of one present at the making. There should have been no haste in carrying such a will through the forms of a probate; and the testimony in support of it ought to have been very satisfactory. Yet it was proved on the day after it was made—and the record is *wholly* silent as to the proofs by which it was established. It is right that the validity of this document as a will should be more deliberately and solemnly tried.

(43) There is no presumption of assent to the probate before or when it was made, and when the dispersed situation of the next of kin and the disabilities of several of them as infants and married women are considered, there is not a sufficient ground afforded by the delay in preferring this petition from which to infer an acquiescence in the probate since.

It being impracticable to serve the defendant, Abram Maer, with personal notice of the petition, it was competent for the court to direct such notice by publication as is prescribed by law in cases of suits by petition (1 Rev. Stat., ch. 31, sec. 98).

The order of the Superior Court is affirmed, and this opinion directed to be certified thereto.

PER CURIAM. Judgment affirmed.

Cited: Etheridge v. Corpew, 48 N. C., 18.

DEN EX DEM. GEORGE C. MENDENHALL ET AL. *v.* JOHN CASSELLS.

Grant from State—Evidence of Boundary.

1. Under the act of 1794 (Rev., ch. 422) a grant from the State conveying more than six hundred and forty acres of land is good.
2. In this country traditionary evidence is received in regard to *private* boundary, but we require that it should have something definite to which it can adhere, or that it should be supported by proof of correspondent acquiescence or enjoyment. A mere report, or neighborhood reputation, unfortified by evidence of enjoyment or acquiescence, that a man's paper title covers certain land, is too slight and unsatisfactory to be received as evidence in questions of boundary.

THIS was an action of ejectment, brought by the lessors of the plaintiff to recover one hundred acres of land. On the trial at Montgomery, on

the last circuit before his Honor, *Judge Dick,* the lessors of the plaintiff produced, in support of their title, a grant from the State to one Barnabas Dunn, dated 11 May, 1795, for ten thousand two hundred and forty acres of land, lying in Montgomery County, and then deduced title regularly from Dunn to themselves. The defendant admit- (44) ted that the land in controversy was covered by the grant to Dunn, but contended that the lessors of the plaintiff were not entitled to recover: First, because the grant to Barnabas Dunn was for more than six hundred and forty acres of land, and second, because the land in controversy had been granted by the King of Great Britain in the year 1745 to James Huey and Murray Crimball, and that therefore the State of North Carolina had no right to grant it to Barnabas Dunn in 1795. In support of the second objection the defendant offered copies of four several grants from the King of Great Britain to Huey and Crimball, dated in 1745, and purporting each to convey twelve thousand five hundred acres of land lying on the branches of certain rivers and bounded by certain courses and distances. The defendant then offered to prove that it was the reputation of the neighborhood where the land in controversy was situated that the premises described in the declaration lay within the boundaries of the grants to Huey and Crimball, but the evidence was rejected by the court.

The jury, under the direction of the judge, returned a verdict for the plaintiff, and the defendant appealed.

Winston for the defendant.
Caldwell for the plaintiff.

DANIEL, J. This ejectment is brought to recover one hundred acres of land in the possession of the defendant. The lessors of the plaintiff deduced their title under a grant by the State to Barnabas Dunn, dated in May, 1795, for 10,240 acres of land. The defendant contended, first, that the grant to Dunn was void, as it contained more land than six hundred and forty acres. The court, however, was of the opinion that the grant was not void on that account, but was good in law. Waiving the inquiry whether this objection can be entertained when offered thus collaterally, we are nevertheless of opinion that it was properly overruled.

The act of 1784 (Rev., ch. 202) authorized surveyors to include many entries in the same survey, on the great swamps in the eastern parts of the State; and it authorized the Secretary of State to make out a grant for the same according to the return of the surveyor. In (45) the year 1794 (Rev., ch. 422) the Legislature amended the act of 1784 by declaring "that all the lands in the State lying to the eastward of the line of the ceded territory (Tennessee) shall be deemed and considered as coming within the meaning and purview of the said act."

Secondly, the defendant contended that the land in controversy had been granted by the King of Great Britain in the year 1745 to James Huey and Murray Crimball, and therefore that the State of North Carolina had no right to grant it to Dunn in the year 1795. The defendant then produced four several grants from the King to Huey and Crimball, each for 12,500 acres. The lands comprehended in each of these grants are designated by lines, marked trees, and known water-courses. The defendant had made no survey, or attempt to survey, these grants, or either of them. He failed in evidence to locate them. But he offered to prove "that it was the reputation of the neighborhood where the land in controversy was situated that the premises described in the declaration lay within the boundaries of the grants to Huey and Crimball." The court rejected the evidence, and, we think, correctly rejected it. *Non constat,* from what appears in the case, but that the defendant might have ascertained the fact mathematically, whether the Huey and Crimball grants covered the lands which the lessors of the plaintiff claimed. The rules of law, admitting reputation or hearsay, either as original or secondary evidence, are not applicable to a case of this description. The authorities cited by the defendant's counsel do not appear to us to bear upon the facts of this case. In a country recently and of course thinly settled, and where the monuments of boundaries were neither so extensively known nor so permanent in their nature as in the country of our ancestors, we have from necessity departed somewhat from the English rule as to traditionary evidence. We receive it in regard to *private* boundaries, but we require that it should either have something definite to which it can adhere or that it should be supported by proof of correspondent enjoyment and acquiescence. A tree, line, water-course may be shown to have been pointed out by persons of a by-gone generation, as the true line or water-course called for in an old deed or grant. A field,

house, meadow, or wood may be shown to have been reputed the
(46) property of a particular man or family, and to have been
claimed, enjoyed and occupied as such. But a mere report, unfortified by evidence of enjoyment or acquiescence, that a man's paper title covers certain territory is too slight and unsatisfactory to warrant a rational and conscientious person in making it the basis of a decision affecting important rights of his fellowmen, and, therefore, as far as we are advised, has never been received as competent testimony. We are of the opinion that the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Toole v. Peterson, 31 N. C., 186; *Scoggins v. Dalrymple,* 52 N. C., 48; *Shaffer v. Gaynor,* 117 N. C., 20.

DUNNS & McILWAINE v. JAMES W. BATCHELOR, EXR. OF JOHN CROWELL.

Judgment—Remittitur.

1. An entry, upon the rendition of a verdict in favor of the plaintiff, that "the defendant is entitled to a credit to be ascertained by M. F. and J. H. S., and the clerk is then authorized to enter a remittitur, judgment of the court accordingly and for costs," is not a judgment *then* rendered, but an agreement for a judgment to be rendered subsequently upon the ascertainment by the referees of the credit to which the defendant is entitled.

2. A judgment regularly entered at one term of a court cannot be set aside by the court at a subsequent term.

THIS was an action of debt brought in the county court of Halifax upon a bond executed by the defendant's testator. Pleas, *payment, fully administered, and no assets.* At May Term, 1837, the case was tried, and on the minutes of that term the following entry was made: "The following jury was sworn and empanelled, to wit, etc., who say they find all the issues in favor of the plaintiffs, that the principal of the bond declared on is $1,298.43, and assess their damage to $149.95. The defendant is entitled to a credit to be ascertained by M. Ferrall and J. H. Simmons, and the clerk is then authorized to enter a remittitur, judgment of the court accordingly and for costs." M. Ferrall and (47) J. H. Simmons met at the clerk's office and agreed on and entered the following remittitur, viz., $835.98 paid 18 April, 1836—balance due May court, 1837, $558.07. At August Term, 1837, another entry in relation to this cause appeared as follows, to wit: "On motion this term the verdict and judgment rendered at last term is set aside, and the following jury sworn and empanelled, to wit, etc., who say they find the principal of the bond declared is $1,298.43, and assess damages to $149.95, the bond to be credited as of 18 April, 1836, in the sum of $835.98, and that the defendant has no assets—issue *sci. fa.* against the heirs and devisees of John Crowell, deceased. Judgment against the plaintiffs for costs."

At February Term, 1838, it appeared that "On motion in court and by consent of parties it is ordered that the judgment against the defendant set aside at August court, 1837, be reinstated, that the parties may avail themselves of all the legal rights which they then had in relation to said judgment, the counsel of the parties not agreeing as to the terms upon which the judgment was then set aside. It is further ordered that the entries upon the several dockets respecting said judgment made at August court, 1837, be stricken out."

The defendants then moved to set aside the judgment obtained in this cause at May Term, 1837, upon the ground that the plaintiffs had deceived him with respect to the amount of their claim, and that in consequence thereof he had not assets sufficient to satisfy the same, but only $460 thereof. The plaintiff's counsel protested against the allowance of this motion because his clients who resided out of the State had no notice of it, and because the court had no jurisdiction to sustain such motion. But the court decided that if the defendant would pay into the clerk's office for use of the plaintiffs the sum of $460 the judgment should be set aside and a new trial granted; and upon the defendants complying with the terms the judgment was set aside accordingly and the plaintiffs appealed to the Superior Court, where, on the last circuit before his Honor, *Judge Pearson,* the order of the county court from which the appeal was taken was reversed and a *procedendo* awarded, directing that the plaintiffs should have execution on their judgment obtained
(48) at May Term, 1837. From this judgment of the Superior Court the defendant appealed to the Supreme Court.

The Attorney-General for the defendant.
Badger & Devereux for the plaintiffs.

GASTON, J. The difficulty in this case is to understand the entry on the record of the county court upon the rendition of the verdict at the May Term, 1837. "The defendant is entitled to a credit to be ascertained by M. Ferrall and J. H. Simmons, and the clerk is then authorized to enter a remittitur; judgment of the court accordingly, and for costs." It is insisted on the part of the plaintiffs that the fair interpretation of it is that judgment was *then* rendered for the amount of the verdict and costs of suit, with an agreement to credit the judgment with an amount which had not been credited in taking the verdict, and which was to be ascertained by M. Ferrall and J. H. Simmons. By the defendant it is insisted that no judgment was then rendered, because the balance for which a judgment ought to be rendered had not been ascertained —that the amount of the plaintiffs' claim was indeed ascertained by the verdict, but that of the defendant's credit was to be ascertained by reference—and that on the report of these referees of the amount of this credit, then that the clerk was to enter a remittitur of so much of the damages as were found by the verdict, and a judgment accordingly for the balance, and the costs. One cannot be certain which of these constructions is the true one, but the court is inclined to adopt the latter. The words "judgment of the court accordingly and for costs" are not found in their proper place if the former were the meaning of the parties, it would have been natural under that sense of the agreement to

have entered them immediately after the verdict, and before the reference. Besides, a "remittitur" is the appropriate term for a relinquishment of part of damages found by a verdict before entry of a judgment, and not for a credit on the judgment itself. And the words "judgment accordingly," by the grammatical structure of the sentence would seem to be governed by the phrase "authorized to enter."

We have said that the interpretation of this entry is the only (49) matter of doubt. For if the plaintiffs' construction were right we hold unhesitatingly that the county court had not the power at a succeeding term to set aside a judgment thus regularly entered. If the defendants construction be right then *no judgment* was rendered at that term, and the court had power at the succeeding term, upon satisfactory cause shown, to set aside what was called a judgment, but was in truth an agreement for a judgment which had not yet been rendered, and ordering a new trial. The motion is regarded as made at the next or August Term, because though moved at the February Term, 1838, it was under the agreement of the parties that they were to be severally remitted to their rights as of the August Term, 1837.

If the county court had the power to make the order appealed from, the Superior Court acted erroneously in reversing it, for the latter could not supervise the discretion of the former in making the order. We have no doubt but that the Superior Court did not attempt to control that discretion, but acted upon the ground of a supposed excess of authority in the county court. The judgment of the Superior Court must be reversed, with costs.

PER CURIAM. Judgment reversed.

Cited: Moore v. Hinnant, 90 N. C., 166.

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(50)

THE GOVERNOR TO THE USE OF ISAAC WHITE, ADMINISTRATOR, v. JOHN MILLER ET AL.

Official Bond—Demand Before Suit.

1. A bond which imposes upon an officer nothing but what the law requires cannot be objected to, because it does not contain *all* that the law prescribes. Hence, a bond executed by a constable which stipulated that he should "well and faithfully execute the office of constable during his continuance in said office, agreeably to an act of Assembly," etc., was held to be good as an official bond under the act of 1818 (1 Rev. Stat., ch. 24, sec. 7), prescribing the duties of constables.

2. In an action upon a constable's bond for failing to pay over money collected by him, it is necessary to prove a demand upon him, or to show

such misapplication of the money received, or such misconduct on his part as established unfaithfulness in accounting with and paying over to the relator what he is entitled to receive.

3. The cases of *Rhodes v. Vaughan*, 9 N. C., 162; *Williams v. Yarborough*, 13 N. C., 14, and *Potter v. Sturges*, 12 N. C., 7, approved.

4. When a sheriff returns an execution "*Fieri feci*" and retains the money, he is immediately liable to the plaintiff's action as for money had and received, or for a breach of his official bond.

THIS was an action of debt brought in the name of David L. Swain, Esquire, Governor, etc., as successor to Montfort Stokes, Esquire, late Governor, upon a bond executed by the defendants as sureties to one Stephen Allred, upon his being appointed a constable during the year 1832. The bond was made payable to Montfort Stokes, Esquire, Governor, etc., and his successors in office. The condition was as follows: "Now, if the said Stephen Allred shall well and faithfully execute the office of constable during his continuance in said office agreeably to an act of assembly in that case made and provided, then the above obligation to be void, otherwise to remain in full force and virtue."

The relator assigned as a breach of the conditions of the bond that the officer had collected certain moneys due to the relator's intestate, and had failed to pay over the same. After oyer of the bond and conditions the defendants pleaded the *general issue* and *conditions performed and not broken.*

(51) Upon the trial at Randolph on the last Fall circuit before *Saunders, J.*, the relator proved the execution of the bond by the defendants, and that the money sued for had been received by the constable within that official year.

The defendants objected first, to the bond being read in evidence, on the ground that it was not an official bond, not being taken as the several acts of assembly prescribed and moved to nonsuit the plaintiff, which motion was overruled by the court, and the bond permitted to be read in evidence. The defendants then moved to nonsuit the plaintiff upon the ground that there was no proof of any demand on the constable or the defendants by the relator for the money alleged to have been collected, before the suit was brought. This objection was also overruled by his Honor, who held that no demand was necessary, and a verdict being returned for the plaintiff the defendants appealed.

Mendenhall for the defendant.
Winston for the plaintiff.

GASTON, J. This action was instituted in the name of David L. Swain, Governor of the State and successor to Montfort Stokes, late Governor,

against the defendants, upon a bond executed by them as the sureties of Stephen Allred, a constable, and payable to the said Stokes and his successors in office. The plaintiff having obtained a judgment below the defendants insist that the judgment is erroneous and pray for its reversal on two grounds.

In the first place it is insisted that the bond is so variant from that which the law required to be given that it is not an *official* bond capable of passing in succession. The alleged incompatibility between the law and the bond is to be found in the condition. Previously to 1818 our acts of Assembly required that every constable should execute a bond with sureties, "conditioned for the faithful discharge of his duty." In that year it was enacted (see 1 Rev. Stat., ch. 24, sec. 7) that the bond of the constable should be conditioned, *"as well* for the faithful discharge of his duty as constable as for his diligently endeavoring to collect all claims put into his hands for collection, and faithfully paying over all sums thereon received either with or without suit to the persons to whom the same might be due." This is the last act passed in (52) relation to the conditions of constables bonds. In the bond declared on the condition is "that the said Stephen shall well and faithfully execute the office of constable during his continuance in office *agreeably to an act of Assembly, in such case made and provided.* In answer to the objection made, it has been said, in the first place, that the act of Assembly referred to must be understood to be the act of 1818, because by prescribing that thenceforth every constable's bond should stipulate for diligence in endeavoring to collect *all* claims put into his hands, and fidelity in accounting for all moneys received on such claims, the act thenceforth made such diligence and fidelity official obligations—and because the act of 1818 was the existing act, containing the latest and fullest exposition of the duties of constables, the performance whereof was to be secured by official bonds, and it was further argued that if the act referred to can be judicially understood to be the act of 1818, then by the reference the terms of the condition are made to correspond with those required by that act and the case is brought within the operation of the principle sanctioned by this Court in *Rhodes v. Vaughan,* 2d Hawks, 162, that where an office bond is so drawn as substantially to include every obligation, and to afford every opportunity of defense intended by the law, it is sufficient, however inartificial, defective, or redundant its language. The court is inclined to think this a sufficient answer to the objection, but it does not deem it necessary so to decide for another answer has been given which is entirely satisfactory. Whether the words of reference can or cannot be understood as declaring with distinctness, the purpose of the obligors to stipulate for *all,* which the act of 1818 requires shall be inserted in the official bond—and regarding the words of

reference as uncertain or unmeaning, nevertheless the condition does contain a stipulation for the faithful performance of the officer's duties. If it contain not *all* which the State had a right to require should be found in the condition of such a bond, it contains nothing which the State had not a right to require should be put into it. It imposes on the obligors
(53) no liability beyond that which the law declared should be imposed upon them, and *they* cannot complain that it does not impose a further liability which might rightfully have been exacted. The public functionaries might perhaps have refused to accept of the bond as being defective, but having been received the defendants cannot object to it as illegal. *Williams v. Yarborough,* 2 Dev., 14. There is nothing in the bond contrary to law or inconsistent with it. The most that can be objected is that the bond falls short of the requirements of the law.

The next error assigned is that the judge erred in holding that a sufficient breach was established by showing that the principal of the defendants had collected money for the relator without showing any demand upon him for payment. As the case does not set forth any facts which would excuse or dispense with a demand, if by law such a demand be in general necessary, we must understand that it was the opinion of his Honor and such the import of his instruction, that it is the duty of a constable who has collected money, to seek out the creditor and pay it over to him without request. We believe this opinion to be erroneous. It was settled in the case of *Potter v. Sturges,* 1 Dev., 79, that a constable who has thus collected is in the nature of an accountable agent—and it follows from the principle there established, that he is guilty of no breach of duty until he refuses to account or misapplies what he has received. With respect to sheriffs who collect money on executions issued from courts it is to be recollected that the exigency of these writs is to have the money in court. With them a failure to return the money is of itself a breach of duty. There can be no question, therefore, when a sheriff returns on such an execution *"Fieri faci,"* and retains the money, but that he is immediately liable to the plaintiff's action as for money had and received, or for a breach of his official bond. In England indeed, the usage of keeping the money in the sheriff's office for the purpose of satisfying the plaintiff is so fixed, that for the protection of a sheriff who has acted upon this usage in good faith, and who has been ready to pay the money on demand, the court will stay the proceedings in such an action on the payment of the money levied without costs, *Jeffries v. Sheppard,* 3 Barn and Ald, 696. In our country, as there is no such fixed usage, it is presumed that so extensive an indulgence would
(54) not be granted to a sheriff. But there is no court or office into which, by law or by the terms of their writs of execution, con-

stables are to return moneys by them collected. They are bound, therefore, to *hold* as well as *collect* for the persons entitled, and thus to perform the entire duty which upon court executions the law has divided between the sheriff and the clerk. It is not a breach of duty, therefore, in the constable to hold—but only to *withhold* the money. Nor is the nature of this duty at all altered by the provisions in the act of 1818, or by the stipulations of a bond made in conformity to that act. Before that act was passed it was very common to put notes and accounts into the hands of constables for collection, either by warrant or without warrant, as might be found expedient. Many collections were made from the debtors without putting these claims into suit, and for moneys thus collected; the official bond of the constable afforded no security, as the money was not collected by virtue of his office. Often, too, it happened that the claims were lost because of neglect to put them in suit, and for this injury the official bond afforded no redress, as it was no part of his *official* duty to cause suits to be instituted. The purpose of the act is to secure by a proper bond to the persons thus employing constable's diligence in prosecuting these claims, and faithfulness in paying over what may be received. But neither the act nor the condition of the bond was intended to alter the measure of faithfulness or the mode of making payment. These depended on the character and the duties of him whose faithfulness was to be secured. He was faithfully to pay all moneys, whether collected by suit or without suit, but to pay as one whose duty it is by law to hold securely what has been received until called to an account therefor. To support the breach alleged in this case, evidence of a demand was necessary of such misapplication of the moneys received, or of such misconduct on the part of the constable as established unfaithfulness in accounting with and paying over to the relator what he was entitled to receive.

Because of the error thus sustained the judgment must be reversed, and a *venire de novo* awarded.

PER CURIAM. Judgment reversed.

Cited: Waring v. Richardson, 33 N. C., 79; *Cole v. Fair,* 46 N. C., 175; *Kivett v. Massey,* 63 N. C., 241; *Bryant v. Peebles,* 92 N. C., 177; *Moore v. Garner,* 101 N. C., 377.

(55) DAVID S. MATHIS v. EDMUND S. MATHIS ET AL.

Alteration of Bond.

An alteration of a bond by a stranger in a material part does not avoid it, but where it was declared on as a bond of $12.50, and the evidence was that it had been altered to that sum from $7.50, the plaintiff has not a right in that action to recover the latter sum, because his evidence does not, upon *non est factum*, support the issue made by his replication.

DEBT commenced by a warrant upon a bond purporting to be for $12.50. Plea, *non est factum.* Replication taking issue.

The defense was that the bond had been originally given for $7.50, and had afterwards been altered by a stranger to the sum of $12.50. This was denied by the plaintiff, and he also contended that if the bond had been so altered he had a right to recover the sum for which it was originally given.

His Honor, *Judge Bailey,* at Sampson on the last fall circuit, thinking that the alteration of a bond by a stranger in a material part avoided it, so instructed the jury, who returned a verdict for the defendant, and the plaintiff appealed.

Strange for the plaintiff.
Henry for the defendant.

DANIEL, J. The plaintiff brought this warrant against the defendant "to answer a plea of debt of $12.50 and interest, due by note." The defendant pleaded *"non est factum."* On the trial of the issue it was proved that the defendant executed to the plaintiff a bond for $7.50, which bond it was alleged had been altered by a stranger from $7.50 to the sum of $12.50. The plaintiff's counsel requested the court to instruct the jury that if they were satisfied that the fact was so, to find a verdict for $7.50 and interest. The court refused so to charge, but told the jury
(56) that an alteration of a deed or bond by a stranger in a material part destroyed the whole validity of the instrument, and that the jury were not at liberty to render a verdict for the true amount, however clearly it might be shown.

The defendant's plea denied that he executed the bond of $12.50 as described in the warrant. The plaintiff replied that he did, and upon this issue the parties went to trial. The plaintiff, having warranted upon a bond for $12.50, cannot sustain the affirmative side of the issue by showing that the defendant had executed to him a bond for $7.50, even if the latter bond had never been altered. His *probata* did not correspond with his *allegata.* The evidence, in fact, was inadmissible to support the plaintiff's side of the issue. But if the plaintiff had war-

ranted upon a bond for $7.50, alleged to have been destroyed by *accident,* as an excuse for not making profert, his evidence then would have been proper. *Powers v. Wave,* 2 Pick. Rep., 458. The alteration of a deed or bond in a material part by a stranger does not destroy any vested rights; it only changes the mode of proof of the contents of the bond. Chitty's Gen. Pract., 304; Byles on Bills, 173. But the plaintiff did not so warrant and he is not in this warrant and pleadings entitled to recover the sum of $7.50 proved to be due on a bond executed for a different sum than that bond described in the warrant.

PER CURIAM. Judgment affirmed.

Cited: Smith v. Eason, 49 N. C., 38; *Darwin v. Rippey,* 63 N. C., 319; *Wilson v. Derr,* 69 N. C., 139.

THOMAS MITCHELL v. JOHN P. RAINEY.

Detinue—Effect of Judgment.

1. One who comes to the possession of a chattel pending an action of detinue for it, *prima facie* claims under the defendant, and is bound by the judgment.

2. The case of *Falkner v. Jones,* 14 N. C., 334, approved.

THIS was a *scire facias* reciting a recovery by the plaintiff in (57) an action of detinue brought by him against one James W. Jeffries, for a slave, and the possession of the same slave by the defendant under a purchase made pending the former suit, and praying execution against the defendant.

The case was submitted to *Nash, J.,* at Burke, on the last circuit upon the following facts:

The plaintiff commenced suit against Jeffries, returnable to the Fall Term, 1836, of the Superior Court of Burke, when a default was suffered by Jeffries; at the ensuing Spring Term, commencing on 15 May, 1837, a writ of inquiry was executed and final judgment rendered. On the 13th day of the same month Jeffries conveyed the slave to the defendant upon trust to secure sundry debts. His Honor, upon these facts, entered judgment for the plaintiff, and the defendant appealed.

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

DANIEL, J. It is a general rule of law that he who comes to the property in contest from or under the defendant, *pendente lite,* is bound by

the judgment; and if he does not show that he comes in above he shall be taken as coming in under him. The defendant purchased of Jeffries, pending the action which Mitchell had brought against him. The defendant does not claim above Jeffries, therefore the plaintiff, according to the above rule of law, is entitled to judgment in this *scire facias*. The case of *Falkner v. Jones,* 3 Dev., 334, cited by the plaintiff's counsel, is in point for him.

PER CURIAM. Judgment affirmed.

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(58) WILLIAM CORNISH v. GEORGE SHEEK.

Execution of Bond—Evidence.

To prove the execution of a bond the testimony of an attesting witness, or if there be none, of the handwriting of the obligee, is the ordinary mode; but this is not exclusive of other modes, as where one whose name purported to be signed to a bond procures the custody of it and erases his name, the execution of it by him may be inferred from this spoliation.

THIS was an action of debt upon bond originally commenced before a single magistrate. On the trial before *Bailey, J.,* at Rowan, on the last circuit, the only question was as to the execution of the bond by the defendant. It was proved that one Tackett brought the bond to the house of the plaintiff signed with the name of the defendant, in the place where sureties usually execute, and in blank as to the principal; that Tackett then signed the bond as principal and it was attested as to him by a subscribing witness and delivered to the plaintiff. This bond was in the plural, "We, or either of us, promise, etc., witness our hands and seals, etc.," but none of the witnesses who saw it on that occasion could prove that the signature purporting to be that of the defendant was in his handwriting. Tackett turned out to be insolvent, and the plaintiff produced a paper signed by the defendant, in which he acknowledged the receipt from the plaintiff of a note made by Tackett for the amount of that claimed in this action, and undertook either to collect or return it. "The magistrate who tried the warrant proved that the defendant produced before him and tendered to the plaintiff a bond in its tenor exactly like that delivered to the plaintiff by Tackett, attested by the same person; which *had* been signed by Tackett and another person, but the name written below that of Tackett had been cut off.

His Honor, thinking that these facts did not prove that the defendant executed the bond, nonsuited the plaintiff, who appealed.

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

GASTON, J. It appears from the transcript that the plaintiff (59) instituted this action to recover from the defendant the amount due upon his bond alleged to have been destroyed by him, and was nonsuited on the trial because, in the opinion of the presiding judge, no testimony was offered of the execution of the instrument declared upon. The question presented for our decision is whether the testimony stated to have been offered was *competent* to show the execution of the bond, and therefore fit to be passed upon by the jury.

When the execution of an instrument is controverted, and that instrument is attested by a subscribing witness, the law requires that the subscribing witness, if he may be had, should be called to testify to the execution. It requires this because the parties have by their selection, appointed the witness to testify as to that matter and all its accompanying circumstances, and he must be presumed to know that matter and those circumstances better than any other person. But if there be no attesting witness, the *disputed fact,* like other disputed facts, may be established by any proof which is reasonably sufficient to produce conviction and which does not imply the holding back of more satisfactory testimony. The admissions of the instrument by the maker, and the identity of character between the signature and his general handwriting, are the ordinary proofs offered, but there is no principle which declares these to be the only admissible proofs. In the present case there is no reason to believe that either of these was attainable by the plaintiff. The defendant was not present when the note was received by the plaintiff: those who are stated to have seen it when in his possession, were ignorant of the defendant's handwriting. Tackett has run away, and if he were present the plaintiff might reasonably have been unwilling to examine him against his interest. The testimony offered is not therefore liable to objection, because better evidence was in the power of the plaintiff, and the only objection to it, if any, is that it was in itself so slight as not to warrant an inference from it of the disputed fact. But was it so slight? If believed it clearly established that the plaintiff had received a sealed note, which purported to be the joint and several bond of Tackett and the defendant, which was certainly executed by Tackett, and was taken by the plaintiff as the bond of both. It also estab- (60) lished that the defendant afterwards obtained from the plaintiff a bond of Tackett's, for the same amount upon an engagement to collect it, and that the defendant produced as the bond so obtained the identical instrument before referred to, but with the signature of the defendant cut off. Now this mutilation must have taken place either while the bond was held by the plaintiff or after it had been delivered by him to the defendant. If the name of the defendant had been taken away by the plaintiff before this delivery, it is difficult to imagine what

inducement the defendant could have had to apply for the possession of it, and undertake its collection; but if the instrument was then entire, the motive for this undertaking is obvious and strong. Again, the act of mutilation must have been prompted by a sense of interest. The plaintiff could have had no motive to commit it, whereas the defendant, after Tackett's failure, might have hoped thereby to escape from his liability for an insolvent principal. These were circumstances well fitted to aid the jury in coming to a conclusion of fact as to the person who made the mutilation; and if they convinced the jury that the defendant was the fraudulent spoilator the inference that *he* had executed the instrument became almost irresistible. Against such a spoilator all presumptions are fair.

It is the opinion of this Court that the nonsuit should be set aside and a new trial awarded.

PER CURIAM. Judgment reversed.

WILLIAM SMITH, CHAIRMAN, ETC., UPON THE RELATION OF HENRY CARRAWAY ET AL. v PROBATE COLLIER.

Letters of Administration—Revocation.

The county courts have power to revoke letters of administration, and payment of the assets made by an administrator whose letters have been revoked, to his successor, are proper.

(61) DEBT upon a bond executed by the defendant as the surety of William B. Green, on his taking out letters of administration upon the estate of Benjamin Caswell.

After *oyer* and plea the usual order of reference to take the administration accounts of Green was made, and upon the report of the commissioner the following facts appeared.

Green was appointed administrator of Caswell by the county court of Wayne, in 1815, and thereupon the bond declared on in this action was executed. A short time thereafter Green tendered to the court his resignation of the office of administrator, which was accepted, and Sampson Lane appointed in his stead. A settlement took place between Green and Lane and the former paid over to the latter the assets of Caswell, which were thereby ascertained to be in his hands. The commissioner charged the defendant Collier with the funds thus paid over by Green to Lane, and the defendant excepted to the report for that cause. The exceptions were overruled *pro forma,* and the defendant allowed to appeal. The

record certified to this court contained a copy of every entry in the cause, as well as of two reports made by the commissioner and of the testimony before him.

I. H. Bryan for the defendant.
Devereux for the plaintiff.

GASTON, J. The act of 1831, ch. 34 (Rev. Stat., ch. 4, secs. 23, 28), allowing appeals to this Court from interlocutory judgments at the motion of the party supposing himself to be aggrieved thereby, upon such terms as the judge below shall deem it just to prescribe, directs that the judge allowing the same shall direct so much only of the record, and the proceedings in the cause to be certified, as he shall think necessary to present the question or matter arising on such appeal fully to the consideration of this Court. It is apparent that although the appeal in this case had the sanction of the judge of the Superior Court, and must therefore be regarded by us as regular, the making up of the case for the consideration of this Court has been left entirely to the counsel of the parties. We have no doubt but these gentlemen in performing this duty were influenced altogether by the desire of bringing the (62) merits of the controversy fully before us, but we think we have some right to object to the manner which they have chosen for that purpose. Instead of making up a short case arising on the record and exhibiting the question or questions of law thereon, they have caused the entire record to be certified, containing the various reports, and amended reports made by the commissioners, all the exceptions thereto taken, the documents, exhibits, and facts agreed, upon which the reports were founded, and leave to this court to say, upon a view of *all* these matters and things, whether the exceptions of the defendant have been correctly overruled. We do not make these remarks so much in a tone of complaint as with the view of indicating the course which we think ought to be observed in bringing such questions as arise upon interlocutory judgments before this Court for revision.

It is deemed unnecessary to examine minutely the voluminous record in this case. One question presents itself upon it very obviously, which we have no doubt is among those intended to be presented, and the decision of which will probably determine the cause. It appears that in 1815 William B. Green was appointed by the county court of Wayne administrator of the estate of Benjamin W. Caswell, deceased, and entered into bond with Probate Collier and James Bradbury, sureties for the faithful performance of the duties confided to him. In a few months thereafter the said William tendered to the said county court his resignation of the office of administrator, which was accepted by the court, and

thereupon Sampson Lane was appointed administrator in his stead. A settlement immediately took place between the said William and the said Sampson, which settlement was returned to the May Term, 1816, of said court, and from which it appears that the former passed over to the latter all the bonds, notes, and other assets of the estate in his hands. In 1831 an action was brought in the name of the Chairman of the Court, upon the relation of the widow and child of Caswell, against Collier, one of Green's sureties, to recover the net amount of the personal estate of Caswell, as his next of kin, and an account taken under the direction of the court, as prescribed in our act of 1826, for the purpose of
(63) facilitating the trial of the suit. Upon this account Green, Collier's principal, has been charged, by virtue of the settlement aforesaid, with the whole amount of the assets so delivered over to Lane—and to the items containing these charges, the defendant excepted.

It seems to us that the exceptions ought to have been sustained. There is no allegation that the revocation of the first letters of administration was not in good faith, nor that the successor appointed to the first administrator is not perfectly responsible. Unquestionably a court ought to consider well before it recalls an administration once duly granted. Such a proceeding may lead to inconvenience, and perplexity. But it cannot be doubted that the court possesses the *power* to revoke such an administration—and there are cases in which it is the duty of the court to execute the power. Thus it is laid down that an administration duly granted to the next of kin may be revoked if such administrator becomes *non compos. Offley v. Best,* 1 Sid., 373; 1 Lev., 158; Coms. Admr. B., 8. And it is said that it may be where the administrator removes beyond the sea. (Williams on Executors, 361.) Thus, also, it has been expressly provided by our acts of 1822 and 1826 (Rev. Stat., ch. 46, sec. 30), that an administrator may be removed from office and a successor appointed upon application of dissatisfied sureties. The act of recalling the administration to Green and granting administration in his stead to Lane not transcending the power of the court, must be treated by all persons and in all courts while it remains unreversed as a valid act. The delivery over by the former administrator of the assets then in his hands was proper and legal and furnished no ground of charge against him in account with the next of kin of his intestate. The settlement then made is not by any means conclusive upon the next of kin. If the former administrator wasted the assets—or did not account fairly for them to his successor—unquestionably the next of kin will have a remedy. It may be a question indeed whether this remedy would not be through the medium of a bill filed against both administrators, but this is not an occasion for the consideration of such a question. The only ground here for charge against the

first administrator is a document showing that he delivered over (64) the assets to his successor. If it constituted any charge by reason of its showing that the assets had come to his hands, it showed at the same time a discharge in that he had paid them over to the person entitled to receive them.

This opinion will be certified to the Superior Court of Wayne, with instructions to allow this exception taken by the defendant to the report in this cause.

PER CURIAM. Order reversed.

Cited: Neal v. Becknell, 85 N. C., 302.

JAMES R. LOVE v. D. C. HOWELL AND A. B. HYATT.

Two Defendants—Pleading.

1. Where there are two defendants, a memorandum of a plea, made by entering the word "justification" on the docket, shall be taken as a joint plea, and unless good as to both is available as to neither of the defendants.
2. The rules of pleading have been too much neglected, and no further relaxation will be countenanced.
3. Where an entry of a *nol. pros.* as to one of two defendants appears, upon the record certified to this court, to have been made after the judgment below, it will, upon appeal, be taken as having been made at the proper time.

TRESPASS *vi et armis* for taking from the plaintiff sundry articles of personal property.

The pleas of not guilty, and a special justification under process, were entered upon the appearance docket in the usual manner, by a mere memorandum.

On the trial before *Nash, J.,* at Buncombe, on the last circuit, the defendants established a justification as to the defendant Howell alone, by proof of process against the goods of the plaintiff directed to him as a constable, but his Honor, instructing the jury that the defense was not available, as the pleas were joint, the plaintiff had a verdict and the defendant appealed. After the entry of the judgment and appeal there was an entry of a *noli prosequi* as to the defendant Howell.

Burton for the defendant. (65)
Caldwell, contra.

DANIEL, J. The first question is, whether the plea of *"justification"* is to be considered as a joint or several plea. The defendants' pleas stand

on the record "general issue and justification." If from this entry the defendants are to be considered by the court as having pleaded jointly then the plea being bad as to Hyatt must be bad as to the officer Howell. But if the loose practice of the courts will authorize the defendants to consider the entry on the record only of the head of pleas, to stand for either a joint or several plea, according as the case may turn out on the trial, then the execution was a complete justification as to Howell. We are of opinion that such an entry as this on the record must be taken as denoting that the defendants had pleaded jointly. The profession, we learn, considers such an entry as joint pleading. The rules of pleading required by law have been too much neglected; this court cannot give countenance to any further relaxation.

The second objection, taken by the defendant Hyatt, is that the entry by the plaintiff of a *nol. pros.* as to Howell was made after the judgment was entered, which, in law, could not be good. That, therefore, the entry should stand and be considered as a *retraxit* of the action as to both the defendants. We think otherwise. The loose entries made on minutes in the progress of a cause during a Term, the whole of which in law is considered but as one day, are but memoranda from which the clerk at the end of the term is to draw a formal record of all the proceedings in the case which had taken place during the term. The whole of this case, even up to this time, still stands as we say upon the minutes or in notes; or, as they say in England, it stands in paper. There is, in the case, neither an entry on the record of a formal verdict, *nol. pros.*, or judgment. If the clerk had been required to put these proceedings in legal form upon the record he would have transferred his notes and
(66) drawn up the record as the judge would have intended the proceedings of the term in the case should appear to the world. The clerk would then have placed the formal entry of *nol. pros.* after the verdict, and before the formal entry of the judgment. The court must consider the record as if it had been formally drawn out from the notes or minutes of the clerk; when, as we have seen, the clerk in doing his duty, would be expected to place every entry in its proper place. Therefore the *nol. pros.* as to Howell would be placed before a formal judgment.

The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

ADIN POWELL, ADMR., v. WILLIAM H. GUY, ADMR.

Note—Interest.

A note, payable one day after date, with an endorsement thereon that it was not to be paid until the death of the maker, bears interest from the time it became due, according to its tenor, without reference to the endorsement.

THIS was an action of *assumpsit* upon a promissory note made by Bathsheba Farmer, the intestate of the defendant, payable to John Farmer, the intestate of the plaintiff.

The only question upon the trial was whether the plaintiff had a right to recover interest according to the face of the note, or whether it was to be computed from the death of the maker, and upon that the following facts were stated in the form of a case agreed:

Bathsheba Farmer, on 21 January, 1817, executed the note to her son, the intestate of the plaintiff, payable one day after date, on which was the following endorsement: "This note is not to be collected until after the death of the maker." His Honor, *Judge Pearson,* ruled that interest should be computed from the death of the maker, and the plaintiff appealed.

No council appeared for the plaintiff.
Manley for the defendant.

DANIEL, J. The words endorsed on the note, "This note not to (67) be collected until after the death of the maker," do not, in our opinion, change the plain intent of the parties, apparent on the face of the note. When we read the note and the endorsement the manifest intention of the parties seemed to be that interest was run on the principal from one day after the date of the same, although the principal and interest were not to be demandable until the death of the maker. It is a case standing on the same footing with all notes made payable at a future day, but carrying interest from the date. The payer of the note could not be expected to abandon the profits of his capital, although, in favor of his mother, we can see a good reason why he did not wish to distress her in her life time for a return of that capital and interest. We think the judgment should have been for the principal, with interest from 22 January, 1817. The judgment will be modified accordingly.

PER CURIAM. Judgment reversed.

THOMAS BRYAN v. JOHN H. DRAKE.

Defeasance—Pleading.

1. A plea must be true at the time it is pleaded, and a stipulation, in the nature of a defeasance to a bond, by which the obligor is to have a credit upon returning a note to the obligee, cannot be made available by making the return on the trial.

2. Evidence of such a defeasance will not support a plea of payment, nor of set-off.

DEBT upon a single bond. Pleas: Payment and a set-off.

On the trial before *Pearson, J.*, at NASH, on the last circuit, the defendant, to support his pleas, proved that the bond was given for a balance due by him as former guardian to one Sarah G. Atkinson, which was composed, in part, of sundry evidences of debt left in the hands of the defendant, under an agreement in writing, whereby the plaintiff bound himself to credit the amount of these debts upon the bond,
(68) in case they should not be paid, and should be returned by the defendant to the plaintiff.

The evidences of those debts were not returned until the trial, when they were produced and a credit claimed for their amount. A question was made whether the defendant had not lost the benefit of this stipulation by his *laches,* which it is not necessary further to notice.

His Honor directed the jury to find for the plaintiff and the defendant appealed.

The Attorney-General for the defendant.
Badger and B. F. Moore, contra.

GASTON, J. It is impossible for the defendant to make anything of the exception which he has taken to the judge's charge. The defense attempted to be made out, and the proofs offered, were altogether irregular and inadmissible upon the trial. The only pleas in the cause were payment and set-off, and every inquiry before the jury that did not tend to establish or contradict these pleas was irrelevant. It is manifest that the *case* set up by the defendant could not amount to a payment or set-off. If it could avail him at all it must have been by way of defeasance, and it should have been pleaded as such. But even then a return of the papers, or something equivalent to a return, must have preceded, or at least accompanied the plea, as every plea must be true or false, according to the state of facts, when it is pleaded. The effort to procure a credit by a return of the papers on the trial, received but too much indulgence from the court—and the failure to succeed in it furnishes no legal cause of complaint.

PER CURIAM. Judgment affirmed.

(69)

WILLIAM JONES, CHAIRMAN, ETC., v. WILLIAM MONTFORT ET AL.

Sheriff's Bond—Breach.

1. A bond given by a sheriff, with a condition to return process and pay over moneys, etc., "and in all things well, etc., to execute the said office," is not broken by a neglect to collect and pay the parish taxes.

2. The cases of *Crumpler v. The Governor*, 12 N. C., 52, and *The Governor v. Matlock*, *ib.*, 214, approved.

DEBT upon a bond executed by the defendants as the sureties of Boyd Fonville, for the faithful discharge of his duties as sheriff of Onslow. The breach assigned was that Fonville had not paid over to the wardens of the poor the parish taxes for the year 1831.

Upon *oyer* the condition of the bond declared on was as follows:

"The condition of the above obligation is such that whereas the above bounden B. F. hath been constituted and appointed sheriff, etc. Now, in case the said B. F. shall well and truly execute and due return make of all process and precepts to him directed, and pay, satisfy all fees and sums of money by him received or levied by virtue of any process, into the proper office to which the same by the tenor thereof ought to be paid, or to the persons to whom the same shall be due, his heirs, etc., and in all other things well, truly and faithfully execute the said office of sheriff, during his continuance therein, then, etc." *Pleas:* Performance and *non infregerunt conventionem.*

On the trial before *Nash, J.*, on the Spring Circuit, 1837, his Honor ruled the default assigned as a breach, was not within the condition, and thereupon the plaintiff offered to prove by parol that the parish taxes were intended to be secured by the bond declared on. His Honor rejected this testimony and the plaintiff submitted to a nonsuit and appealed.

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

GASTON, J. The condition of the bond declared on in this case (70) corresponds *precisely* with that which was under the consideration of the court in the case of *The Governor v. Matlock* (1 Dev., 213). It there received a judicial construction by which it was held not to extend to the fiscal duties of the office. The decision then made was in conformity to the principle before established in the cases of *Crumpler v. The Governor*, 1 Dev., 52, and *The Governor v. Barr*, 1 Dev., 65, that the general words in the conclusion of the condition shall be restricted by the preceding particular words, to duties of a like kind with those specified. To hold any other doctrine now, and to put a different construction on the words in the condition of this bond from that so authorita-

tively assigned to the same words heretofore, would be to fly in the face of former adjudications, and to introduce the most perplexing confusion.

The instruction of the judge to the jury was in conformity to the settled law of the country, and the rejection of the offered evidence to explain the bonds was unquestionably correct.

The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Deaton v. Kelly, 72 N. C., 113.

HENRY B. WILLIAMS, ADMR., v. ROBERT IRWIN.

In an action against the endorser of a promissory note or negotiable bond since the act of 1827, ch. 2 (see 1 Rev. Stat., ch. 13, sec. 11) for making endorsers of promissory notes sureties, it is unnecessary to state in the declaration, or prove on the trial, any demand on the maker of the note or obligor of the bond and notice of non-payment to the endorser.

DEBT against the endorser of a promissory note under seal.

The declaration stated merely the making of the note, the endorsement thereof by the defendant, and that by reason of the said endorsement, and by force of the statutes in such cases made and pro-
(71) vided, the defendant became liable to pay the money specified in said note.

On the trial at Mecklenburg on the last circuit, before *Bailey, J.,* the only question was whether the defendant, as endorser, was liable without notice of a previous demand on the maker, and a refusal of payment by him. His Honor was of opinion "that under the act of 1827, ch. 2, notice of a demand from the maker was not necessary before suit against endorser," upon which the plaintiff had a verdict and the defendant appealed.

Barringer for the plaintiff.
D. F. Caldwell for the defendant.

RUFFIN, C. J. The act of 1827, ch. 2, renders an endorser of a negotiable instrument, excepting bills of exchange, "liable *as surety* to the holder." The question is, whether the holder must give the endorser any notice before he brings his action. It is to be regretted that statutes should be expressed in such terms as impart to the judiciary no certain knowledge, or means of knowledge of the legislative intention, and put the court in danger of mistaking it. It unfortunately may so happen in this instance. The expression "liable as surety" has no definite legal sense, nor any established signification in common parlance. Whenever one person is liable for the debt of another, by whatever means or in

whatever form the liability is created, the person is in law a surety, and perhaps in popular language is said to be *"liable as surety* for the other." But the extent of the liability, its nature, whether immediate or remote, positive or conditional, legally depends upon the terms and nature of the engagement. It may be by recognizance, by bail bond, obligation, note, guaranty, endorsement, and otherwise, in the same or a separate instrument. But "liable as surety" is not the phraseology of the law, and in either of those cases the surety is said to be liable for the debt as cognizor, obligor, maker or endorser. It is therefore hazarding something to change the responsibility of an endorser upon language so vague and unsatisfactory. But practically an interpretation on the circuits was given to the act soon after it passed, which was (72) probably in accordance with the intention of the framers, then, perhaps, better known than now, and which, as far as it can be ascertained and has been uniform, ought to be adhered to, if not inconsistent with the words of the act itself. It is believed that it has invariably been construed as dispensing with a demand on the obligor of a bond, or maker of a note, and of course with notice also to the endorser of their default. It has been likewise generally understood that it is unnecessary to put the endorser himself in default by a demand of payment from him before suit. If the enactment is to be regarded at all, it must have the first of those effects allowed to it; and perhaps those were all that were in the contemplation of the legislature. The declaration against an endorser alleged his endorsement, a demand upon the maker, his refusal, and notice thereof to the endorser, by means whereof and by force of the statute he became liable to pay; and the controversies were numerous and nice, whether the endorser had been fixed by a demand, at the proper place and day, on the proper person, and a notice within reasonable time from the party entitled to the money. The escapes of endorsers upon pretense of *laches* in the holder, were frequent and the holders for value lost their securities by ignorantly or negligently omitting some trivial minutia, such as not inquiring for the nearest postoffice of the endorser, or sending by a dilatory private hand instead of the post, or not writing by the first post, although absence from home might have prevented the holder from coming to the knowledge of the dishonor of the instrument. These were the ordinary inconveniences which required a remedy, for generally the endorser came by no actual loss from the mistakes or omissions of the holder. That remedy will be complete by allowing everything to be struck out of the old declaration but the endorsement and the averment that thereby, and by force of the statutes, the defendant became liable to pay the money in the bill or note specified to the holder. This will be carrying the act far enough for all the purposes of justice. It fixes the endorser with a positive, direct and unconditional responsi-

bility for the debt, if the endorsement has a consideration to support it; and the holder can lose his money only by such delay as will
(73) bar him by force of the statute of limitations. In construing so dark a provision we are authorized, if not required, to accept light from every source, if even a feeble ray. This exposition receives partial confirmation by the addition made in revising the statutes that "no demand on the maker shall be necessary." (See 1 Rev. Stat., ch. 13, sec. 11.) Those words are in a measure explanatory of that liability, which before was that of an endorser, and is now that of "a surety." It is not necessary, therefore, to give to those words, "liable as surety," the meaning that the endorser should be liable as if he had signed a note as a maker with the principal, or sealed and delivered a bond in like manner. Instead of doing justice to the holder by protecting him from artful quibbles that might work injustice to endorsers by subjecting them upon endorsements obtained by fraud or without consideration, and by exposing them to stale demands that might be kept alive by collusion between the holder and maker. It is not to be presumed that the legislature meant to repeal the statute of limitations in respect to an endorsement which is a simple contract, while laws have been constantly passing with the object, for the ease of sureties, of making creditors diligent, by discharging sureties by bond, if not sued in a reasonable time, as the bonds of guardians, sheriffs, and others. And it is not credible that they meant to declare this simple contract valid without a consideration, and oblige one who endorsed a note by way of gift, or to an agent, to pay the money to his donee or factor, if it could not be collected from the maker. They did not intend any alteration but that of turning an implied conditional contract into an implied unconditional stipulation between the endorser and holder. The words "unless otherwise plainly expressed" refer to endorsements without recourse and the like. Such being the object of the statute, it seems to follow that no notice of any sort to the endorser is requisite. It seemed otherwise at first, upon the ground that this was a collateral engagement for the act of another. But it is not so, or if it be, it has the obligation of an endorsement after the endorser is *fixed* with notice of demand and refusal, and that the holder looks to the endorser for payment. No further or second notice to the en-
(74) dorser was required, before the act, to sustain the action against him; and the act was certainly not meant to create a necessity for notice to any purpose. The declaration seems, therefore, to be properly framed under the statute and the judgment of the Superior Court right.

PER CURIAM. Judgment affirmed.

Cited: Ingersoll v. Long, post; Tapping v. Blount, 33 N. C., 64; *LeDuc v. Butler,* 112 N. C., 459.

RICHARD T. DISMUKES v. JOHN WRIGHT.

Endorsement—Notice of Non-payment—Deed in Trust.

1. In an action against the endorser of a promissory note since the act of 1827, ch. 2 (1 Rev. Stat., ch. 13, sec. 11), it is unnecessary to state in the declaration, or prove on the trial, notice of non-payment.
2. If a debtor has conveyed property to his creditor in trust to sell and satisfy the debt, and the latter sells the property and holds the proceeds, it is a payment of the debt.

THIS was an action of *assumpsit,* bronght to recover of the defendant as endorser, the amount of two notes. Pleas: *The general issue and payment.*

Upon the trial at Davie on the last circuit, before his Honor, *Judge Bailey,* the defendant objected that he had not received notice of non-payment before the suit was brought, but the objection was overruled. He then offered to show that the maker of the notes had, for the purpose of paying them, assigned to the plaintiff, as trustee, property sufficient to satisfy them, and that the plaintiff had sold the property and received the money. This evidence was objected to by the plaintiff and was rejected by the court. The plaintiff had a verdict and the defendant appealed.

Boyden for the defendant.
D. F. Caldwell for the plaintiff.

DANIEL, J. The first question raised in this case has been de- (75) cided by us at the present term in *Smith, admr., v. Irwin.* We there determined that an endorser of a note is not entitled under the act of 1827, ch. 2 (1 Rev. Stat., ch. 13, sec. 11), to be notified that he is looked to for payment before suit can be brought against him.

Upon the second point the defendant offered to show that the principal debtor in the two notes had placed property in the hands of the plaintiff as trustee, to sell and raise money and pay these two notes, and furthermore that he had sold the property and raised from the sales money sufficient to discharge them. We are unable to see upon what grounds this evidence could be legally rejected. The plaintiff being the holder of the notes and at the same time trustee to sell the property, placed in his hands expressly to discharge the notes, it does seem to us that when he did sell and receive the money it was immediately a payment of the notes. We think the evidence was improperly rejected, and a new trial must be granted.

PER CURIAM. Judgment reversed.

WILMINGTON AND RALEIGH RAILROAD COMPANY v. ABRAHAM BAKER.

Delinquent Stockholder—Judgment.

The 11th section of the act incorporating the Wilmington and Raleigh Railroad Company, declaring "that if any stockholder shall fail to pay the sum required of him on his subscription by the President and Directors within one month after the same shall have been advertised in some newspaper published at the seat of government, it shall be lawful for the said President and Directors *without further notice* to move for judgment in the county or Superior Court of Wake, or New Hanover, against the delinquent stockholder or his assignee for the amount of the installment required to be paid, at any court held within one year after the notice, and *the court shall give judgment accordingly,* or they may sue for the same in an action of *assumpsit,* or by warrant, according to the jurisdiction of the respective tribunals of the State," does not authorize a judgment against a defaulting stockholder, without his appearance, or without process to call him into court.

(76) AT the last term of the Superior Court for the county of New Hanover, before his Honor, *Judge Dick,* the plaintiffs, by their attorney, without any notice to the defendant, moved for a judgment against him, which was granted, and an entry thereof made in the following words, viz.:

"On motion of W. A. W., attorney for the plaintiffs, and it appearing to the satisfaction of the court that the defendant is a stockholder in the Wilmington and Raleigh Railroad Company, and that certain sums of money have been required of him on his subscription by the President and Directors, to wit: the sum of $300 due and payable on 1 October, 1837, and the sum of $300 due and payable on 15 December, 1837—that he has failed to pay the same and the advertisements required by the charter of said corporation have been made more than one month before the sitting of the court—it is considered by the court that the Wilmington and Raleigh Railroad Company recover of the said Abraham Baker the sum of $609.02, of which sum $600 is principal."

The defendant obtained a rule upon the plaintiffs to show cause why the judgment should not be set aside, which, upon argument, was discharged and the defendant appealed.

No council appeared for the defendant.
J. H. Bryan for the plaintiffs.

GASTON, J. This is an appeal from the judgment of the Superior Court of New Hanover, refusing to set aside a judgment rendered in that court in favor of the plaintiffs against the defendant. No counsel has appeared here in behalf of the defendant to show the objections taken by

him to the original judgment. One of these, however, is obvious on inspection of the record.

The judgment was rendered without appearance by the defendant, or previous process or notice to call him into court, or opportunity of making defense against the claim of the plaintiffs. Such a judgment must be regarded as a nullity, unless an authority to render it can be clearly shown. It is a principle not only of our law, but of universal law, that no one shall be condemned unheard.

It is said that the act entitled "an act to incorporate the Wil- (77) mington and Raleigh Railroad Company" (see 2 Rev. Stat., p. 335), does distinctly confer this authority. If the act must obtain this construction then will be imposed upon us the duty of considering whether, under our Constitution, the Legislature can confer upon a court the power to render a judgment for one individual, or company of individuals, against another, without notice. But it is not decent to suppose that the Legislature willed such a violation of all legal usages, unless this intent appears upon the act too unequivocally to admit of a fair doubt.

The words of the enactment bearing directly on the point are those of the 11th section, declaring "that if any stockholder shall fail to pay the sum required of him on his subscription by the President and Directors, or a majority of them, within one month after the same shall have been advertised in some newspaper published at the seat of government, it shall and may be lawful for the said President and Directors, *without further notice,* to move for judgment in the county or Superior Court of Wake or of New Hanover, against the delinquent stockholder or his assignee, or both, for the amount of the installment required to be paid, at any court held within one year after the notice, and *the court shall give judgment accordingly,* or they may sue for the same in an action of assumpsit or by warrant according to the jurisdiction of the respective tribunals of the State." The words, "without further notice," it is said, show that *previous* notice of the motion is dispensed with—and by the direction "that the court shall give judgment accordingly," it is obviously intended that such judgment shall be given at the term when it is prayed, and, of course, without issuing process to the defendant to show cause against the motion. It is admitted that the section will bear this construction, but we deny that such is its necessary meaning.

It will be seen on a little examination that the section will not stand a strict literal interpretation. The failure of payment, which is to subject the subscriber to a judgment, is by the words of the section, "a failure to pay the *sum required* within one month after the *same* shall have been advertised." Now, certainly the default contemplated was not the nonpayment of requisition for one month after *advertisement* (78)

made, but for one month after *the time* when, according to the advertisement, it was required to be paid. Again the motion for judgment is according to the words of the act to be made in a court of Wake or New Hanover county within a year *after the notice,* and the only notice previously mentioned is the advertisement—but if the time is to be computed from the *date* of the advertisement the judgment might be rendered before the day on which the installment was required to be paid.

The section before us is not then expressed with such critical precision as to induce the belief that we shall best ascertain the legislative intent by a literal interpretation of the text. It must be helped by a reasonable construction to save it from absurdity—and the inquiry is, what is its reasonable construction in regard to the matter immediately under inquiry.

By other sections of the act books are to be opened at Raleigh, Wilmington, and other places, under the direction of the commissioners therein named, or of any three persons to be appointed by a part of those named, to receive subscriptions for stock; and on each share of $100 of stock subscribed the sum of $2 is to be paid down, and the residue in such installments and at such time as may be required by the President and Directors. By the terms therefore of his engagement the stockholder is entitled to notice from the President and Directors of every installment required, and the time at which the payment thereof is required before he is in default. When, therefore, the 11th section declares that a failure to pay within one month after the time when the payment is required to be made by an advertisement in a newspaper published at the seat of government, shall without *"further notice"* subject him to a motion for judgment, it certainly in terms enacts no more than the requisition so advertised, and the lapse of one month thereafter without payment shall be plenary evidence of *the notice* of the requisition to which the stockholder was entitled by the nature of his engagement; and the direction that the court shall give judgment accordingly imports no more than that judgment shall be rendered on motion for the sum *so* required
(79) and neglected to be paid. By giving to the enactment this construction we satisfy every word of it. We may, indeed, conjecture that it means more, but we have no judicial certainty that it has a further meaning. The act authorizes the company to get a judgment by motion, and is silent as to the notice of *that motion.* This omission may occasion perplexity as to the mode of proceeding—whether a previous notice should be given of the intended motion, or upon the motion being made, process should issue to the defendant to show cause against it, but it cannot be understood as a legislative declaration that there may be judgment without notice, process, or appearance. Wherever a statute is

silent, it must be understood that the matter not therein provided for is left to the operation of the general rules of law. An abnegation to the defendant of the right of being heard against the alleged charge of being a defaulting subscriber, must be very plainly expressed before it can be supposed to have been intended.

It is said, however, that there is notice. The act authorizes the motion to be made only in some county or Superior Court of the counties of Wake or of New Hanover, within one year after the time of payment advertised, and this amounts to notice that the motion will be made at some one of the courts aforesaid, to be held during that period, and a subscriber cannot be heard to complain of the sort of notice which the charter prescribes. To this there are several sufficient answers. In the first place this implied notice is only to the delinquent stockholder, and when a judgment has been rendered against one who has not been heard, *non constat* but for the judgment that *he* was a stockholder at all. It would be a vicious circle of reasoning to hold that the *notice* authorized a judgment, and then that the judgment proved a notice. But this implied notice is not that which the *lex terræ* entitles a citizen to. To justify a judgment against him he must have a *day* in a *court* certain. It were a mockery to hold that notice to attend at the twelve courts to be holden during the year in the counties of Wake and New Hanover, for at *some one* of them the plaintiffs would move against him, was legal notice—a valid substitute for a process that would warrant a default for non-appearance.

It is argued also that when the right is conferred on the plain- (80) tiffs to move for judgment against delinquent stockholders the course of proceeding is the same which the State pursues against her revenue officers, and there it has been held that notice to the officer is not necessary. The answer to this argument is that in the revenue law it is declared that no citation or other warning shall be required or be necessary preparatory to a judgment. The legislative will in those cases is express, and the only question which the judiciary can entertain about it is whether that will may consist with the will of the people declared in the Constitution. Our predecessors have held, and we suppose rightfully held, that in a case of revenue—between the State and its accounting officers—the Legislature may make the books of the treasury a record—and render it the duty of the courts on motion to issue executions for what shall thereon appear to be due. It is not for us now to say whether the Legislature can do this with respect to the books of an individual, or an association of individuals, in regard to his or their claims against other individuals. It will be time enough to determine that question when the Legislature shall have made a declaration of their will to do it.

It is argued that it was undoubtedly the purpose of the Legislature to favor the objects of the company, and for this purpose to facilitate the collection of its moneys, the essential and indispensable means of the successful prosecution of these objects; that for this end an option was given to the company to proceed against the delinquent members by motion or by suit in the ordinary forms of law, and that by this construction the benefit of the option will be in effect taken away, as there will be little difference of expedition between the different modes of proceeding. No doubt can be entertained that the Legislature did have at heart the great public improvement which it was the avowed object of this enterprising company to accomplish—and that the option presented in the charter for compelling payment of their moneys subscribed was believed to be an important privilege, but it by no means follows that our construction destroys the value of it. We hold no more than that it must be exercised with a sacred regard to a principal which lies at the bottom of all justice and fairness, which ought never to be violated, and
(81) which the Legislature did not mean to violate—to pass on no man's rights until he has had the opportunity of being heard in their defense.

It is the opinion of this court that the judgment rendered against the defendant was null—that according to the established distinction between judgments void and judgments erroneous, it ought to have been set aside on the prayer of the defendant, and that the judgment of that court refusing to set aside should be reversed, with costs.

PER CURIAM. Judgment reversed.

JOHN McRAE v. DANIEL RcRAE, ET AL., ADMR.

Account—Credit Entered.

A person, having an account against another for work and labor done, may give the other credit for such sums as may be justly due him on account, and if the balance be thereby reduced below sixty dollars may warrant for it before a single magistrate, and the other party can neither object to the jurisdiction nor insist upon having *his* account of the same items allowed as a set-off to the plaintiff's demand.

THIS was an action of *assumpsit* for work and labor done by the plaintiff for the defendants' intestate, commenced by warrant, and carried by successive appeals to the Superior Court, where it was tried at Montgomery on the last circuit, before his Honor, *Judge Dick*. Plea: A set-off.

The plaintiff in his account charged the defendant's intestate with six months' labor performed, at twelve dollars and a half per month, amounting to seventy-five dollars, and in the same account gave the defendant's intestate credit for sundry articles had by him in payment, during the time he was performing the labor, amounting to twenty-five dollars, and sued out his warrant for the balance due on said account, to wit: fifty dollars. On the trial in the Superior Court the defendant claimed some other and further credits, amounting to seven dollars, which were allowed by the plaintiff.

The defendant contended that the plaintiff had no right to (82) enter the credit of twenty-five dollars and thereby bring his claim within the jurisdiction of a single magistrate. And that as he had warranted for fifty dollars only they were now entitled to have their account of thirty-two dollars deducted from the amount sued for.

His Honor instructed the jury that the plaintiff had a right to enter a credit for articles had by him in payment for his labor, from the defendant's intestate, and to warrant for the balance due, and further, that if the plaintiff had proved to their satisfaction that he had performed the labor as charged it was for them to say what it was worth and to allow the plaintiff accordingly; that if the evidence satisfied them that the credit of twenty-five dollars entered by the plaintiff on his account was for the same articles for which he stood charged on the books of the intestate they ought not again to allow the credit; for the defendants' intestate had once had the benefit of it. The jury found a verdict in favor of the plaintiff for forty-three dollars, besides interest. The defendants moved for a new trial, which being refused and judgment pronounced, they appealed.

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

RUFFIN, C. J. If the objection to the jurisdiction were valid it comes too late, after a plea in bar. But we think the matter does not constitute a good objection, if it had been taken in apt time.

The warrant is for a less sum than thirty pounds, which is demanded as a balance due for work and labor done. The book debt act, 1756 (1 Rev. Stat., ch. 15, sec. 1) requires the plaintiff to declare upon oath that he has given the defendant all just credits, and the acts creating and extending the jurisdiction of a single magistrate expressly provide the remedy by warrant, not only for demands, originally, of 30 pounds or under, but also for a balance of that amount due for goods sold and delivered, or for work and labor done. Where there are mutual accounts the Legislature intended to make the balance the true debt, for

(83) the purposes of this jurisdiction. If the plaintiff should not attempt to prove his demand by his own oath he may not be confined to this method of proceeding, but may sue in a court of record, and leave it to the defendant to insist on his set-off. But it is not a fraud on the jurisdiction of the courts, nor an evasion of the statutes, to allow, in the first instance, all the just counter-demands of the other party, and thereby reduce "the balance due" to a sum within the jurisdiction of the justice of the peace. The credits entered by the plaintiff in this case are not fictitious and given for the mere purpose of the summary proceeding, but are truly for payments or a just set-off; and the case is therefore within the letter and policy of the statutes which give this as a fair mode of settling, and a summary method of collecting small demands.

Both law and justice alike forbid the allowance of the sums claimed by the defendant as deductions from the balance of the plaintiff's account upon proof at the trial, since he had already the benefit of them by the admission of the plaintiff on the face of the account.

PER CURIAM. Judgment affirmed.

JOHN McMORINE v. GEORGE STOREY, EXR.

Executor de son tort.

One who intermeddles with the goods of a deceased person *after* the will is proved, or administration granted, cannot be sued by a creditor as executor *de son tort*, unless where he claims under a fraudulent deed. But if he had intermeddled *before* the appointment of a legal administrator he may be charged as executor *de son tort*, then being a legal administrator at the date of the writ.

THIS was an action of *assumpsit*, brought by the plaintiff against the defendant, to charge him as as executor *de son tort* of one David Davis. The defendant pleaded *ne unques executor*, and the cause was tried on this issue at Pasquotank, on the last circuit, before his Honor *Judge Settle*.

(84) The plaintiff proved his debt against Davis and his insolvency. He then exhibited the record of a suit which had been determined in Pasquotank Superior Court, at the Spring Term, 1835, at the instance of John Williams, the rightful administrator of the same David Davis, against one Joseph Davis. It was admitted that John Williams then was and still continued to be the rightful administrator of David Davis. This suit was brought for the recovery of certain slaves, then in the possession of Joseph Davis, and alleged to be the property of David Davis' administrator. It was further proved by the plaintiff that on the trial

of that suit Joseph Davis set up a claim to the slaves as his own property, under an execution sale against David Davis, *alleged* to have been made by one Hezekiah Cartwright, formerly a constable of Pasquotank County. By the record of that suit it appeared simply that the jury found a verdict therein in favor of the defendant. The plaintiff then proved by Cartwright that he never made a sale of David Davis' property and that he knew nothing of the sale of the negro woman, who, with her children, were the negroes in controversy in the action referred to at the instance of Williams. It was further proved by the plaintiff that David Davis had been in possession of these negroes for fourteen or fifteen years before his death, after which they went into the possession of Joseph Davis, who continued to hold them until his death, which occurred about a year after the death of David. After the death of Joseph Davis the slaves were taken possession of by the defendant, his executor, who claimed them as the property of his testator.

His Honor charged the jury that if they believed that the alleged conveyance from David to Joseph Davis was made with the intent to hinder, delay, or defraud the creditors of David Davis, it was fraudulent and void, and if Joseph Davis in the action that was brought at the instance of the rightful administrator of David, set up a fraudulent claim to the negroes, and defeated that action, then a creditor of David would have a right to maintain this action; and if they believed that the plaintiff had proved his claim against David he was entitled to recover. The jury, under this charge, found a verdict for the plaintiff and the defendant appealed.

A. Moore for the defendant. (85)
Kinney and J. H. Bryan for the plaintiffs.

DANIEL, J. The plaintiff was a creditor of David Davis, deceased, and he has brought this action of assumpsit against the defendant, charging him as executor *de son tort* of the said Davis. Plea: *Ne unques executor.* The case states that before *the time* the slaves (which were assets of David Davis' estate) came to the possession of Storey, the defendant, there had been a legal administrator of David Davis appointed. There is nothing in the case to show why the legal administrator could not in his action have recovered the slaves of Storey. There never was any conveyance or alienation of them by David Davis to any other person, either good or fraudulent as to his creditors. The law seems to be settled that when the will is proved, or administration is granted, and another person *then* intermeddles with the goods, this shall not make him executor *de son tort* by construction of law, because there is another representative of right against whom creditors can bring their actions; and

such a wrongful intermeddler is liable to be sued as a trespasser. Williams on Exrs., 139. If the defendant had intermeddled with the assets *before* the appointment of the legal administrator the plaintiff might have then sued him as executor *de son tort,* notwithstanding there had been at the date of his writ a legal administrator. *Kellorn v. Westcombe,* Freeman, 122; Williams on Exrs., 139. But here the intermeddling by the defendant with the assets was *after* the appointment of the legal administrator; therefore the plaintiff had no right to charge
(86) Storey in an action as executor of his own wrong. There is nothing in the case to show that David Davis ever made any conveyance of the slaves to Joseph Davis for the purpose of defrauding his creditors, or for any other purpose. The charge of the judge to the jury was upon a supposed state of facts which did not exist. We think there must be a new trial.

PER CURIAM. Judgment reversed.

NOAH SMITHERMAN, ADMR., v. NANCY SIMTH, ET AL.

Endorsement—Accord and Satisfaction.

Where, upon the endorsement of a note, it was agreed by parol between the endorser and endorsee that if the former would execute to the latter a deed for a tract of land the latter would strike out the endorsement and release the endorser from all liability thereon, and the endorser did afterwards execute a deed for the tract of land, which was accepted by the endorsee: *It was held* that proof of those facts was not evidence tending to establish a contract variant from that contained in the written endorsement and was competent to establish an accord and satisfaction.

THIS was an action of debt brought by the administrator of the assignee of a negotiable bond against the makers and endorsor. The makers suffered a default, but the endorser entered among other pleas that of an *accord and satisfaction.*

Upon the trial at Moore, on the last circuit before his Honor, *Judge Dick,* the defendant, the endorser, offered to prove by parol that at the time he sold and endorsed the bond to the plaintiff's intestate it was agreed between them that if the endorser would execute a deed for a certain tract of land to the endorsee the latter would strike out the endorsement on the bond and release the endorser from all liability thereon, and look to the makers only for payment. And the endorser offered to prove further that in pursuance of said agreement he had afterwards executed and delivered a deed for the land to the plaintiff's intestate. This evidence was objected to by the plaintiffs, and rejected by the court

upon the ground that it went to establish a contract variant (87) from that contained in the endorsement. A verdict was found for the plaintiffs and the defendant appealed.

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

DANIEL, J. The defendant (the endorser of the bond), pleaded *"accord and satisfaction,"* and on the trial offered to prove that at the time of the endorsement it was agreed between himself and the plaintiff's intestate that if he would execute a deed for a certain tract of land to the endorsee, then the endorsement should be stricken out, and that he, the endorser, should be released from all liability; and that, in fact, he did afterwards execute and deliver to the endorsee (the plaintiff's intesttate), a deed for the said tract of land. The court rejected this evidence on the ground that it would establish a contract variant from that contained in the endorsement. It seems to us that the court misconceived the object of the defendant. It was not to set up by parol evidence an executory contract, made at the time of the endorsement, variant from that which the law raised from the written endorsement itself, but it was intended to show from the agreement respecting the land, entered into at the time of the endorsement, and from the endorsee's taking the deed for that very tract of land at a subsequent time, a subsisting agreement carried into full execution by the parties subsequent to the time of the endorsement, so as to amount to an accord and satisfaction of the defendant's liability under the written endorsement. In this light we think that the evidence was admissible. The defendant wished to show by the evidence that he was discharged from the endorsement by the endorsee's subsequently receiving *satisfaction,* by accepting a deed for the land, and that the *accord* was repeated by the parties at the time the deed was accepted, was a fact which might fairly be inferred by the jury from the evidence. We are of opinion that there must be a new trial.

PER CURIAM. Judgment reversed.

Cited: Terrell v. Walker, 66 N. C., 248.

(88) THOMAS KAYWOOD ET AL. v. THOMAS BARNETT, ADMINISTRATOR OF THOMAS KAYWOOD, SR.

Witnesses—Pedigree—Evidence.

1. In a petition against an administrator, upon an issue made up to try whether the petitioners are the next of kin of the intestate, the sureties to the administration bond are competent witnesses for the defendant, they being neither parties nor privies to the record.
2. In questions of pedigree, declarations of deceased persons, to be admissible, must be derived from those who are connected with the family.
3. In an action on a joint and several promissory note, if the action is against the principal alone, the surety may be a witness either for the plaintiff or defendant.

THE plaintiffs filed their petition against the defendant as the administrator of Thomas Kaywood, Sr., alleging that they were the next of kin of his intestate, and praying for distribution. They stated that they were the legitimate children of Stephen Kaywood, who was a brother of the intestate Thomas, and who died before the said Thomas.

The defendant in his answer admitted that he was the administrator of Thomas Kaywood, Sr., but denied that the plaintiffs were the next of kin of his intestate. He alleged that his wife, Ann, was the legitimate and only child and next of kin of his intestate.

The court thereupon ordered two issues to be made up and submitted to a jury: 1. Were the petitioners the next of kin of Thomas Kaywood, Sr., deceased? 2. Was Ann, the wife of the defendant, the legitimate daughter of the said deceased?

On the trial of these issues at Burke, on the last circuit, before his Honor, *Judge Nash,* the depositions of two men, to wit: L. Moore and J. Young, were offered on the part of the defendant. These depositions were objected to by the plaintiffs because the deponents were, as they alleged, interested, being sureties for the defendant on his administration bond. The objection was overruled by the court, and the depositions were read. His Honor, in charging the jury, told them that in
(89) looking over the depositions, whenever they found a witness speaking as to pedigree from general report they should, in making up their verdict, reject such testimony; that hearsay was evidence of pedigree, but it must be hearsay coming from some member of the family, or from some other person who, from his situation and connection with the party, had an opportunity of knowing the facts.

The jury returned a verdict that the petitioners were not the next of kin and distributees of Thomas Kaywood, Sr., the defendant's intestate, and the plaintiffs appealed.

No counsel appeared for the plaintiff.
Burton & Caldwell for the defendants.

DANIEL, J., after stating the case, proceeded as follows: The first question arising in the case is, did the judge act right in admitting the the depositions to be read in evidence? The deponents Moore and Young had no interest in this record, for, as they were no parties to it, it could never be given in evidence for or against them. Neither could any actual loss or gain result to them simply and immediately from the verdict and judgment. But it is said that if the witnesses are so situated that a legal right or liability, or *discharge* from liability would immediately result, they would be incompetent. Now it is enough to say in answer to this that under our law it would be clearly competent for the plaintiffs to institute an action on the administration bond against the sureties separately from their principal, and that upon such an action they could, in no way, either by plea or as evidence, avail themselves of the judgment rendered against the plaintiffs in this case. Not being parties nor privies to the record they could neither be benefitted nor prejudiced by the judgment therein; neither be fixed with nor discharged from any legal liability. In an action on a joint and several promissory note, if the action is against the principal the surety is a witness either for the plaintiff or the defendant; for if the surety be afterwards sued on the note and the debt be recovered of him, he can again recover of his principal the debt and costs. Byles on Bills of Exchange, 236, 237. So, if Moore and Young were made liable on the bond they could again recover the debt and costs against Barnett. We therefore think (90) they had not such an interest as to render them incompetent.

The charge of the court as to pedigree is not objectionable. To warrant the admission of declarations relating to pedigree it is essential, first, that the parties who made the declarations be proved to be dead; secondly, that the declarants were likely to know the facts. The tradition must, therefore, be derived from persons so connected with the family that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken. 2 Starkie on Evidence, 604, 605. We are of the opinion that the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Governor v. Carter, 25 N. C., 341.

JESSE R. SILER v. ARTHUR BLAKE, ADMR. OF DANIEL BLAKE.

Sheriff's Commissions—Appeal.

1. A sheriff is not entitled to commissions upon a *fieri facias*, though the defendant pay the money to the plaintiff while the *fi. fa.* is in his hands, of at the time the defendant held no property upon which the *fi. fa.* could be levied.

2. An appeal will not be sustained where there is no judgment between the parties, nor at the instance of one who is not a party to the cause.

THIS was a *scire facias* to subject the defendant's own goods to the payment of a judgment obtained against him for a debt of his intestate. No pleas were put in by the defendant, but certain facts agreed were submitted to his Honor, *Judge Settle,* at Macon, on the last Fall circuit. The facts were as follows:

An execution issued upon the judgment obtained as above stated, directed to the sheriff of Buncombe County, commanding him to make the sum mentioned in said judgment, of the goods and chattels of
(91) Daniel Blake, deceased, in the hands of his administrator, Arthur Blake. There were no goods and chattels of the intestate in the hands of the administrator on which the execution could be levied, but the proceeds of the goods and chattels of the intestate sold by the administrator were then in his hands. A few days previous to the return day of the execution, and while the *fieri facias* was in the hands of the sheriff, the administrator paid to the plaintiff the amount of the debt, the administrator agreeing to pay all costs. This payment was unknown to the sheriff at the time he returned the execution. The return was that there was no property to be found subject to the execution. Upon these facts it was submitted to the court whether the sheriff of Buncombe was entitled to commissions upon the money paid by the defendant to the plaintiff. His Honor decided that the sheriff was not entitled to commissions, whereupon the transcript stated there was a judgment for the defendant, from which an appeal was prayed and granted.

No counsel appeared for either party.

GASTON, J. The decision of the court below on the question of commissions is, as we think, correct. The act of assembly fixing the compensation of sheriffs (1 Rev. Stat., ch. 105, sec. 21), after giving specific fees for specific services, declares a sheriff entitled to receive "for selling the estate of an intestate, to be allowed by the court, not exceeding two and a half per cent; for executing a warrant for distress, or an execution

against the body, two and a half per cent, and for all moneys collected by him by virtue of any levy, two and a half per centum, and the like commissions on all moneys that may be paid the plaintiff by the defendant while such precept is in the hands of the sheriff." The difficulty in construing the last clause is in ascertaining the meaning of the words "such precept." The reference is to the execution meant in the clause immediately preceding under the words "collected by virtue of any levy"—and as express provision had been made for commissions in executing a warrant of distress and an execution against the body, we may be satisfied that neither of these was therein intended. The precept (92) contemplated was then an execution against property, and it might be contended that "by *such* precept" is to be understood an execution against property *levied.* On the other hand this interpretation is not readily reconciled with the words "while in the hands of the sheriff." But however this may be, we cannot believe that the Legislature meant to give the sheriff a commission on money paid by the defendant to the plaintiff unless the execution in the hands of the sheriff was one by which the collection of the money, had it not been anticipated by the parties, might have been coerced. In the case stated it is agreed as a fact that the defendant held nothing on which a levy could be made, and the sheriff made that return on the execution.

Although we approve of the decision thus made we have a difficulty on the transcript in knowing what to do with the case. The record shows a *scire facias* sued out at the instance of the plaintiff, requiring of the defendant to show cause wherefore execution should not issue against the defendant's proper goods and chattels, to satisfy a judgment theretofore obtained against him in his representative character. To this *scire facias* there are no pleas, so that it is not judicially seen what is disputed *between the parties.* But a case is stated upon which the opinion of the court is asked, whether the defendant is liable for commissions claimed by the sheriff of Buncombe County. It does not appear from the case what judgment, upon the agreement of the parties, is to be acknowledged and rendered *between them* accordingly as the opinion of the court may be for or against the defendant upon this claim of the sheriff. If it did, then the judgment would follow that agreement, and be correct or erroneous, as the opinion by which it was to be regulated, might be right or wrong. Where there is no agreement for acknowledging a judgment, then the judgment is the sentence of the law upon the matter contained in the record—and we should say in this case that there being no plea, nor default taken for want of plea—any judgment between the parties as the act of the court would be premature, and the course erroneous. Upon the whole, however, we believe that a judgment between the parties has not been rendered. The transcript speaks indeed of a (93)

"judgment for the defendant, from which an appeal was prayed and granted," but it does not set forth that judgment nor who appealed therefrom. Upon comparing the alleged judgment with the subject-matter on which it was asked we think that we are not warranted in saying that more was done below than to declare that the sheriff was not entitled to the commissions he asked of the defendant; and as in *this* collateral controversy "the sheriff" is represented as the claimant, we are to understand that *he* has appealed from the determination against *his* claim. Who is the person called "the sheriff of Buncombe" does not appear, and if it did we do not know him as a party in this cause. He cannot, therefore, appeal in it.

The court directs the case to be dismissed as not being properly before it.

PER CURIAM. Case dismissed.

Cited: Kincaid v. Smith, 35 N. C., 496.

OLLEN MOBLEY v. JOHN A. FOSSETT.

Agreement—Action.

1. Where an agreement in writing was made for the exchange of slaves, and one of the parties afterward refused to complete the contract: *It was held,* that the latter might maintain an action of assumpsit on the special agreement.
2. Where a party is bound by his agreement to make a tender of an article at a particular place, and the other party apprises him that he will not receive the article at all, it dispenses with the necessity of making the tender.

THIS was an action of *assumpsit* in which the plaintiff declared upon a special agreement for the exchange of slaves. On the trial at Sampson, on the last circuit, before his Honor, *Judge Dick,* the proof was as follows: The defendant being the owner of a slave by the name of Squire, wrote a letter to the plaintiff proposing to exchange Squire with him for either one of two slaves belonging to the plaintiff, by the
(94) names of Sam and Balaanc, if the plaintiff would carry one of said slaves to the defendant at Hillsborough. The plaintiff immediately agreed to the proposition and sent an agent with the slave Sam, and also a bill of sale for him to the defendant, and a letter informing the defendant that he (the plaintiff) accepted the offer made. The agent on his way met with the defendant in Raleigh and handed

him the plaintiff's letter, and at the same time tendered to him the slave Sam, with the bill of sale, and offered to deliver Sam either at Raleigh or Hillsborough and receive in exchange the slave Squire, according to the agreement. The defendant then refused to take Sam and declared that he would not receive him at any place, nor would he deliver Squire. Upon this evidence the judge directed a nonsuit, on the ground that the plaintiff had misconceived his action—that he ought to have brought either trover or detinue; whereupon the plaintiff appealed.

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

DANIEL, J. After stating the case, proceeded as follows: The mode of contracting for this species of property, prescribed by the act of 1819 (1 Rev. Stat., ch. 50, sec. 8), that is, writing signed, etc., was compiled with by the parties. The defendant's positively refusing to take the slave Sam at all dispensed with the necessity of a tender of him at Hillsborough (2 Stark. on Ev., 778). Whether the plaintiff had a right to to bring trover or detinue, it seems to us, not necessary to determine; for if he had he might waive such right and bring assumpsit to recover damages for a refusal to deliver Squire according to the contract when demanded. Mr. Starkie in his treatise on evidence (2 vol., 886) says: "An action by the vendee of goods is either on a special contract for not delivering the goods (assumpsit), or of detinue; or of trover for a conversion; or of money had and received upon a rescinded contract; or upon a warranty." Here the plaintiff elected to bring assumpsit and to declare on the breach of the special contract to deliver the slave, Squire. We think the action sustainable. The nonsuit must be set aside and a new trial had.

PER CURIAM. Judgment reversed.

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(95)

THE STATE v. JESSE, A SLAVE.

Former Acquittal—Evidence.

1. An acquittal upon an indictment for a rape against a person of color cannot be pleaded in bar to an indictment against the prisoner for an assault with intent to commit the rape upon a white female, under the act of 1823 (1 Rev. Stat., ch. 111, sec. 78), because both offenses are felonies, created by different statutes, and the latter requires different allegations in the indictment and different proof on the trial from the former, and because an indictment for the commission of a felonious act is not supported by proof of the intent to do that act, and an indictment for the latter, if a felony, may be sustained after an acquittal upon an indictment for the former.

2. Where a person of color has been acquitted upon an indictment for a rape, and is subsequently indicted for an assault with intent to commit the rape upon a white female, under the act of 1823, he cannot object, upon the trial, that the evidence offered proves an actual rape, because the jury may convict for the specific charge contained in the indictment, if the evidence proves that charge, notwithstanding it may also prove the other charge for which the prisoner has been formerly tried and acquitted.

3. A formal acquittal, if it cannot be pleaded in bar to a subsequent indictment cannot be taken an advantage of as an estoppel.

4. It is not sufficient to make a judgment in one indictment a bar to another that evidence of the facts alleged in the first would also be *evidence* of the facts alleged in the latter. As an acquittal upon an indictment for the burglary and stealing is not a bar to a second indictment for the burglary *with intent to steal.*

5. An acquittal upon a former indictment can be no bar to a second unless the former were such as the prisoner might have been convicted upon by proof of the *facts contained in the second.*

6. An intent to commit a felonious act, where the intent is only a misdemeanor, merges in the felony, if the act be committed; but not if the intent alone is a felony of the same grade with the act itself; and the prisoner may be convicted of either upon any competent testimony that satisfies the jury of his guilt of the particular offense charged.

7. In burglary the *intent* to steal is most satisfactorily proved by an actual stealing.

The prisoner was arraigned on the following indictment in the Superior Court of Craven.

(96) "The jurors for the State upon their oath present, that Jesse, a slave, being a person of color, late of the county of Craven, the property of Sarah Green, of the said county, on, etc., with force and arms at, etc., in and upon B. W. in the peace of God and the State, then and there being, did violently and feloniously make an assault, and her the said B. W. then and there did beat, wound and illtreat, with intent unlawfully, forcibly and feloniously to commit a rape upon the body of her, the said B. W., being a white female, and with intent her the said B. W. violently, forcibly and against her will then and there feloniously to ravish and carnally know; and other wrongs to the said B. W. then and there did, to the great damage of the said B. W., contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

To this indictment the prisoner pleaded *"autre fois acquit,"* and also pleaded over to the felony "not guilty," and issue was joined upon both pleas.

The first plea set out the record of a former indictment against the prisoner in the same court, containing two counts. The first charged the prisoner with a felonious assault on B. W. and feloniously commit-

ting a rape. It described him as a slave, the property of Sarah Green, but it did not otherwise describe him as a "person of color," nor did it describe B. W. as a white female. The second count was for an assault with intent to commit a rape on B. W., and in all respects like the present indictment except that it omitted the term *feloniously* as applied to the assault therein charged. On that indictment the prisoner was tried, and by the jury found not guilty of the felony and rape charged on the first count of the indictment, and guilty of the felony and assault, with intent to commit a rape, charged on the second count. Whereupon there was judgment of the court that the prisoner should be discharged and go acquitted of the premises in the said first count specified, and the judgment upon the verdict upon the said second count was arrested. (See *ante,* 2 vol., page 297.)

Upon the trial of the issues joined on the second indictment, at Beaufort, on the last circuit before his Honor, *Judge Saunders,* the evidence raised a doubt whether a rape had not, in fact, been committed; and the counsel for prisoner insisted thereupon that he was en- (97) titled to a verdict and prayed the court so to instruct the jury. The court refused to give such instruction, but charged them that if the prisoner had, in fact, committed a rape, yet he was not on that ground, entitled to a verdict; to all which the prisoner excepted. The jury found the prisoner guilty, and that he had not been before acquitted of the premises in this indictment specified and charged on him. Sentence of death being pronounced on the verdict, the prisoner appealed to the Supreme Court.

Badger and J. H. Bryan for the prisoner.
The Attorney General for the State.

RUFFIN, C. J., after stating the case as above, proceeded as follows: The instruction prayed on behalf of the prisoner does not specify on which of the two issues he demanded a verdict in his favor. From the nature of the instruction and referring to the evidence to which it relates, it would seem to be necessarily confined to the plea to the felony; if so, the question which has been debated upon the effect of the former indictment and the proceedings on it, as mentioned in the *other* plea, does not arise upon this record. But as all the matters were treated at the bar as open, and were fully argued on both sides, the court is not inclined to preclude the prisoner from any advantage he may possibly be entitled to, and therefore has considered the whole case. It has been insisted that the judgment must be reversed for several distinct reasons.

The first is that the record set forth in the plea of *autrefois acquit,* sustains that plea, the identity of the persons and transactions being assumed, and that is not disputed here.

In the first indictment the prisoner was charged in one count with a felonious assault and committing a rape, of which he was acquitted; and in the second count with an assault with intent to commit a rape, of which he was found guilty; but no judgment was pronounced thereon, because, for the want of the word *felonice,* the offense was a mis-
(98) demeanor, and of that the Superior Court had not jurisdiction.

The prisoner's counsel rests his case on the verdict and judgment given on the first count and claims to confine our attention to that part of the former proceedings, denying an operation, for any purpose, to the other part of the proceedings.

If indeed it were true that upon an indictment for a rape the jury might find the accused not guilty of the rape, but guilty of an assault with intent to commit a rape, and consequently that a general acquittal upon such an indictment would be a bar to a subsequent prosecution for, specifically, an assault with that intent, the court would yet not be prepared in this case to admit without much hesitancy, the conclusion necessary to the prisoner. The reason would not seem applicable to an indictment with two counts, in which the two grades of offense and the facts necessary to constitute them are separately charged as distinct crimes, and the verdict expressly discriminates between them, finding the prisoner guilty of the assault as charged in one count, but not of the rape as charged in the other. It would seem to be the duty of the court to make the verdict consistent with itself, if possible. Perhaps it mught therefore, if necessary for that purpose, be deemed a conviction of the assault of which the prisoner could be convicted on the first count, notwithstanding the general terms of finding the prisoner not guilty of the premises charged on that count, because the verdict expressly and affirmatively finds the party guilty of an assault. But if that would not be justifiable, it is plain that the verdict cannot be perverted into an acquittal of the assault, contrary to its explicit purport. If not a conviction to that extent in both counts it would, in itself, be repugnant—since upon the one count it affirms the prisoner to be guilty of an assault, of which same assault it at the same time affirms him to be not guilty upon the other. In such a case there could not be a judgment of acquittal, but only such proceedings as ensue in other cases of insensible verdicts.

The position of the counsel upon this point is, therefore, in opposition to the judgment of this court upon the very case of this prisoner, when it was before us on the first indictment. (See 19 N. C., 297.)
(99) The judgment of acquittal on the first count was then affirmed, and the judgment was arrested on the second count because that was regarded as charging a distinct offense, which was not charged in the former, or of which the prisoner could not be convicted on that

count. But as the validity of the verdict in this respect was not then discussed, nor even adverted to at the bar, nor by ourselves, the court will now proceed to inquire whether the prisoner was before acquitted of the crime, of which the present indictment accuses him. This will be done independently of the authority of the adjudication of ourselves, just alluded to, and also with reference only to that part of the first verdict which acquitted the prisoner on the first count of that indictment, and without noticing the fact that the indictment contains more than that count.

The affirmative is asserted for the prisoner, because it is said that he might have been convicted of the assault on that count. In the opinion of the court that is the legal criterion. The nature of the evidence does not seem to be an infallible test. It is true, to use the words of *Mr. Justice Buller,* "if crimes are so distinct that evidence of the one will not support" (a charge of) "the other, it is as inconsistent with reason as it is repugnant to the rules of law to say that they are so far the same that an acquittal of the one shall be a bar to a prosecution for the other." That two crimes must be proved by different evidence does certainly constitute them distinct and different crimes, of both of which the same person may be guilty, and for both of which, therefore, he may be prosecuted concurrently or successively. The difference of evidence conclusively establishes the distinctness of the accusations; the guilt in the one case is independent of guilt or innocence in the other. But it does not follow *e converso* that two indictments are identical in their accusations, although the same evidence may be legally competent and sufficient to sustain each—and particularly is this true where the one charges an act done as constituting the crime and the other charges an intent to do that act as constituting also a crime. Two species of offenses may have several circumstances in common, but to constitute either offense some other circumstance is to be added; and that may be a circumstance peculiar to each, and when added as a fact alleged in the (100) record, constitutes each offense a different one from the other. Yet it is obvious that the allegation of the distinguishing fact, in the one indictment may be sustained in the minds of the jury as a rational inference from proof on the trial of the facts laid in the other indictment.

Thus, although an assault with intent to murder and an assault with intent to maim or disfigure are different offenses, and evidence to sustain an accusation of the latter would not establish the former, yet it was held in Coke and Woodburn's case that an attack with intent to murder, with an instrument which could not but endanger the disfiguring, would, where death did not ensue, authorize a verdict under the Coventry act that the prisoners were guilty of an assault with intent to disfigure. If

the intent was only to maim, evidence of that intention would not prove an intent to murder, which is a distinct and further intent requiring further evidence. Of consequence an acquittal upon an indictment for an assault with either intent would not bar a subsequent one for an assault with the other intent. Yet we find, as to the proof, that evidence of the intent to murder involves the evidence of intent to maim, if the mode of the murder involves the mode of maiming mentioned in the statute. The manner of the act in that case was evidence of both intents and therefore each intent may be deduced from proof of the act, althongh each intent constitutes the act a different offense, and they are accordingly charged specifically different in the indictments respectively. So, too, in the case of burglary, which is defined to be breaking and entering a dwelling house in the night time and stealing goods therein, or breaking and entering a dwelling house in the night time with intent to commit a felony. Now, in the case of *Vandercomb v. Abbott,* Leach Cr. Cas., 708, it was held, that evidence of a breaking and entering with intent to steal goods was not sufficient to support an indictment charging the breaking, entering and larceny. The same rule is said down in *Rex v. Furnival,* Russ. and Ry. Cr. Cas., 445. It is usual, indeed, not to charge the larceny although actually committed, because the intent to commit it constitutes the crime, or at least one species of it, and (101) the charge of the intent may be supported by any evidence sufficiently denoting it, although short of an actual larceny, and is fully supported by proof of the stealing. The perpetration of the felony is indeed the usual proof of the intent. Locust and Villar's case, Kel. 30, and it is even said to be the best evidence of it. Arch. Cr. Plea, 260. It is not, therefore, sufficient to make a judgment on one indictment a bar to another, that evidence of the facts alleged in the first would also be *evidence* of the facts alleged in the latter; for in the case of Vandercomb and Abbott the court held, notwithstanding the proof of stealing is evidence of the intent to steal, that an acquittal upon an indictment for the burglary and stealing the goods was not good as a plea to a second indictment, for the burglary *with intent to steal.* Why? Because upon the first indictment the prisoner could not have been convicted by proof of an intent to steal, but only on proof of an actual stealing. He had, therefore, been acquitted only of not having stolen, but had not been acquitted of nor charged with purely an intent to steal, which intent was itself one species of burglary, and might have been entertained, although never carried into execution. *Mr. Justice Buller,* in delivering the opinion of the court in that case, therefore, lays down the principle in these words: "That unless the first indictment were such as the prisoner might have been convicted upon by proof *of the facts contained in the second* indictment, an acquittal on the first can be no bar to the second." In other

words we are to inquire whether the facts *alleged in the two indictments* are actually or legally the same. If they be, the accused cannot be a second time put on trial; if they be not, he is tried but once on the same accusation.

The principle thus deduced seems to the court to be decisive against the plea of the prisoner. The comparison of the present indictment with the first count in the former indictment displays at once such marked differences between them as to render it palpable, that the frame of neither would admit of a conviction on it of the offense charged in the other. The facts contained in the first indictment fall short, in some essential respects, of those indisputably requisite to constitute the crime in the second indictment. So, likewise, of the facts laid in the second indictment, if true throughout, they would not make up (102) the crime specified in the first indictment.

First, both the crime of rape and that of an assault with intent to commit a rape are felonies created by statute. But they owe their existence to different statutes; the former to the statute of Westminster, 2nd, and the latter to the statute of this State of 1823. (See 1 Rev. Stat., ch. 111, sec. 78.) The conclusion of an indictment under each must be *contra forman statuti;* and the first count of the former indictment did so conclude. Now, admitting that upon that count the jury might have acquitted the prisoner of a rape and convicted him of an assault with intent to commit a rape, if this last had been a common law felony, yet we think it certain that he could not be so convicted of that offense when made a felony by another statute. The reason upon which a reference to the statute is held necessary at all is in direct opposition to such a conviction. The object is to inform the accused and the court of the particular law under which the indictment is formed, and to prevent surprise on either the court or the accused, very nice distinctions have been adopted establishing the necessity of concluding *contra forman statuti vel statutorum,* according to the truth, when the offense depends upon one statute or upon two or more statutes. The object then is to specify with certainty on the record the very law which created the crime for which the prosecution is instituted. This is indeed done in the general terms of the conclusion *contra forman statuti,* without identifying the statute by its title or date. But the indictment furnishes, or ough to furnish, other as sure means of identifying it, by laying, namely, such facts and circumstances in the indictment as constitute the offense within a particular statute and thus bringing the case within that statute. Under what statute the indictment is framed may be determined, and, therefore, is to be determined, by the facts and circumstances alleged in the indictment as constituting the offense, or giving color or degree to it. An indictment

concluding against the form of the statute cannot be treated as an indictment founded upon two statutes. There is no better reason why (103) it should be received as an indictment founded on the one or the other statute, according to the evidence on the trial. The tenor of the indictment shows on which statute it proceeds, and not the proof on trial. In the case before us the first indictment charged the crime of rape and concluded against the form of the statute. What statute? Certainly that statute which renders rape a capital felony, and not the the statute which makes an assault with intent to commit a rape a felony. That statute is meant which makes the facts and circumstances charged in the indictment a specific offense; and not another statute which creates an offense which may be described, and, therefore, ought to be described, by terms which constitute it specifically a different offense, though it be of the same grade with the former. For these reasons the first count in the former indictment could not, in the opinion of the court, be deemed an indictment under the statute of 1823; and consequently the prisoner, if a white person, could not have been convicted on it if the offense created by that statute, that is to say, of an assault with intent to commit a rape, which is the crime with which he now stands charged. No authority was cited by the prisoner's counsel in support of his position except an adjudication in Massachusetts, *Commonwealth v. Cooper,* 15 Mass. Rep., 187. That was an indictment for a rape, and the jury, after long consultation, not agreeing upon a verdict, were instructed by the court that they might acquit the prisoner of the rape and convict him of an assault with intent to commit it. As an authority the case is open to the observations that the decision was offhand, in the midst of a protracted trial, without argument, and without precedent; and that it might be, perhaps, justified by local legislation, of which we are uninformed. But there is a more decisive answer to it in the fact that, upon reconsideration in a full court in the subsequent case of Roby, 12 Pick Rep., 496, the doctrine is expressly overruled in that State.

Secondly. There are other ingredients in the offense created by the act of 1823 which were not charged in the first indictment and without the existence of which, apparent on the record, the prisoner could not be convicted under that act. Rape is a capital felony, if committed by any person, white or black; and accordingly the first count (104) charged it in that general form, without describing the prisoner as a person of color, or the woman as a white woman. It is not so with respect to an assault with intent to commit a rape. That is a capital felony only where the actor is a person of color and the subject

a white female. As those facts were not necessary to constitute the rape, and were not charged in the first count of the former indictment the prisoner could not have been convicted on that indictment of the assault.

But independent of these two particular objections a complete answer to the plea is furnished, thirdly, by the more general principle before adverted to, that an indictment *for doing a criminal act* is not supported by proof of an *intent* to do that act, although the intention to perpetrate, and the perpetration be each a crime, and of the same grade. To this position the case of *Vandercomb v. Abbott* is a direct authority; as it is also to the consequence necessarily deducible from it, that an acquittal upon an indictment charging the doing of an act is not a bar to an indictment charging the intent to do it.

In the more recent case of *Rex v. Furnival,* Russ. and Ry. Cra. Cas., 445, it was again decided that where an indictment for burglariously breaking and entering a dwelling house, and then and there stealing goods therein, *omitted to state the intent,* the defendant might be convicted if the larceny were proved, *but not otherwise.* Those were cases of burglary, it is true, but they are equally applicable to the question before us, since they proceed on the ground that although the dwelling-house in which, and the time when, the burglary was charged to have been committed, were precisely the same, both in the indictment for the burglary and stealing the goods and in the indictment for the burglary with intent to steal the goods, yet that the difference between the charge of *stealing* in the one and that of the *intent to steal* in the other, constituted the indictments essentially distinct and dissimilar. In strict analogy to that is the case of two indictments, the one for an assault and a rape consummated, and the other for an assault with intent to commit a rape.

The court, for each of the foregoing reasons, is of opinion (105) that the first plea of the prisoner is bad, and that he might be properly convicted on the other issue if sufficiently proved on the part of the State.

It has, however, been contended for the prisoner that he was entitled to a verdict on his plea of *not guilty,* because the evidence, if proper to be received, proved a substantial and distinct felony, namely, a rape, and consequently disproved the felony charge, namely, an assault with intent to commit a rape. For the support of this position, Hornwood's case, 1 East P. C., 411, 440, is relied on. But we think that case proceeds on a different reason. It establishes that upon an indictment for an assault with intent to commit a rape, if the proof be of a rape actually committed the prisoner must, in England, be acquitted. But the reason is that such an assault is, in the law of that country, a misdemeanor only, and it cannot exist where a felony has been actually committed, but is merged

in the felony. It does not proceed on the ground that evidence of the intent consummated disproves the intent itself, but on the contrary that the intent is established in both cases, and that when it is executed the act and the intent together constitute a different and a *higher* crime than the intent alone did, and extingishes the inferior one. But that case is obviously distinguishable from the cases of distinct felonies. When the intent alone is a felony of the same grade, and followed by the same punishment with the act itself, if perpetrated, there can be no merger of the one in the other; each is a substantive capital felony, and the party may be convicted of either upon any competent and relevant evidence that satisfies the jury of his guilt of the particular offense charged. Is not proof of a rape actually committed evidence of an assault with intent to commit a rape? In good sense and law the doing an act raises the highest presumption of an intent to do it. The application of that principle of evidence is of every days' occurrence in practice. In burglary the intent to steal is most satisfactorily proved by an actual stealing. 1 Hale P. C., 560, and in the case of *Locost v. Villers,* where the indictment was for burglary in breaking and entering a man's house *with intent to ravish his wife,* the prisoners were found guilty and hanged, upon evidence of the rape committed. "The fact (as (106) Keeling informs us), being very foul, for the woman was actually ravished." The objection on the part of the prisoner is, therefore, deemed untenable, for the evidence of proving a rape was also a relevant evidence of the intent to commit it, and the latter being a distinct felony, subsists, notwithstanding the prisoner proceeded to commit a further felony.

The preceding observations serve also to answer, in a great measure, another and the last objection of the prisoner's counsel, that is, that if the former acquittal cannot be pleaded technically as a bar to this indictment, yet that the State is estopped by it as evidence from proving, for any purpose, that the prisoner was guilty of a rape. The court is not aware of any mode of taking advantage of the estoppel created by a former trial, but pleading it as an acquittal or conviction for the same offense. But if there were, the same reasons which avoid the bar as a plea, must necessarily repel the objection of a former trial set up as an estoppel upon the evidence. Nor is it seen what benefit the prisoner would derive if we could allow the record of the former acquittal to be as evidence, an estoppel to other evidence on the part of the State that he actually committed a rape, for estoppels are mutual, and he cannot take advantage on this occasion of the fact that he was guilty of the rape, more than the State can. The former trial establishes conclusively on both the State and the prisoner that he was not guilty of the rape. He is not at liberty more than the State is to say for any purpose that he

was guilty of the rape itself; and whatever on this trial the evidence might tend to prove, both sides are, upon the argument of the prisoner's counsel, restrained from denying that it did prove a rape actually committed. When, therefore, a doubt was raised on the evidence for the State, if it was on *that* evidence that the doubt arose, whether a rape had not in fact been committed, it was not competent to the prisoner to insist thereon as a defense to this indictment, that he was guilty of the rape. But it does not appear on what evidence that for the State or the prisoner, the doubt arose; and certainly the argument that the State was concluded from giving such evidence, is equally applicable to the prisoner himself. He could not prove himself to be guilty of the rape for the purpose of availing himself of the former acquittal. The truth is, however, that the guilt (107) or innocence of the prisoner of the rape was not in controversy upon the trial. The *gist* of the charge was an assault with intent to commit a rape; and it was competent to give evidence of any facts from which that intent might be presumed by the jury—not for the purpose of establishing his guilt or innocence of any other charge, but of this only.

It is admitted, as a result from these positions, that the prisoner may practically be indicted for two felonies, and his guilt proved of one, upon the same evidence on which he received an acquittal on the other, from which inconveniences and hardships may arise. But it is a consequence of the circumstance that the two felonies are of such a nature that the existence of one may, in fact, be inferred from the existence of the other; while in law, the felonies themselves are so distinct and essentially different, as alleged in the indictment, that an acquittal or conviction of one cannot bar a prosecution for the other. This is beyond the power of the court to correct, since, in passing upon plea of former acquittal, the court is confined to the facts and averments of the indictments, and cannot know upon what evidence the former verdict was rendered, or what evidence will be given on the plea of not guilty on a second trial.

Having been unable to sustain any of the objections on behalf of the prisoner and not perceiving any error in the record the court is obliged to affirm the judgment of the Superior Court.

PER CURIAM. Judgment affirmed.

Cited: S. v. Birmingham, 44 N. C., 122; *S. v. Nash,* 86 N. C., 651.

(108) THE STATE v. CUREN JOLLY AND ELIZABETH WHITLEY.

Fornication and Adultery—Witnesses—Costs.

1. Where, upon a conviction for fornication and adultery, the defendants were fined severally; and nothing was said as to how the costs should be paid: *It was held*, that the judgment was several as to the costs also, and that one might appeal without the other.
2. In an indictment for fornication and adultery, one who had been the husband of the *feme* defendant, but had been divorced from her on account of her adultery, is incompetent to testify against the defendants as to the adulterous intercourse, or any other fact which occurred while the marriage subsisted. And if the testimony be received at the trial, after objection made to it, and the defendants be found guilty, and the man alone appeals, it is not thereby rendered competent against him.
3. An indictment under the statute for fornication and adultery may be simply for "bedding and cohabiting together," and the charge will be sustained by showing an habitual surrender of the person of the woman to the gratification of the man, without proof that either had taken the other into his or her house.

THE defendants were indicted for that they, "being persons of lewd and vicious habits, on etc., and for a long time, to wit, for, etc., unlawfully did bed and cohabit together as man and wife, without being joined together in the holy bonds of matrimony, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

Upon the trial at Martin, on the last circuit, before his Honor, *Judge Pearson,* one Henry C. Whitley was offered as witness for the State, when the defendants counsel objected to his competency because he had been the husband of the defendant, Elizabeth, although it was admitted that they had since been divorced from the bonds of matrimony; and it was insisted for the defendants that he was not a competent witness as to any matter that took place before the divorce. The court overruled the objection, "thinking the matter about which he (the witness) was called to testify, to wit, the criminal intercourse of the defendants, did not, after the divorce, fall within the rule excluding confidential com-
(109) munications, and all such facts as are known by reason of the peculiar confidence existing between man and wife."

The witness was examined and proved a criminal intercourse between the defendants before the separation of the witness from his wife, the defendant, Elizabeth, and for some time after that separation, but before the divorce.

His Honor charged the jury "that a single act of adultery was not indictable, but that if they were satisfied from the evidence that the de-

fendants had been guilty of criminal intercourse time after time, so as to make a practice of it, they should find them guilty." The counsel for the defendants then moved the court to instruct the jury that they ought not to convict unless the evidence satisfied them that the defendant, Jolly, or the defendant, Elizabeth, had taken the other into his or her house, and they had lived together in adultery. The court refused so to charge, but again instructed the jury "that it was not necessary for the parties to live together in the same house, provided they were satisfied that the parties were in the habit and made a continual practice of this adulterous intercourse."

A verdict of guilty was returned, when the counsel for the defendants moved for a new trial because the court had erred in receiving the testimony of the witness, Whitley, the former husband of the defendant, Elizabeth, and also in the charge to the jury. This motion was overruled. A motion was then made in arrest of judgment because the indictment charged simply a bedding and cohabiting together, without alleging that either of the defendants had taken the other into his or her house, and lived together, etc. This motion was also overruled, and the court fined the defendant, Jolly, two hundred dollars, and the defendant, Elizabeth, one dollar. From this judgment the defendant Jolly appealed.

Iredell for the defendant Jolly.
The Attorney-General for the State.

GASTON, J. Upon the trial of this indictment the former husband of the female defendant, who had been divorced from her by a regular judicial sentence, was introduced as a witness by the State, to (110) prove the adulterous intercourse between her and the appellant previously to the divorce. The counsel for the defendants objected to the witness as incompetent for this purpose, but the court being of opinion that the case did not come within the rule excluding testimony of confidential communications, and of such facts as are known by reason of the confidence between man and wife, admitted the testimony, whereupon the defendants were both convicted, and one of them, the male defendant, Jolly, appealed to this Court.

It has been objected on the part of the State that this appeal is irregular, for that although the sentence was several as to the fines imposed, it was joint as to the costs. We do not so understand it. The sentence is in law several in *all* respects; where the costs can be discriminated each is liable for his or her part of them, and where they cannot be each is liable for the whole. The judgment against *each* is to pay the fine and costs of prosecution.

The objection made to the witness would have been insuperable if at the time of the trial he had remained the husband of the female defendant. It is a rule, subject to very few exceptions arising from necessity, that a wife cannot be a witness for or against her husband, nor a husband for or against his wife, nor either for or against any person who is a party on the record, and in interest with such husband or wife. This rule is founded principally upon the identity of interest which the law creates between the married pair, and so far as it is based upon this principle, the rule ceases with the dissolution of the relation which made them two one flesh. But it is also founded on public policy, which seeks to render the relation not only one of intimate union, but of entire confidence, and this policy makes it necessary that the disability to testify against each other should in part (at least) remain after the connection shall have been altogether severed. It would outrage propriety if the law were to require or permit communications made under the seal of marriage confidence to be published, to the *injury* or *disgrace* of the trusting party, after the marriage was dissolved. The law had invited confidence, and it should not permit this confidence to be violated
(111) or betrayed. But it is not enough to throw protection over *communications* made in the spirit of confidence. The intimacy of the marriage union enables each to be a daily and almost constant witness of the *conduct* of the other; and thus in fact a confidence, reaching much farther than that of verbal communications, is forced upon each of the parties. What one may even desire to conceal from all human eyes and ears is thus almost unavoidably brought within the observation of the other. The confidence which the law thus *extorts* as well as that which it *encourages,* ought to be kept sacred, and therefore the husband and wife are not in general admissible to testify against each other as to any *matters* which *occurred* during the relation.

But it is argued by the Attorney-General that the criminal conduct testified to in this case was itself an outrageous violation of the marriage vow—a matter in respect to which confidence was not yielded by the wife, nor could have been asked by the husband—a wrong to him of which he had a right to complain, of which he had complained, and for which he had obtained redress by a final separation from his false partner, and it is therefore insisted that testimony as to conduct of this kind, occurring during the continuance of the marriage relation, ought not to fall within the general rule above stated. No decisions have been cited, either for the State or the prisoner, bearing directly upon this point. Indeed, most of the adjudications referred to in the argument in relation to the general rule itself are *nisi prius* decisions, very briefly reported and not entirely reconcilable to each other. *Monroe v. Twisleton,* Peak's Evid, app'd, 91; *Beveridge v. Mintor,* 1 Car and P., 364 (11 E.

C. L. R., 421), and *Doker v. Hasler,* Ry. and M., 198 (21 E. C. L. R., 416). In this dearth of authority we must decide the question by a proper application of the principle of the rule.

We are not satisfied that the exception contended for is established by reasoning urged in its support. The rule we deem a valuable one, and we view with apprehension any exception having a tendency more or less direct to promote cunning, or to generate distrust, where the best interests of society require that perfect frankness and confidence ought to prevail. If one exception be sanctioned because from the char- (112) acter of the criminal act imputed, the dissent of the witness from its commission must be presumed, others may follow where the like presumption will be entertained, although not perhaps with equal confidence —and there will be danger of our having no rule capable of general and steady application. Besides in the infinite variety of motives which operate on wayward and depraved beings, it may happen even in adultery that actual confidence is reposed in the party supposed to be most injured. The judicial records furnish instances in which the husband was the confidant of his wife's licentious amours. *Cibber v. Sloper; Smith v. Allison,* Buller N. P., 27. But, moreover, the rule is not founded exclusively upon an actual voluntary confidence reposed by one of the married pair in the other, but also upon the unavoidable confidence which the intimacy of the marriage state necessarily produces. It is safest, we think, to hold that whatever is known by reason of that intimacy should be regarded as knowledge confidentially acquired, and that neither should be allowed to divulge it to the danger or disgrace of the other.

In holding this doctrine we do not in the slightest degree impugn our decision in *Hester v. Hester,* 4 Dev., 228. The disclosure there authorized was of a matter which the former husband of the witness could not have wished to conceal, but must have desired to make known, and to make known through her if he found no other means of doing so.

It has been argued, however, that supposing the objection to the witness to be good, it was an objection personal to the wife, and as she has submitted to the judgment the appellant has no right to complain of the objection having been overruled. But we hold otherwise. The objection was made on the trial, and if well founded, the testimony offered should have been excluded. *Non constat* that there was any other testimony to establish the charge and if not the appellant has been unlawfully convicted. Besides we are of opinion that if the appellant had been solely on trial the testimony of the husband should not have been received. The crime charged is one in which the guilt of both was necessary to be shown, and we understand the prohibition of the husband to testify against his wife, and of the wife to testify against her hus- (113)

band, to apply not only when the testimony is offered to *convict,* but when its *direct* tendency is to criminate and degrade. *King v. Inhabitants of All Saint Worcester,* 6 Man. and Sel., 194.

Our determination upon this point renders it unnecessary to examine the other question which was raised upon the judge's charge and which is also presented by the motion in arrest of judgment. But as we have no difficulties upon it, and to prevent future controversy we deem it proper to say that as we understand the law, the offense is sufficiently described by charging an unlawful "bedding and cohabiting together," and this charge is sufficiently made out by showing such an habitual surrender of the person of the one to the gratification of the other as usually takes place in the marriage state.

For the error in receiving the testimony of the former husband of the female defendant the judgment is to be reversed and *venire de novo* awarded.

PER CURIAM. Judgment reversed.

Cited: Gardner v. Kluttz, 53 N. C., 376; *State v. Jones,* 89 N. C., 561; *State v. Brittain,* 117 N. C., 786; *State v. Raby,* 121 N. C., 684.

THE STATE v. BENJAMIN MORRISON.

Mistrial of Misdemeanor.

On the trial of a misdemeanor the court has a discretionary power to discharge the jury before they have rendered a verdict, and to require the defendant to be again put upon his trial for the same offense.

THE defendant was indicted for an assault upon one Jonathan Holly, and pleaded "not guilty," and issue was joined thereon. At Spring Term, 1837, of Cumberland Superior Court, a jury was empanelled to try this issue, and being unable to agree upon a verdict it was (114) ordered by the court that a juror be withdrawn. This was done on Friday before the end of the term, and against the consent of the defendant. At Spring Term, 1838, before his Honor, *Judge Dick,* the solicitor for the State demanded that the defendant should again be put upon his trial on the aforesaid issue. The defendant thereupon moved the court to discharge him, on the ground that a jury had, at Spring Term, 1837, being regularly empanelled to try the issue, and that the court had discharged the jury against his consent and without any sufficient legal cause. His Honor overruled the defendant's motion,

and the defendant then pleaded specially the facts above stated, in bar of any further prosecution. To this special plea, Mr. Solicitor Troy entered a general demurrer. The court *pro forma* overruled the demurrer, and ordered the defendant to be discharged, and from this judgment the solicitor appealed.

The Attorney-General for the State.
Iredell for the defendant.

DANIEL, J., after stating the case as above, proceeded as follows: It seems to us that a plea of matters appearing on the record in the case itself, is of a very extraordinary character, but as no objection has been taken to this irregular mode of proceeding we shall consider the point, which upon the plea and demurrer was evidently intended to be submitted.

In the case of the *State v. Ephraim* (*ante,* 2 vol., page 162) we held that a jury charged in a case of capital felony, cannot be discharged before rendering a verdict, but for evident, urgent, overruling necessity, arising from some matter occurring during the trial, which was beyond human foresight and control. But in the trial of issues on indictments for misdemeanors the rule is different. All the learning on this subject was examined and reviewed by the court in the case of the *People v. Olcott,* 2 Johnston's Cases, 301. The Court there proceeded to say: "The case now before the court is a case of misdemeanor only, and the precise question is whether in such case it does not rest in the discretion of the court to discharge the jury whenever they deem it requisite to a just and impartial trial. It is worthy of notice that there is no (115) general rule, nor any adjudged case, denying this power in the court in the case of a misdemeanor." The power of the courts in those cases is analogous to their power in civil cases. It must from the reason and necessity of the thing belong to the court, on trials for misdemeanors, to discharge the jury, whenever the circumstances of the case render such interference essential to the furtherance of justice. Every question of this kind must rest with the court under all the particular or peculiar circumstances of the case. We are, therefore, of the opinion that the demurrer should have been sustained. The judgment rendered in the Superior Court discharging the defendant was erroneous, and the same is reversed. This opinion will be certified to the Superior Court of Law for the county of Cumberland, and the case will there proceed.

PER CURIAM. Judgment reversed.

Cited: S. v. Morrison, 35 N. C., 204; *S. v. Tillettson,* 52 N. C., 115; *S. v. Bass,* 82 N. C., 572.

THE STATE v. WILLIAM SMITH.

Homicide—Legal Provocation.

Where one goes to the house of another in a peaceable manner, without offering or threatening violence to his person or dwelling, and upon being ordered off and not going immediately, is killed by the owner of the premises, the slayer is guilty of murder, although it be proved that he had previously forbidden the deceased from coming on his premises.

THIS was an indictment for murder, tried at Rockingham on the last circuit before his Honor, *Judge Toomer.*

The prisoner was charged with having killed one Samuel Callam. On the trial a witness was introduced on the part of the State who swore that on 11 February, last, which was Sunday, he was sent by the (116) deceased to the house of the prisoner to get a bottle of whiskey, the deceased and prisoner being neighbors. The witness was to procure the whiskey from a son of the prisoner, but the son not being at home the witness was detained, awaiting his return, longer than he had expected and longer than had been foreseen by the deceased. While the witness was sitting in the house by the fire, with the prisoner and one Osborne, he saw the prisoner waive his hand and heard him say at the same time, "clear yourself." The witness, from his position, could not see who was in the yard to whom the prisoner spoke. The prisoner instantly rose from his seat, took a shotgun and went into the piazza where the witness followed him and saw the deceased standing in the yard with his face towards the house. The prisoner raised the gun, presented it at the deceased and snapped it; he then prepared the lock, raised and presented the gun again at the deceased and snapped it a second time. The prisoner then laid the gun on a bench, went into the house, got a rifle, returned into the piazza and fired at the deceased. The ball from the rifle took effect, and the deceased instantly exclaimed, "Lord! Uncle Billy, you have killed me," and died in about an hour after receiving the wound. The deceased was not approaching the house when he was shot, and had not advanced a step towards it after the witness first saw him. He had in his hand a small and very light walking stick, which he held in the ordinary position, with one end on the ground, and he made no attempt to raise it. He did not speak a word to the prisoner until after he was shot, when he made the exclamation above stated. The deceased had no weapon with him except the stick above spoken of. When the prisoner was about to shoot the deceased, the witness attempted to interfere to prevent it, but the prisoner threatened him and he was compelled to desist. Not more than two or three minutes elapsed from the time the prisoner went into the piazza with the shotgun before he fired the rifle.

The prisoner offered to give in evidence testimony to show that the deceased had attempted to use a dirk in two or three different quarrels, but the evidence was objected to by the prosecuting officer and rejected by the court. The prisoner then offered to give in evidence declarations of the deceased, made several months before the killing, (117) when the court was about to reject the testimony upon the ground that those declarations formed no part of that transaction, and that if they had, *words* were not *legal provocation,* and could not extenuate the offense, but being assured by the prisoner's counsel that those declarations would not be urged as *legal provocation* in themselves, but be submitted to the jury as circumstances giving a character to the transaction, and from which the jury could infer the intent with which the deceased visited the prisoner's house, and therefrom deduce inferences explaining the conduct of the deceased there, and having a direct tendency to show that he was assaulting the prisoner, or attempting forcibly to dispossess him of his domicil, the evidence was admitted. Several witnesses were thereupon introduced who stated that several months before the fatal occurrence they heard the deceased, on public occasions and at different places, boast that he had debauched the prisoner's wife, and declare that he could have illicit intercourse with her whenever he pleased. The prisoner then introduced his daughter, who swore that in August last the prisoner and her mother separated and had not since that time lived together; that about a week after the separation the prisoner told her to inform the deceased that he would not go in pursuit of him, but that the deceased must not come to his house; that if the deceased came there he would kill him; that he had parted the prisoner and his wife and he must not come on the prisoner's premises to "pester" him. This message was delivered to the deceased within a few days thereafter, when he replied that he was a free man and would go where he pleased.

The testimony being closed the prisoner's counsel urged that the homicide was justifiable; if not justifiable that it was excusable; and then insisted that if the homicide was felonious, it was only manslaughter and not murder. And the court was requested to instruct the jury: "1st. That if the deceased was expressly forbidden to enter the yard of the prisoner, it was only manslaughter; 2nd. That if the prisoner had forbidden the deceased to come to his house, and the deceased did come, and the prisoner had a well grounded belief that the object of the deceased was unlawful, then it was only manslaughter. 3rd. (118) That if the deceased had been forbidden to come to the house of the prisoner, and he did come and menace the prisoner with violence, either by words or gestures, and refused to go away when ordered, then it was only manslaughter."

His Honor, after stating the different kinds of homicide and explaining what was justifiable, and what excusable, homicide, proceeded to instruct the jury as follows: Felonious homicide includes murder and manslaughter. Murder is the felonious and unlawful killing of one reasonable creature by another, with malice aforethought, either express or implied. Malice is implied, when the circumstances attending the transaction show that the slayer is a man of wicked and depraved disposition, of violent temper, of ungovernable passions, and vindictive feelings, and has a heart regardless of social duty, and fatally bent on mischief. If there be no *legal* provocation, and the weapon used be fitted and likely to produce death, the law infers malice. Words are not legal provocation. Was the weapon fitted and likely to produce death? If the prisoner had taken the deceased in adultery with his wife, and killed him on the spot, or before his passions had time to cool and subside, it would be manslaughter and not murder. This the law considers the greatest provocation that can be given. But declarations by the deceased that such an act had been committed are mere words, and are not legal provocation; and especially if the killing occurred long after the declarations had been made. The State also insists that the law not only implies malice from the circumstances of this transaction, if they be believed by you, but that there is evidence of express malice. If you be satisfied from the evidence that the prisoner killed the deceased with sedate and deliberate mind, and with a formed design, there is express malice. Former grudges and antecedent menaces are evidence of this formed design. Do the witnesses introduced by the prisoner satisfy you that he entertained grudges, and uttered menaces against the deceased? If so, there is evidence of express malice; and you are to determine, if you be satisfied of its existence. If you believe from the evidence that the homicide was committed under the influence and by the
(119) promptings of former grudges, and in pursuance of antecedent menaces, and was not in consequence of the conduct of the deceased at the time of the fatal occurrence, there was malice, and the act was murder.

"But the prisoner insists that it is merely manslaughter. To extenuate the offense from murder to manslaughter it must have been perpetrated in a gust of passion, and that passion must have been excited by legal provocation. Do the circumstances satisfy you that the prisoner acted deliberately and with formed design, and not under the influence of passion? If so it is not manslaughter. But if the deed were perpetrated under the influence of passion, was there *legal* provocation. Words are not legal provocation. If the killing be with a deadly weapon—one well fitted and likely to produce death, and the provocation be *slight*, it will not extenuate the crime to manslaughter. The mode of resentment must

bear a *reasonable* proportion to the provocation given, to reduce the offense to manslaughter. If the deceased were a mere trespasser on the land of the prisoner, by coming there against his will; and if the deceased came there after having been told not to come, as stated by the prisoner's daughter; and if the deceased did not go away instantly when he was ordered, under the circumstances stated by the witness, it would not be such a provocation as would reduce the killing to manslaughter, if the deed were perpetrated under all the circumstances stated by the witness."

The prisoner was convicted of murder and judgment of death being pronounced he appealed.

J. T. Morehead for the prisoner.
The Attorney-General for the State.

PER CURIAM. The court has not perceived anything in the instructions to the jury, taken in connection with the evidence stated, that can authorize a reversal of the judgment.

There was no evidence from which it could be judicially or rationally inferred that the deceased, in word or action, threatened or even that he meditated violence to the person or dwelling of the prisoner. On the contrary the evidence establishes a killing without provoca- (120) tion at the time, upon a formed design and ancient grudge, indicated by express threats, and three repeated attempts to shoot an unarmed and unresisting man. It is a case of express malice, proved by direct evidence.

The judgment must, therefore, be affirmed, and the usual certificate transmitted to the Superior Court, in order that the sentence of the law may be carried into execution.

THE STATE v. THOMAS S. JONES.

Larceny—Recent Possession—Evidence.

1. The possession of stolen property affords presumptive evidence that the possessor is the thief; and the evidence is stronger or weaker as the possession is more or less recent. A recent possession raises a reasonable presumption of guilt.

2. If, in attempting to rebut the presumption of larceny arising from the recent possession of stolen property, it be proved that the defendant after the larceny found the property in the possession of another person from whom he received it, claiming it as his own, but that before such finding he gave an exact description of the stolen articles which *he* alleged he

had lost, that he made different statements to different persons as to the *time* he lost *his* property, that after finding the property he put false marks upon it, and that afterwards he left the State in consequence of the indictment—all these circumstances furnish evidence tending to connect the defendant with the felonious possession of the property anterior to the time when he found it in the possession of such other person.

THE defendant was indicted for petit larceny, in stealing two pigs at Chowan, on the last circuit, before his Honor, *Judge Settle.*

On the trial it was proved for the State that four pigs, the property of the prosecutor, had been stolen, and that shortly thereafter two of them were found in the possession of the defendant, and the other two in the possession of a person of color, to whom the defendant had sold them, after having put them in the mark of an uncle of his who had (121) been dead five or six years. It appeared further that the defendant was a young unmarried man and lived with his father at the time of the transaction, and that his father owned hogs marked differently from those of his deceased brother, the uncle of the defendant above mentioned. It was also proved for the State that the defendant left the State for Tennessee the week after the court at which the indictment was found against him and that he returned to Chowan County the week before the next succeeding court, and that he said it was in consequence of the indictment that he was going off.

The defendant, in attempting to account for his possession of the property, called upon a witness by the name of Dennis, his brother-in-law, who stated that the defendant requested him to come to the town of Edenton to assist him in hunting for some pigs which he had lost that morning, describing their number, size, and color; that this was on Sunday morning; that after going to two or three other places they went to the house of a free negro woman, living in the suburbs of the town, where they found the pigs as described by the defendant, in number, color, and size; that the defendant inquired of the woman how she came by the pigs; the witness did not recollect her answer, but the defendant then took the pigs, and after selling two of them carried the others to his father's. The defendant then introduced two other witnesses, a Mrs. King, and his brother, William Jones, who stated that the defendant had told them that he lost his pigs on the same Sunday morning, and they believed that he had lost them. William Jones stated that his brother had lost pigs. These witnesses further stated that when the defendant went off on the same morning to look for his pigs he took his bag with him, and returned about breakfast time with three of his pigs, and that one of the three was claimed by another person and given up. The defendant then introduced a Mr. Smith, a merchant residing in the town of Edenton, who proved that on Saturday night preceding Sunday

morning, between 7 and 8 o'clock at night, the defendant came to his store and asked him to assist him in looking for some pigs which defendant stated that he had lost that evening. This witness further stated that the defendant told him very early next morning that he had found two of his pigs. The defendant also introduced a witness (122) by the name of McNider, who stated that about half an hour by sun on the same Sunday morning the defendant told him that he had found all his pigs in the possession of the negro woman living in the suburbs.

The court, in charging the jury, left it to them to ascertain whether the evidence offered connected the defendant with the felonious possession of the pigs anterior to the time when they were found by the defendant and his brother-in-law, Dennis, in the possession of the free woman of color.

The counsel for the defendant then moved the court to instruct the jury that there was *no* evidence to connect the defendant with the felonious possession of the pigs before the time they were found in the possession of the free woman. The court declined giving such instruction, but on the contrary charged the jury that there was evidence of the felonious taking, but its weight and effect was for them to decide, and that if it satisfied them beyond a reasonable doubt of the defendant's guilt, they were bound to convict him. The defendant was found guilty and appealed.

Iredell for the accused.
The Attorney-General contra.

DANIEL, J. The property which the indictment charged the defendant to have feloniously taken and carried away, was on the trial proved to have been stolen from the prosecutor, and *shortly* thereafter the identical property was found in possession of the defendant. This proof having been made on behalf of the State, raised a presumption that the defendant was the thief. The effect of this evidence was to throw upon the defendant the burden of accounting for that possession. Evidence of this nature is by no means conclusive, and it is stronger or weaker as the possession is more or less recent. The rule is that recent possession raises a reasonable presumption against the prisoner. East. P. C., 657, 2 Starkie's Evidence, 450. The defendant introduced evidence to explain his possession, and for the purpose of repelling the presumption that he stole the property. His brother stated that the defendant had lost pigs; but when he lost them or what sort they were he did not (123) state. His brother-in-law Dennis stated that the defendant told him on Sunday morning that he had on that morning lost pigs, and he

described the number, color, and size; they went in search and at the house of a free woman of color they found the pigs as described by the defendant in number, color, and size. He told Mrs. King and his brother that he lost his pigs on Sunday morning. He told Mr. Smith on Saturday evening that he had lost his pigs on Saturday evening and asked his assistance in searching for them. The court left it to the jury to ascertain whether the evidence offered connected the defendant with the felonious possession of the pigs anterior to the time they were found in the possession of the free woman by the defendant and Dennis. The counsel for the defendant moved the court to instruct the jury that there was *no* evidence to connect the defendant with the felonious possession of the pigs before the time they were found in the possession of the free woman. The court refused to give such instruction, but charged the jury that there was evidence of the felonious taking, but its weight and effect was for them to decide on. On the first branch of the charge there can be no objection; and on the second we think the defendant had no right to demand of the court the charge prayed. The declaration of the defendant to Dennis, on Sunday morning before they went to the house of the free woman, of the number, size, and color of the identical pigs which were proved to belong to the prosecutor, and which were also proved to have been recently stolen from the prosecutor, connected with the different statements which the defendant had made as to the time he lost *his* pigs, with the circumstance of his marketing these pigs, and his leaving the State, all taken together, precluded the judge from saying there was no evidence to connect him with the taking before they went to the woman's house on Sunday morning. The evidence was properly left to the jury for them to say whether they were satisfied beyond a reasonable doubt that the defendant had stolen the property, and had carried it to the free woman's house as a cloak to the transaction. We see nothing erroneous in the opinion delivered by the Court. Therefore the Superior Court will proceed to judgment in the case according to this (124) opinion.

PER CURIAM. Judgment affirmed.

Cited: S. v. Patterson, 78 N. C., 473; *S. v. McRae,* 120 N. C., 609.

THE STATE v. JOHN HATHAWAY.

Harboring Slave.

Harboring or maintaining a runaway slave within the act of 1741, etc. (Rev. Stat., ch. 34, sec. 73), consists in secretly aiding him by any means to continue absent from his master, knowing at the time of rendering such aid that he was a runaway.

THE defendant was tried on the last circuit at Edgecombe, before *Pearson, J.*, for "secretly, clandestinely, and fraudulently harboring and maintaining a runaway slave, the property of one E. C."

Much testimony was offered to the jury and certified to this court, consisting of facts similar to the following: That the negro had one or more places of concealment on the land of the defendant and of declarations of the defendant that he could have taken the negro if he pleased, but that he would not do so because of the confidence that the slave reposed in him, offers by the defendant to purchase, etc.

His Honor instructed the jury "that if the evidence satisfied them that the defendant had fraudulently and secretly done any act to aid, countenance, and comfort the negro, knowing him to be a runaway, with a view to make it more easy and safe for him to stay out, or to make it more difficult for his owner to take him, as if he permitted him to make a cave or shelter, or camp upon his land, and to remain in it, and while there gave him his countenance, and informed him when it was safe to go, or when to stay, he was guilty. That it was not necessary to constitute the offense that the State should prove that the defendant had given the negro food, or drink, or clothing. That assistance, if (125) any was given, must, in order to make out the offense charged, be given secretly and clandestinely, and that by *'secretly'* was meant the doing the act in a way to prevent its being proven, and that it differed from assistance openly given under a claim of title, or in an avowed disregard of the rights of the master, in the same way that stealing differed from trespass—the one being a recent taking so as not to let the owner know what had become of his property, or who had taken it—the other being a taking under a claim of title, or in open disregard of the rights of the owner, without attempting to conceal from him what had become of his property. That the assistance must also be given fraudulently; but that fraud would be implied if in point of fact the defendant knew the negro to be a runaway at the time of rendering such secret assistance."

The defendant was convicted and appealed.

Iredell and B. F. Moore for the defendant.
The Attorney General for the State.

DANIEL, J. We have examined the charge of the judge delivered to the jury in this case. We do not discover any error in it. The defendant appears to have been properly convicted under the act of Assembly (1 Rev. Stat., 209). This opinion will be certified to the Superior Court of Edgecombe, and that court will proceed to judgment, etc.

PER CURIAM. Judgment affirmed.

Cited: Young v. McDaniel, 50 N. C., 104.

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(126) THE STATE v. JAMES LEIGH.

Indictment Against Justice of the Peace.

1. An indictment against a justice of the peace for refusing to issue his warrant for the arrest of a felon, must charge either that the felony was committed in his presence, or the tender to him of an affidavit of its commission.
2. It should also charge that the felon was in the magistrate's county when the refusal took place.
3. A master is not at liberty to contrive the escape of his slave who has committed a felony—but if he be a magistrate, he should not act officially against him.

THE defendant was indicted at Perquimans on the last circuit, as follows:

"The jurors for the State, etc., present, that James Leigh, late of, etc., on, etc., was and yet is one of the acting justices of the peace in and for the said county of Perquimans, and as such bound by the duties of his said office, and by the laws of the State, to issue his warrant for the apprehension of all persons guilty of felony; and the jurors aforesaid do further present, that afterwards, etc., in, etc., a certain negro slave, Jim, the property of one James Leigh, Sr., did commit a felony by feloniously killing and murdering a certain negro slave, Washington, the property of the said James Leigh; and the jurors aforesaid do further present that afterwards, to wit: on, etc., etc., the said James Leigh, Sr., well knowing of the commission of the said crime by the said slave, Jim, as aforesaid, unlawfully and contemptuously neglected and refused to issue his warrant for the apprehension of the said negro slave, Jim, for the commis-

sion of the said felony, as he was bound by the duties of his said office and by the laws of the land to have done, to the great hindrance of justice," etc.

Upon the motion of the defendant his Honor, *Judge Settle,* quashed the indictment, and Mr. Solicitor Outlaw appealed.

The Attorney-General for the State.
Kinney for the defendant.

RUFFIN, C. J. It was probably the object of this appeal to (127) obtain the opinion of the court, whether a justice of the peace be liable to indictment, who, without corruption, neglects to issue a warrant for the apprehension of a person within his county, who the magistrate personally knows, or has reason to believe, has been guilty of felony. But the court does not think it proper to decide that general question upon an indictment framed like the present, which does not raise it.

There are two grounds on which a magistrate may, and ought to grant process for the apprehension of persons charged with crimes. The one is his own personal knowledge when the offense is committed in his presence. Although it has been said that it is indelicate for a magistrate to act on his personal knowledge, and that he ought to apply to another, yet strictly speaking, it is perhaps his duty, especially if it be necessary to prevent an escape. The other ground is probable cause, supported by the oath of some other person. Now, admitting in this last case that it is a duty of a magistrate to grant process, although no felony was committed, in order that due investigation may be had; and admitting, also, this to be a ministerial duty, for the negligent omission of which, though without corruption or any particular bad motive, he would be responsible upon indictment; yet it seems indispensable that the indictment must allege either the commission of the felony and the presence thereat of the magistrate, or, in lieu thereof, a charge before him on oath of probable cause, or at least, an offer of some person to make such charge. The presence of the magistrate, or an accusation or offer to accuse on oath, is necessary to raise the duty of issuing a warrant, and to render the refusal or neglect to do so illegal or contemptuous of the law. In all these particulars the present indictment is deficient.

It charges that "on, etc., at, etc., a certain slave, Jim, the property of one James Leigh, Sr., did commit a felony by feloniously killing and murdering a certain negro slave, Washington, the property of the said James Leigh; and that afterwards, to wit, on the day and year last aforesaid, at and in the county aforesaid, the said James Leigh, Sr., well knowing of the commission of the said crime by the said (128)

negro slave, Jim, as aforesaid, unlawfully and contemptuously neglected and refused to issue his warrant," etc. Not to say anything of the very imperfect manner in which the indictment charges the homicide, which does not appear therefrom to be either murder or manslaughter; it is obvious that *no fact* is laid which required the magistrate, as a positive duty, to grant a warrant. It said, indeed, that "well knowing he neglected"; but the source and means of knowledge are not specified—whether from personal presence he fully knew the fact of felony, or whether from evidence he knew of probable cause; or whether from rumors he had reason to believe or know that a felony had, or probably had been committed. It seems to us that the allegations of the indictment in these respects are entirely too vague and general.

There is another fatal omission in the indictment. The negligence of the magistrate is criminal, if at all, from its tendency to favor the escape of the offenders. It may be a duty to issue a warrant against a person in the county of the magistrate, upon which an arrest may be made. But it is not the duty of a justice of the peace to grant process against felons in every part of the State. The indictment before us does not allege that the supposed felon was in Perquimans at the time the knowledge of the felony came to the defendant, nor at any time afterwards.

There is also another objection peculiar to this case: Upon the face of the indictment the defendant was the owner of both the slaves—the slain and the slayer. A master is not more excusable in law than justifiable in morals, for contriving or assisting the escape of his slave, who has committed felony. But while that is so, he is not, in our opinion, bound, if at liberty, to be judicially or officially active against him in any stage of the prosecution. Passing by the interest of the owner, their relation imposes on him the obligation of the slave's defense, and the law generally charges him with it as a duty alike to the slave and to the fair administration of public justice. Prosecution and defense are so incompatible that the two duties cannot be incumbent on the same person.

It is, upon the whole, so clear that no judgment could be pro-
(129) nounced on this indictment, as to render it improper to put the defendant to his plea. It was, in the opinion of the court, properly quashed.

PER CURIAM. Judgment affirmed.

Cited: Shelfer v. Gooding, 47 N. C., 177; *Nissen v. Cramer,* 104 N. C., 576.

THE STATE v. JAMES M. G. ROBINSON ET AL.

Malicious Mischief.

1. Malicious mischief consists in the willful destruction of personal property, from actual ill-will, or resentment towards its owner or possessor.

2. The cases of the *State v. Landreth*, 4 N. C., 331, and *State v. Simpson*, 9 N. C., 460, approved.

THE defendants were indicted for malicious mischief, in removing a wagon, the property of one I. H., from its place, "and willfully, wickedly, wantonly, mischievously, and maliciously" breaking it.

Upon the trial before *Bailey, J.*, at Lincoln, on the last circuit, the case was that the defendants found the wagon standing in the street, and for the purpose of having sport they ran it through the street and down a hill, whereby it was injured as charged in the indictment, and where they left it.

His Honor instructed the jury that if the defendants injured the wagon from mere sport and wantonness they were guilty, although they had no malice against the owners.

The defendants were convicted and appealed.

Caldwell for defendants.
The Attorney-General for the State.

GASTON, J. The distinction between those injuries which are (130) regarded simply as trespasses on the rights of individuals, and those which amount to a violation also of the duties due to the community, ought to be accurately drawn and carefully observed. We fear that this has not been done in this State with respect to the wrongs known under the general name of "malicious mischief," and apprehend that this confusion has been the result of treating as common law offenses, acts which owe their existence, as crimes, wholly to positive statutes. For reasons which have been assigned in the case of the *State v. Scott* (2 Dev. and Bat., 35), it is too late now to question whether an indictment for malicious mischief may not be sustained as for a misdemeanor at common law, but there is difficulty in laying down clearly the necessary constituents of that offense. It is obvious if *"malicious"* be understood in its legal sense of intending wrong, and *"mischief"* mean any harm done to another's property, that almost every trespasser on property may be made the subject of criminal prosecution. The description of malicious mischief usually given by the writers on criminal law, that is to say, "such damage as is done to private property, not *animo furandi*,

or with an intent of gaining by another's loss, but either out of spirit of wanton cruelty or black and diabolical revenge," may answer as a general indication of those common law trespasses, which, by a multitude of statutes, have been raised into crime, but it is too destitute of precision to constitute a legal definition. What spirit of severity shall be deemed a spirit of cruelty—what degree of cruelty mounts up to *wanton* cruelty —and what intensity of revenge is required to render it black and diabolical—may be considerations in the exercise of legislative discretion, but cannot be fit subjects of judicial ascertainment, nor furnish of themselves rules of public justice suspectible of steady and uniform application. We can discover no other mode in which we shall at the same time pay becoming deference to proceeding adjudications, and secure to the public that certainty which is indispensible in the administration of criminal justice, than to hold such invasions of private property to be indictable as malicious mischief, which are unquestionably within the limits of those adjudications, and to treat all others as private or civil
(131) wrongs, until the Legislature shall think proper to impress upon them a different character. Governed by these views we extract from the adjudged cases as a rule of decision that malicious mischief to be indictable, consists in the wilful destruction of some articles of personal property, from actual ill-will or resentment towards its owner or possessor. *State v. Landreth,* 2 Law Rep., 446; *State v. Simpson,* 2 Hawks, 460.

It is the opinion of this court that there was error in the charge of the judge below, and that the judgment rendered against the defendants be reversed and a new trial ordered.

PER CURIAM. Judgment reversed.

Cited: S. v. Helmes, 27 N. C., 365; *S. v. Jackson,* 34 N. C., 330; *S. v. Sheets,* 89 N. C., 548.

CASES AT LAW

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

DECEMBER TERM, 1838
(4 DEV. AND BATTLE)

JOHN A. McLANE, CHAIRMAN, ETC., UPON THE RELATION OF CATHARINE PEOPLES v. SALLY PEOPLES, REUBEN FOLGER, ET AL.

Administration Bond—Breach.

1. The clause in the condition of a bond given by an administrator with the will annexed, which provides that the obligor shall well and truly deliver and pay over all the rest and residue of the effects and credits which shall be found due on his account at the close of his administration "unto such person or persons respectively as the same shall be due unto, pursuant to the true intent and meaning of the acts of the General Assembly in such cases made and provided," is broken both in letter and in spirit by a refusal or neglect of the administrator with the will annexed to pay legacies.
2. The case of *Washington v. Hunt*, 12 N. C., 475, approved.
3. Where there is an ambiguity in the condition of an obligation, which cannot otherwise be removed, the law adopts the construction which is the most favorable to the obligor; but no formal or technical words are essential to the constitution of a condition, and any set of words from which it can be satisfactorily collected that it was the intention of the obligor to bind himself to the performance of a duty, will be sufficient to make the performance of that duty a part of the condition of his obligation.

THIS was an action of debt upon the bond executed by the defendants upon the appointment of the defendants, Sally Peoples and Reuben Folger, administrators with the will annexed of Harbert Peoples. The breach assigned was the nonpayment of a legacy to the rela- (134) tor. The defendants pleaded *conditions performed and not broken.*

Upon reading the bond on the trial, which took place at Guilford, on the last circuit, before his Honor, *Judge Pearson,* the conditions were as follows:

"The condition of the above obligation is such that if the above bounden Sally Peoples and Reuben Folger, administrators with the will

annexed of all and singular the goods and chattels, rights and credits of Harbert Peoples, deceased, do make or cause to be made a true and perfect inventory of all and singular the goods and chattels, rights and credits of the said deceased, which have or shall come to the hands, possession or knowledge of the said Sally Peoples and Reuben Folger, or into the hands and possession of any person or persons for them, and the same so made do exhibit or cause to be exhibited to the county court, where orders for administration passed within ninety days after the date of these presents; and the same goods, chattels and credits, and all other goods, chattels and credits of the said deceased at the time of his death, or which at any time after shall come to the hands or possession of the said Sally Peoples and Reuben Folger, or into the hands or possession of any other person or persons for them, do well and truly administer according to law; and further do make or cause to be made a true and just account of their said administration, within two years after the date of these presents; and all the rest and residue of the said goods, chattels and credits which shall be found remaining upon the said administrators' account, the same being first examined and allowed by the county court, shall deliver and pay to such person or persons respectively as the same shall be due unto, pursuant to the true intent and meaning of the acts of the General Assembly in such cases made and provided. And it appears to us that a last will and testament was made by the deceased, and the executor or executors therein named did exhibit the same into court, making request to have it allowed and approved accordingly; but renouncing the right of executorship, administration with the will annexed is granted to Sally Peoples and Reuben Folger above named, ap-
(135) probation of such testament being first had and made in the said court, then this obligation to be void and of none effect, or else to remain in full force and virtue."

His Honor being of opinion that the conditions of the bond did not provide for the payment of legacies the plaintiff submitted to a judgment of nonsuit and appealed.

No counsel appeared for the plaintiff in this court.
W. A. Graham, J. T. Morehead, and Mendenhall for the defendants.

GASTON, J. This case does not raise the question whether the bond on which the action was brought could be put in suit at the instance of a legatee before the assent of the administrators with the will annexed to the legacy or a decree therefor in a proper court. On that question therefore we forbear from expressing an opinion. The only point presented for our determination is whether the condition of this bond be

sufficiently explicit to embrace within it the duty of accounting to the legatees of the testator.

We admit that where there is an ambiguity in the condition of an obligation which cannot otherwise be removed, the law adopts the construction which is the more favorable to the obligor, but it is beyond question that no formal or technical words are essential to the constitution of a condition, and that any set of words from which it can be satisfactorily collected that it was the intention of the obligor to bind himself to the performance of a duty will be sufficient to make the performance of that duty a part of the condition of his obligation.

The obligation before us is made payable to the chairman of the county court of Guilford. The condition states as facts that the last will and testament of Harbert Peoples had been duly proved in that court; that the executors therein named had refused the office, and that upon such refusal administration with the said will annexed had been committed to the two first named obligors, Sally Peoples and Reuben Folger. It is true that this recital is found in the latter instead of the preliminary part of the condition, where it would have been more appropriately introduced; but it is not the less on that account a recital, explanatory of the purposes of the instrument. The condition (136) then undertakes to set forth the means by which the obligation executed under these circumstances shall be discharged. It provides that if the persons to whom the administration with the will annexed has been thus committed, shall, within ninety days after the date of the bond, return a full inventory of all the effects and credits of the deceased; shall well and truly and according to law administer all the effects and credits of the deceased which shall come into their possession; shall at the end of two years, cause a true account to be exhibited of their administration; and all the rest and residue of the said effects and credits which shall be found due on such account, shall deliver and pay over unto such person or persons respectively as the same shall be due unto, pursuant to the true intent and meaning of the several acts of the General assembly in such cases made and provided; then the said obligation shall be void, but otherwise in full force and virtue.

There can be little doubt but that it was the intention of the parties to this instrument, the court acting through their chairman on the one side and the obligors on the other, to secure by it the performance of all those duties which ought to have been secured by an obligation from administrators with the will annexed. There is as little doubt but that it was the duty of the court to require, and of such administrators to execute an obligation that should secure a faithful administration of the assets for the benefit of the legatees. The Statute 21, Hen. 8, ch. 5, requires that if any person shall die intestate, or the executors shall

refuse to prove the testament, the ordinary shall grant administration to the widow or next of kin or both by discretion of the ordinary, *taking security for a true administration;* and it cannot be questioned but that a *true* administration by an executor or his substitute, the administrator with the will annexed, comprehends the payment of legacies so far as his assets will permit. The executor indeed is not ordinarily required to give security for that purpose, because he is selected by the testator himself, and the testator, not having required surety of him to pay the legacies it was thought unfit that legatees who claim through the (137) bounty of the testator should have the right to demand it; but the administrator with the will annexed is selected by the court; the deceased had no hand in his appointment; the legatees do not claim against him as an agent appointed by the testator, but one appointed by the court, and therefore it was made the duty of the court to require surety from such officer for a faithful discharge of his duties. (See *Washington v. Hunt,* 1 Dev., 479.) This provision of the Statute of the 21st Hen. VIII, is accordingly incorporated substantially in the late Revised Statutes, vol. 1, ch. 46. It remains, then, to be seen whether this intention of the parties to this instrument has been so defectively expressed that the duty of payin glegacies is not embraced within the fair import of its terms.

The difficulty is understood to lie in the last stipulation of the condition for delivering and paying to such persons respectively as the same shall be due unto, "pursuant to the true intent and meaning of the several acts of the General Assembly in such cases made and provided." It is supposed that "these persons" do not include legatees, because *they* claim from the will of the deceased, and not under any act of the General Assembly. But in our opinion these persons do include legatees, because, although they claim under the will of the deceased, their claim is expressly sanctioned and made obligatory upon administrators by the acts of the General Assembly. In the first year of our Colonial Legislation of which we have any records, it was enacted that "no *executor* or *administrator* shall hereafter take or hold (to) himself (according to the value of the appraisement) more of the deceased's estate than amounts to his necessary charges and disbursements, and such debts as he shall legally pay within twelve months after administration granted; but that all such estate so remaining shall immediately after the expiration of twelve months be equally and indifferently divided and paid to such persons to whom the same is due *by this act or the will of the deceased,"* such persons giving bonds to refund for the payment of debts thereafter discovered. 1715, Swan's Ed., ch. 48. The same act directs administrators how they shall distribute a "surplusage," where there is an (138) intestacy among the widow and next of kin of the intestate, and

makes it the duty of the administrator, if any money shall remain in his hands after the terms of seven years shall have expired, not recovered by any of kin to the deceased or by any creditor in that time, to pay the same to the church wardens and vestry to and for the use of the parish where the said money shall remain. It also prescribes the condition of the bond to be given by administrators of intestates, to which form the present bond conforms *mutatis mutandis,* and directs that the bond shall be assigned to *any* person or persons injured, who shall and may maintain an action thereon. By subsequent acts passed before the execution of this bond, the prohibition on the executor or administrator to retain more of the deceased's estate than amounts to his necessary charges and disbursements and debts paid, has been so changed as to permit the executor to hold the estate for *two* years, and at the expiration of that time these acts expressly command him to divide, deliver, and pay over all such estate so remaining, to the person or persons to whom the same may be due *by law* or the *will of the deceased.* These acts also provide that all sums of money or other estate of whatever kind which shall remain in the hands of any executor or administrator for seven years after his qualification unrecovered by the *creditors, legatees,* or *next of kin* of his testator or intestate, shall, by the said executor or administrator, be paid over to the trustees of the University and they provide that the bond of an administrator shall be put in suit on the relation of *any person injured* without an assignment. See acts 1789, Rev., ch. 308, sec. 2; 1809, Rev., ch. 763, sec, 1; 1791, Rev., ch. 341. It is therefore *literally* true that the withholding by an executor or administrator of legacies given by a will the administration whereof has been confided to him, after the expiration of two years from his qualification, provided that he has sufficient assets over and above his charges and disbursements, and the just debts of the deceased is in direct violation of these acts; and therefore the condition of a bond which stipulates for payment of what shall remain after a fair account of the administration of these assets, unto those "to whom the same may be due pursuant to the true intent and meaning of the acts of the General Assembly in such cases made and provided," is broken in the letter as (139) well as in its spirit by such violation of these acts.

There are other considerations which have had an influence in bringing our judgment to the conclusion which we adopt as correct. By the acts of 1807, Rev., ch. 730, and 1813, Rev., ch. 855 (1 Rev. Stat., ch. 46, sec. 6 and 7), our Legislature has required that executors under certain circumstances shall give bond for "a faithful administration," and on their failure to do so the court shall grant letters of administration with the will annexed. This requisition is avowedly made for the benefit of the legatees ("representative" is the term used), as well as of the credi-

tors, and the only direction as to the form of the bond is to be collected from these words, "bond with sufficient security for the faithful administration of the estate, as is required by law in cases of *administration* on the estates of deceased persons, and there shall be the same remedy upon the said bond to the party aggrieved, as upon the bond of an administrator in like cases." If a bond had under these statues been required from the executors of Harbert Peoples, and they under such requirement had executed an obligation with a condition in the very words of that before us, it would, we think, have fully conformed to the requisition. It would have been "a bond for a faithful administration of the estate as required by law in cases of administration upon the estates of deceased persons." If so, it might be put in suit at the instance of an aggrieved legatee as well as of an injured creditor. But if such a condition would be in the bond of an executor effectual to secure the interests of legatees as well as of creditors, it is not easy to see why it should have a different operation when contained in the bond of the executor's substitute, the administrator with the will annexed.

The construction which we adopt is moreover in the spirit of the adjudications which have prevailed in this State on the subject of administration bonds. According to these adjudications such bonds have an operation which it has been doubted at least whether they have been permitted to have in England. Creditors, who *certainly* are not among the persons to whom the rest and residue of the estate, after a full (140) administration and the taking of the account, is to be delivered and paid over, have with us a right to put such bonds in suit, and allege for breach the nonpayment of a debt. The words "the said effects shall well and truly administer according to law," have been deemed sufficiently comprehensive to provide against every case of mal-administration to the injury of any one; and *therefore* to enure to the benefit of creditors. *The People v. Dunlap,* 13 Johns., 437. This construction, which has been supposed to be *technically* wrong (see *Washington v. Hunt,* 1 Dev., 475), is felt by all to be *substantially* right upon the great principle of public policy and public justice, that when the State confides to any individual the management of property not his own, it is bound to take, and it is to be presumed intends to take, security for the rights of *all* who may be injured by the misconduct of their office.

It is the opinion of the court that the judgment of nonsuit in this case ought to be set aside, and the cause remanded for a new trial.

PER CURIAM. Judgment reversed.

DEN EX DEM. OF THOMAS HAMPTON ET AL. V. JOSIAH COWLES.

Construction of Devise.

A devise by a testator of his "Home plantation" will not carry town lots laid off on a part of that tract of land by commissioners under an act of the Legislature passed at the instance of the devisor, when it appears that the lots have been occupied for many years as part of the town, although the title to the lots may still be in the devisor.

EJECTMENT for two lots in the town of Hamptonville in the county of Surry, tried at Surry, on the last circuit, before his Honor, *Judge Settle.*

The lessors of the plaintiff claimed title under the will of Henry Hampton, Sr., made in the year 1831, devising to them his *Home* plantation. In the year 1801 Henry Hampton, Sr., acquired title to a tract of land in Surry County, and in 1805 an act of the Legisla- (141) ture was passed, which, after reciting that Henry Hampton, Sr., had signified to the Legislature that he wished fifty acres of the said tract laid off for a town to be called Hamptonville, enacts that the said fifty acres shall be laid off by five commissioners (of whom Henry Hampton, Sr., was one), one-half in town lots and the other half to remain a town common; and that the said commissioners shall have an indefeasible title in the said fifty acres, with power to appoint their successors and to convey titles in fee simple. In the same year the said commissioners, Henry Hampton, Sr., being present and assisting, laid off the said town within the boundaries of the said tract and sold the lots; and various persons having purchased lots from them resided in the village, claiming the lots so purchased as their own from the year 1805 until the time of trial. The dispute was concerning two of the lots so originally laid off within the bounds of the said town, the lessors of the plaintiff claiming them as part of the home plantation of Henry Hampton, Sr., and as passing under the clause in his will devising to them that plantation.

The defendant exhibited no written title to himself from the said commissioners or anyone else, but he proved that three of the original commissioners were still alive, and by one of these he proved that he, the defendant, was in the actual possession and occupation of these lots before and at the death of Henry Hampton, Sr., and that he had been in constant possession more than seven years before the commencement of this action. It further appeared that Henry Hampton, Sr., had resided within one hundred yards of the town of Hamptonville, on the tract which he had purchased in 1801, from that time until his death, and it did not appear that he had ever set up claim to or exercised ownership over, any of the town lots as his home tract, or as part of his plantation.

His Honor held that the act of Assembly reciting that it was made by the consent of Henry Hampton, Sr., was constitutional, and that, even if it were not, actual adverse possession under it for more than seven years would give the defendant a valid title as against the lessors of the
(142) plaintiff. That the title, by the act, vested in the commissioners, the survivors of whom might maintain an action, but that the lessors of the plaintiff, claiming under the will, could not. There was a verdict and judgment for the defendant, and the lessors of the plaintiff appealed.

J. T. Morehead for the lessors of the plaintiff.
Boyden for the defendant.

RUFFIN, C. J. Whether the statute by itself, or that together with the acts done under it, did or did not divest the title out of Henry Hampton we are very clearly of opinion that the land so laid off for a town was thereby severed from the whole tract or "home plantation," so as not to pass under that description in the devise. No part of the town tract was ever afterwards called or occupied by the testator as a part of his plantation; but it was called, known, and occupied as Hamptonville. This continued for twenty-six years before the date of the will. There is no claim even, or anything else, to raise the slightest presumption of a reunion of the village to the farm or "plantation," or to bring the village within the will.

Although we do not perceive any such doubt in the other questions as would induce much hesitation in the decision of them, yet as the judgment on the one point puts an end to all interest in the lessors of the plaintiff under the will, those questions must be left open until the heirs at law shall choose to raise them.

PER CURIAM. Judgment affirmed.

DEN EX DEM. OF ZACHARIAH CANDLER v. ELI LUNSFORD ET AL.

Copies of State Grants.

As patents or grants from the State are recorded in the office of the Secretary of State, copies of them obtained from that office may be given in evidence without accounting for the originals by all persons except the patentees or grantees themselves, or those claiming under them who would be entitled to the possession of the originals.

(143) EJECTMENT for two tracts of land, tried at Buncombe on the last circuit before his Honor, *Judge Dick*.

After the lessor of the plaintiff had made out his case by showing a grant from the State for the lands in dispute, dated 10 January, 1829,

and that the defendants were in possession of the said lands, the defendants offered in evidence a copy of a grant from the State to one John G. Blount, of older date than the one to the lessor of the plaintiff, and covering the whole of one of the tracts claimed by the lessor of the plaintiff, and also a large body of land not claimed either by the plaintiff's lessor or the defendants. An affidavit was also offered by the defendants in which it was stated that they did not know where the original grant to Blount, was, without stating that they had made any inquiry for it. Upon this, and because it appeared further to the court that the Blount grant covered a large portion of Buncombe, and one or two of the adjoining counties, and that it was a matter of notoriety in the county of Buncombe that the said grant was, and for a number of years had been, in the possession of Colonel Love, of Haywood County, the court rejected the copy as evidence. The lessor of the plaintiff had a verdict and judgment, and the defendants appealed.

No counsel appeared for either party in this court.

RUFFIN, C. J. The principle on which the court rejected the copy of the grant offered in evidence by the defendants applies to papers between private persons. The rule is different as to patents or grants from the sovereign. They are enrolled in the office from which they emanate, and are there records. Like all other records they may be used as evidence by all persons by obtaining copies, except the patentee or those claiming under him, who would be entitled to the possession of the original. Such was the rule at the common law, inasmuch as the grant is of record. This principle is recognized by a statute of 1748 (Rev., ch. 44, sec. 6), which not only makes the "record of every grant in the Secretary's office evidence, but goes further and makes the abstracts enter in the office of Lord Granville, or (generally) exemplifications of them, (144) duly proved, evidence, as if the original were produced."

The judgment appealed from must therefore be reversed and a *venire de novo* awarded.

PER CURIAM. Judgment reversed.

Cited: Ray v. Stewart, 105 N. C., 473; *Clarke v. Diggs,* 28 N. C., 161; *Osborne v. Ballew,* 29 N. C., 416; *McLenan v. Chisholm,* 64 N. C., 324.

THE STATE v. WILLIAM MANUEL.

Constitutional Law—Working Out Court Costs.

1. The act of 1831, ch. 13 (1 Rev. Stat., ch. 111, secs. 86, 87, 88, 89), providing for the collection of fines imposed upon free negroes and free persons of color convicted of any criminal offense, by directing them to be hired out under certain rules, regulations, and restrictions, is not so clearly repugnant to the 39th section of the Constitution, which provides that debtors shall not be continued in prison after delivering up *bona fide* their property for the use of their creditors, nor to the 19th section of the same which gives to the Governor the power of granting pardons, nor to the 10th section of the bill of rights, which prohibits the imposition of excessive fines or the infliction of cruel or unusual punishment, nor to the 3d section of the same which declares that no man nor set of men are entitled to exclusive or separate privileges from the community but in consideration of public services, nor to the spirit of the 12th section of the same, which forbids the deprivation of liberty to a free-man "but by the law of the land," nor to the principles of free government, as to warrant the courts in pronouncing it unconstitutional and void.

2. The act of 1838, which provides that *if any person* shall be convicted in any court of record in this State of any crime or misdemeanor, and shall be in execution for the fine and costs of prosecution, and shall have remained in prison for the space of twenty days, he may be discharged in the manner therein prescribed, does not repeal the act of 1831, ch. 13, but as the last expression of legislative will, necessarily abrogates so much of that act as stands in the way of its provisions.

3. The primary purpose of the Constitution was the well being of the people by whom it was ordained, and the political powers reserved or granted thereby, must be understood to be reserved or granted to the people collectively, or to the individuals of whom it was composed.

4. But that section in the Constitution which prohibits the imprisonment of debtors, applies to debtors, whether citizens or foreigners, dwelling among us—and all those sections which interdict outrages upon the person, liberty or property of a freeman, secure to that extent all amongst us who are rescognized as persons entitled to liberty, or permitted the enjoyment of property. They are so many safeguards against the violation of civil rights, and operate for the advantage of all whom these may be lawfully possessed.

5. According to the laws of this State all human beings within it fall within one of two classes, to wit, aliens and citizens.

6. Foreigners, unless made members of the State, continue aliens. Slaves manumitted here become freemen—and if born within North Carolina are citizens of North Carolina—and all free persons born within the State are born citizens of the State.

7. Naturalization is the removal of the *disabilities* of *alienage*. Emancipation is the removal of the *incapacity* of *slavery*. The latter depends

wholly upon the internal regulations of the State—the former belongs to the government of the United States, and it would be a dangerous mistake to confound them.

8. The possession of political power is not essential to constitute a citizen. If it be, then women, minors, and persons who have not paid public taxes are not citizens.

9. Free negroes and free persons of color are entitled as citizens to the protection of the 39th section of the Constitution, and the 10th section of the Bill of Rights.

10. The cases of *Burton v. Dickens*, 7 N. C., 103, and *Jordan v. James*, 10 N. C., 110, approved.

11. The 39th section of the Constitution, under the operation of the act of 1778, Rev. ch. 133, prohibits the imprisonment of an insolvent debtor, after that insolvency has been ascertained to be *bona fide* in any manner directed by law, either before or since the adoption of the Constitution.

12. A fine imposed for an offense against the criminal law of the country is a punishment.

13. And as, after it has been judicially imposed, the same means may be used to enforce its collection, which by law the State may employ to collect its debts, it may, for this purpose, be regarded as a debt due to the State.

14. But it is not a debt within the meaning of the 39th section of the Constitution.

15. Constitutions are not themes proposed for ingenious speculation, but fundamental laws ordained for practical purposes. Their meaning once ascertained by judicial interpretation and contented acquiescence, they are laws in that meaning until the power that formed shall think proper to change them.

16. The costs of a convicted offender are not a debt.

17. The sentence pronounced against a convicted criminal that he shall pay the costs of prosecution is as much a part of his punishment as the fine imposed *eo nomine*, and it has never been held that he could discharge himself therefrom by taking the oath of insolvency, except by virtue of statutory enactments authorizing or supposed to authorize such a discharge.

18. The right of the Legislature to prescribe the punishment of crimes belongs to them by virtue of the general grant of legislative powers. It is a power to uphold social order by competent sanctions unless they be restricted, and so far only as they are restricted by constitutional prohibitions, it is a power in the Legislature to accomplish the end by such means as in their discretion they shall judge best fitted to effect it.

19. The 39th section of the Constitution has no application to, or bearing upon debts due to the State.

20. Its object, and sole object, was to protect unfortunate debtors who had been unable to comply with their private engagements, from the malignity, resentment and cruelty of their offended creditors.

21. The language of the 10th section of the bill of rights is addressed *directly* to the judiciary for the regulation of their conduct in the administration of justice.

22. No doubt the principles of humanity, sanctioned and enjoined in this section, ought to command the reverence and regulate the conduct of *all* who owe obedience to the Constitution. But when the Legislature, acting upon their oaths, specifying the fines to be imposed, etc., as the reasonable or excess of them, are necessarily questions of discretion, it is not easy to see how this discretion can be supervised by a co-ordinate branch of the government. Certainly in no case can it be, unless the act complained of contain such a flagrant violation of all discretion as to show a disregard of constitutional restraints.

23. Whatever might be thought of a penal statute, which in its enactments makes distinctions between one part of the community and another capriciously and by way of favoritism, it cannot be denied that in the exercise of the great powers confided to the Legislature for the suppression and punishment of crimes, they may rightfully so apportion punishments according to the condition, temptations to crime, and ability to suffer, of those who are likely to offend, as to produce in effect that reasonable and practical equality in the administration of justice, which it is the object of all free governments to accomplish.

24. The execution of every sentence of a court is under the control of the court, and the court is bound by obligations too sacred to be disregarded to allow time to make application for a pardon in every case where time is *bona fide* desired for that purpose.

25. Appeals in criminal cases annul the sentences rendered below, and whether the sentences be approved or disapproved, they are not to be affirmed or reversed in the Supreme Court; but the decision of that court is to be certified to the court below with instructions to proceed to judgment and sentence thereon agreeably to that decision *and the laws of the State.*

THE defendant, at the Spring Term, 1838, of the Superior Court of Sampson, before his Honor, *Judge Dick,* was convicted of an asault and battery, and thereupon was sentenced to pay a fine of twenty dollars, and it appearing to the court that he was a free person of color and unable to pay the said fine, it was further ordered and adjudged by the said court that the sheriff of the county of Sampson should hire out the defendant to any person who would pay the said fine for his services for the shortest space of time. From this judgment the defendant appealed to the Supreme Court.

Strange for the defendant.
The Attorney-General for the State.

GASTON, J., after stating the case as above, proceeded as follows: There is thus directly presented for our decision the question which was heretofore raised and argued in the case of *Oxendine* (*ante,* 2 vol., 435),

but which it was then deemed neither necessary nor proper to determine, that is to say, whether the act of 1831, ch. 13 (See 1 Rev. Stat., ch. 3, secs. 86, 87, 88, 89), "to provide for the collection of fines imposed upon free negroes and free persons of color," be unconstitutional and void. Every case seriously questioning the constitutionality of a statute is entitled to the most deliberate consideration, because it invokes the exercise of the highest and most delicate function which belongs to the judicial department of the government. The case before us not only seriously raises this question—but raises it upon grounds so plausible at least, if not so strong, as to render a full examination of them a task of some difficulty. We have therefore felt it our duty to examine the question with diligence and care, and if the conclusion to which we have arrived be not right, the error will not have resulted from the omission of our best efforts to form a correct judgment.

The act of 1831 directs that when a free negro or free persons (148) of color shall be convicted of an offense against the criminal law and sentenced to pay a fine, if it shall appear to the satisfaction of the court that he is unable to pay the fine imposed, the court shall direct the sheriff of the county to hire out the free negro or free person of color so convicted to any person who will pay the fine for his services for the shortest space of time. It further makes it the duty of the sheriff during the week of the court, or as soon thereafter as may be convenient, publicly, at the door of the courthouse, to hire out the convict to any person who will pay the fine so imposed for his services for the shortest space of time, and to take from the person so hiring, bond and security in double the amount of the fine so paid, payable in the same manner and with the same conditions for the proper treatment of the free negro or free person of color during the time for which he is so hired, as are contained in apprentice bonds, except the condition of teaching him to read and write. It declares that such hirer shall have the same authority over and the same right to require and control the services of such free negro or free person of color, and shall be liable in all respects to the same obligations and duties as masters now have, and are liable to, in cases of apprentice bonds. It further enacts that if no person can be found who will pay the fine so imposed for the services of the free negro or free person of color so fined for a space of time not exceeding five years, it shall be the duty of the sheriff to hire the free negro or free person of color to any person who will pay the highest sum for his services for five years, which sum shall discharge the fine; and it shall be the duty of the sheriff after deducting five per cent commissions to account for and pay over the money collected by virtue of this act as other fines. Provided that if any free negro or free person of color hired out under the provisions of this act shall abscond or leave the service of his master

before the expiration of his time, he shall be liable and bound to make up such time so elapsed by serving double the time thereof; and provided further that the fine imposed shall in all cases be at least equal to the amount of the costs of such prosecution.

(149) On the part of the defendant it has been objected that the act in question comes in direct conflict with that section in our Constitution which protects the person of a debtor after ascertained insolvency from imprisonment for debt, and with those sections in our declaration of rights, which prohibit the imposition of excessive fines and the infliction of cruel or unusual punishments, and the destruction or the deprivation of life, liberty or property of a free-man otherwise than by the law of the land. It was insisted, however, in argument by the Attorney-General that it was unnecessary to enter into the examination of these constitutional prohibitions, for that the defendant can set up no right and claim no benefit from them, because he is not a citizen of North Carolina. The positions of the Attorney-General are, first, that these provisions, being contained in the fundamental law by which the people of North Carolina, theretofore a colony and dependency of Great Britain, rising in revolt against the oppressions of the mother country, constituted and declared themselves a sovereign and independent state; *all* the securities provided in that fundamental law, either for persons or for property, and all the inhibitions against wrong, were designed exclusively for the benefit of those who were constituent members of that State, and of such as by inheritance or subsequent incorporation into that political body should thereafter become members thereof; and, secondly, that persons of color, whether born free or emancipated from slavery, were not originally members of that political body and never since have been incorporated into it. We do not yield our assent to either of these positions in the extent in which they have been asserted.

No doubt the primary purpose of the Constitution was the well-being of the people, by whom it was ordained, and the political powers reserved or granted thereby must be understood to be reserved or granted to that people collectively, or to the individuals of whom it was composed. But as justice is the great object, highest duty and best interest of every community, that people wisely deemed it essential to the well-being of themselves as a community so to consecrate by their most solemn sanctions certain great principles of right as to cause them to enter into the

(150) very elements of their association, in order that their violation should never be permitted to any who might be entrusted under the Constitution with the powers of the State. For instance, the 39th section of the Constitution is express that *"all prisoners* shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or presumption great." Can it be contended that this universal com-

mand may be disregarded unless the prisoner be a citizen? Take the 9th section of the declaration of rights, "*all men* have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences." Is this declaration to be understood as of a right belonging solely to the citizens of North Carolina? Take the 7th, 8th, and 9th sections of the same instrument, by which it is declared that every man accused of a crime has a right to be informed of the accusation against him, to confront his accusers and witnesses, and no man shall be compelled to give evidence against himself—that no free-man shall be put to answer any criminal charge, but by indictment, presentment, or impeachment—nor convicted of a crime but by the unanimous verdict of a jury of good and lawful men in open court. Is it believed that these great principles in the administration of criminal justice may be set at nought if the accused is not a citizen? By the 40th section of the Constitution it is provided that every foreigner who comes to settle in this State, having first taken an oath of allegiance to the same, may purchase, or by other just means acquire, hold and transfer land or other real estate, and after one year's residence shall be deemed a free citizen. If such a person, under the sanction of this clause, purchase land here, will it be doubted whether the land thus acquired is secured to him by that Constitution, so that it cannot be taken away, even before he becomes a free citizen, otherwise than by the law of the land? We understand the section in the Constitution, whatever may be its meaning, prohibiting the imprisonment of debtors as applying to debtors whether citizens or foreigners dwelling amongst us—and all the sections which interdict outrages upon the person, liberty, or property of a free-man, as securing to that extent for all amongst us who are recognized as persons entitled to liberty, and permitted the enjoyment of property. They are so many safeguards against the violation of civil rights and operate for the advantage of all by whom these rights may be (151) lawfully possessed.

It is not necessary to examine very particularly the argument upon the second position, which in its course assumed on both sides very much the character of a political discussion. According to the laws of this State, all human beings within it who are not slaves, fall within one of two classes. Whatever distinctions may have existed in the Roman law between citizens and free inhabitants, they are unknown to our institutions. Before our Revolution all free persons born within the dominions of the king of Great Britain, whatever their color or complexion, were native born British subjects—those born out of his allegiance were aliens. Slavery did not exist in England, but it did exist in the British colonies. Slaves were not in legal parlance persons, but property. The moment the incapacity—or disqualification of slavery was removed—they became

persons, and were then either British subjects or not British subjects, accordingly as they were or were not born within the allegiance of the British king. Upon the Revolution, no other change took place in the law of North Carolina than was consequent upon the transition from a colony dependent on an European king to a free and sovereign state. Slaves remained slaves. British subjects in North Carolina became North Carolina free-men. Foreigners until made members of the State continued aliens. Slaves manumitted here become free-men—and therefore if born within North Carolina are citizens of North Carolina—and all free persons born within the State are born citizens of the State.

A few only of the principal objections which have been urged against this view of what we consider the legal doctrine, will be noticed. It has been said that by the Constitution of the United States the power of naturalization has been conferred exclusively upon Congress—and therefore it cannot be competent for any State by its municipal regulations to *make* a citizen. But what is naturalization? It is the removal of the *disabilities* of *alienage*. Emancipation is the removal of the *incapacity* of *slavery*. The latter depends wholly upon the internal regula-
(152) tions of the State—the former belongs to the government of the United States. It would be a dangerous mistake to confound them.

It has been said that before our Revolution, free persons of color did not exercise the right of voting for members of the colonial legislature. How this may have been it would be difficult at this time to ascertain. It is certain, however, that very few, if any, could have claimed the right of suffrage, for a reason of a very different character than the one supposed. The principle of freehold suffrage seems to have been brought over from England with the first colonists, and to have been preserved almost invariably in the colony ever afterwards. In the act of 1743, ch. 1 (Swann's Revisal, 171), it will be seen that a freehold of fifty acres was necessary to entitle the inhabitant of a county to vote, and by the act of 2d Sept. of 1746, ch. 1, *ibid.*, 223, the *freeholders* only of the respective towns of Edenton, Bath, Newbern, and Wilmington were declared entitled to vote for members of the Colonial Legislature. The very Congress which framed our Constitution was chosen by freeholders. That Constitution extended the elective franchise to every freeman who had arrived at the age of 21, and paid a public tax, and it is a matter of universal notoriety that under it free persons without regard to color claimed and exercised the franchise until it was taken from free men of color a few years since by our amended Constitution. But surely the possession of political power is not essential to constitute a citizen. If it be, then women, minors, and persons who have not paid public taxes are not citizens—and free white men who have paid public taxes and arrived at full age, but have not a freehold of fifty

acres, inasmuch as they may vote for one branch and cannot vote for the other branch of our Legislature, would be in an intermediate state, a sort of hybrids between citizens and not-citizens. The term "citizen" as understood in our law, is precisely analogous to the term *subject* in the common law, and the change of phrase has entirely resulted from the change of government. The sovereignty has been transferred from one man to the collective body of the people—and he who before was a "subject of the king" is now "a citizen of the State." Considering, therefore, the defendant as having a right to the protection of the clauses in the Constitution and declaration of rights on which he relies, (153) we proceed to the examination of the alleged repugnancy between these and the act of 1831. The 39th section of the Constitution is in these words "The person of a debtor, where there is not a strong presumption of fraud, shall not be continued in prison after delivering up *bona fide* all his estate, real and personal, for the use of his creditors in such manner as shall be hereafter regulated by law." The argument of the defendant's counsel is that this declaration of the will of the people is found where details are not to be expected; that by it there is thus embodied into the Constitution a great principle which pronounces imprisonment of the body of an honest but unfortunate insolvent debtor, unjust and oppressive; that the restraint of his person, whether in jail or under the constraint of a master or keeper, is substantially imprisonment; that a fine to the State, though imposed because of crime, is debt; and that an act of the General Assembly commanding imprisonment of such insolvent to enforce satisfaction of this debt is therefore in direct conflict with this paramount law of the land. The argument is relieved from one great difficulty with which it would otherwise have had to contend, by the adjudication of this Court in *Benton v. Dickens,* 3 Murph., 103, and *Jordan v. James,* 3 Hawks., 110. In its terms the injunction of the Constitution would seem mandatory on the Legislature, and to be carried into execution only by the Legislature. The continuance in prison was forbidden after the surrender *bona fide* of the debtor's estate for the use of his creditors in such manner as should be thereafter regulated by law; and until such regulations should be made by law it was not in the power of any court to ascertain whether the required surrender had been or had not been made. But in the cases referred to it was decided that as the General Assembly in the year 1778, Rev., ch. 133, had *declared* all the acts of the colonial legislature which were in force before the Revolution to be yet in force, so far as they were not inconsistent with the freedom and independence of the State, and with the new form of government; and as by an act of the colonial legislature of 1773, it had been provided that a prisoner for debt, on surrendering his property for the use of his creditors in the manner therein di-

(154) rected, or without any surrender where he was not worth forty shillings sterling, and upon taking an oath of insolvency, should be set at liberty, and be forever discharged, both as to his person and property as against the creditor at whose instance, and for the debt upon which he was imprisoned—the act of 1778 was a substantial re-enactment of the regulations for ascertaining a *bona fide* insolvency, and therefore *under the constitution,* the insolvent complying with those regulations was protected from imprisonment for any antecedent debt to any creditor. Submitting, as it is our duty to submit, to the authority of these adjudications of our predecessors, we hold, therefore, that the 39th section of the Constitution does prohibit the imprisonment of an insolvent debtor, after that insolvency has been ascertained to be *bona fide* in any manner directed by law either before or since the adoption of the Constitution. And we also agree that the principle thus sanctioned by the Constitution is not to be honored in form only, and disregarded in substance by a literal adherence to the words "continued *in prison.*" A delivery over of his person from the public prison to a master or private keeper is as much forbidden as his *continuance* in the prison. But the same rule of construction which commands that effect should be given to the constitutional will of the people, to its full extent, without regard to verbal subtleties, equally forbids that we should interpolate into the Constitution what the people did not will, by an artificial and technical stretching of their language beyond its ordinary, popular and obvious meaning. *Ultra citraque nequit, consistere rectum.* A fine imposed for an offense against the criminal law of the country is a punishment—an evil or inconvenience in the form of a pecuniary mulct, denounced and inflicted by human laws, in consequence of disobedience or misbehaviour, not by way of atonement or compensation, but as a precaution against future offenses of the same kind—to correct the offender and as a terror to evil-doers. After it has been judicially imposed the same means may be used to enforce its collection, which by law the sovereign may employ to collect his debt—because by the imposition of the fine the right of the sovereign to that amount of money from him who has been sentenced to pay it has been conclusively ascertained
(155) of record. For this purpose it may be regarded as a debt due to the sovereign. But it is incontestible, we think, that the section of the Constitution which we are now considering did not embrace—and cannot without violence to many other provisions in it be held to embrace—fines imposed on conviction of crimes. It speaks of a *debtor* honestly surrendering all his effects for the *use* of his *creditors.* Neither of these terms, "debtor or creditor," is appropriate to describe the relation in which the convicted offender and the offended State stand towards each other. Again, the Constitution itself discriminates between

debts and fines. In this section it provides against unnecessary and wanton imprisonment for the *collection* of *debts*—but in regard to *fines* its language is "excessive bail shall not be required, nor *excessive fines imposed,* nor cruel nor unusual punishment inflicted." Declaration of Rights, sec. 10. Here we find a fine classed where it ought to be, among the means used in the administration of *criminal justice,* and in immediate connection with other punishments *imposed* or *inflicted,* in the course of that administration. Moreover, the 19th section of the Constitution confers on the Governor the power of granting pardons, but no part of the Constitution gives him any power over the public property, whether consisting of debts due to the State or of any other kind except the naked authority "to draw for and apply such sums of money as shall be voted by the General Assembly for the contingencies of government," and for these he is "to be accountable." Now if a fine of this character be a debt —a mere debt—creating the simple relation of debtor and creditor, between the individual who has been sentenced to pay and the State who is to receive it—certainly the Governor has no power to remit or release it. Yet from the institution of our government down to this day it has been the uniform, constant, and with one exception *unquestioned* usage of the Governor to grant a *pardon* remitting fines thus imposed—and on the only occasion when the question of his right so to do was raised, this Court held that it did not admit of discussion. *State v. Twitty,* 4 Hawks, 193. Nay, up to the last session of our legislature it has been considered as undoubted law—(and because the law was so deemed the legislature at that session passed the act to which we shall (156) hereafter have occasion to refer)—that there was no power under the law except the pardoning power of the executive which could relieve an imprisoned offender from his fine. It has been the understanding of every branch of the government, legislative, executive and judicial—of the whole community ever since the constitution was ordained, that a fine might be remitted by pardon, because it was a punishment, and that a prisoner could not be discharged from a fine under the insolvent acts, because in the sense of the Constitution it was not a debt. It is too late now, if it ever could have been permitted, to entertain a doubt upon the subject. Constitutions are not themes proposed for ingenious speculation; but fundamental laws ordained for practical purposes. Their meaning once ascertained by judicial interpretation and contented acquiescence, they are laws in that meaning until the power that formed shall think proper to change them. The argument, therefore, which we have been considering fails in this, that the fine imposed by the sentence below is not a debt within the meaning of the 39th section of the Constitution. But the argument presents another view in relation to the character of the fine which is proper to be considered. The last proviso in the act

makes it the duty of the court before whom the conviction of a free negro or a free person of color shall take place, on ascertaining his insolvency, to impose in every case without regard to the character of the offense, a fine at least equal to the cost of prosecution. Now by antecedent acts the several counties in the State are charged in cases of insolvent criminals with the costs of prosecution, and all fines levied on convicted offenders, belong to the counties respectively in which the convictions are had. In pursuance of these acts the statute before us makes it the duty of the sheriff to account for and pay over the money collected under it, after a deduction of his commissions, as other fines. It is, therefore, manifest, say the counsel for the defendant, that the very purpose of the enactments in this statute is to reimburse the county the expense of prosecution, and that the fine *so* directed to be imposed, and all the machinery for collecting and discharging the fine, are *in effect* so many provisions for collecting costs, and whatever may be
(157) thought of a fine really imposed for punishment, yet costs consequent upon conviction do constitute a debt. There are difficulties in interpreting the act with which, of course, we should not hesitate to grapple were it necessary. For instance, it would seem that the fine, the *minimum* of which is fixed, is required to be imposed before the insolvency is ascertained. This may, however, be a mere inaccuracy of language or arrangement. But, however this may be, a very strong, if not insuperable difficulty is felt by a portion of the court in asserting for the judicial branch of the government, a right to understand an act of the Legislature as professing one thing and meaning another, or to suppose the Legislature designed to do indirectly what was directly interdicted to them. Another portion of the court feels no such embarrassment, but thinks that the purpose of the act to secure to the counties the costs of prosecution is manifest, and that there is no indelicacy in thus interpreting its enactments. It feels itself bound indeed to believe that the Legislature did not intend to violate the Constitution, and that they had no doubt of their right under the Constitution so to relieve the counties from the inconvenience of paying the costs of prosecuting insolvent free negroes. It conceives, therefore, that the Legislature being satisfied of the rightfulness of their object, might for very sufficient reasons of expediency have preferred to accomplish this object rather by ordering the *costs* to be *included* in the fine, than by the ungracious mode of *excluding* the persons convicted from the benefit of the laws which permitted insolvency to exonerate from costs. But in the judgment of the Court it is unnecessary to determine whether this be or be not the true construction of the act, for the costs of a convicted offender are not a debt. The general rule of the common law was that the sovereign neither pays nor recovers costs. It is not easy now to say when this rule was first departed

from in North Carolina, by making the payment of costs a part of the sentence of the court. The change was antecedent to the Revolution, for in an act of 1762, for laying a tax on several counties of the District of of Halifax Superior Court, to repair the public prison thereof, and for other purposes (Swan's Revisal, 299), the new practice seems to be recognized. We find it there enacted "that the charges of committing and keeping a criminal shall, *if such criminal have not* (158) *sufficient estate to satisfy the same,* be paid by the public." Since the Revolution it has certainly been the usage in every case of conviction when a fine was imposed, to add thereto "and pay also the costs of prosecution." The existence of this usage was recognized in an act of 1778, ch. 4. (Iredell's Revisal, 363.) Up to that time the State's witnesses were not entitled to demand fees for their attendance. The act recites this as an injustice to these witnesses, and for the cure thereof directs that thenceforth they shall be allowed the same pay for their daily attendance as is allowed to witnesses attending in civil suits, and such fees for attendance shall be paid *by the defendant upon conviction;* and if the State shall fail upon the prosecution of any offense of an inferior nature, the court may, at their discretion, order the costs to be paid by the prosecutor in case such prosecution shall appear to have been frivolous or malicious; and *in case the defendant shall not be able to pay costs,* or the court shall not think fit to order the prosecutor to pay the same, that then, and in that case, the clerk shall grant a certificate to such witnesses in manner as certificates are directed to be granted to witnesses in civil cause; and such certificates may be received by the sheriffs in payment of public duties. The provision in this statute for the case in which the defendant shall not be able to pay costs, was construed, or rather misconstrued, into a legislative permission for a defendant sentenced to pay a fine and the costs of prosecution, to discharge himself from the costs by taking the oath of insolvency. The act of 1787, ch. 11 (Iredell's Rev., 613) recites that many persons convicted on indictments take the benefit of the insolvent act, either neglecting or refusing to pay fee of office, and sheriffs' and gaoler's fees, and for remedy thereof, enacts that every person who shall be found guilty of any charge exhibited against him by indictment or presentment, and shall be unwilling or unable to pay the office and gaoler's fees that are or may be consequent thereon, shall be hired out by the sheriff of the county where such person is convicted, for such time as any person will take him, to serve for the said fees and charges, the said sheriff first advertising the time and place of hiring at least ten days previous thereto. This act, which was sometimes, though seldom, (159) enforced had the effect to put an end to the practice of discharging criminals from costs by taking the oath of insolvency. It has never

been directly repealed, but it was regarded as harsh and offensive by a large portion of the community; and upon provisions being made by subsequent statutes for the payment of costs incurred by the state in prosecutions where the defendant was convicted but unable to pay, containing, it was thought, a clear indication that the defendant might be wholly discharged from the costs if insolvent, the act of 1787 was decided by the courts to have been impliedly repealed thereby. From this review of our usages, legislative acts, and judicial interpretation of them, it follows that the sentence pronounced against a convicted criminal that he shall pay the costs of prosecution is as much a part of his punishment as the fine imposed *eo nomine,* and that it was never held that he could discharge himself therefrom by taking the oath of insolvency, except by virtue of statutory enactments authorizing or supposed to authorize such a discharge. The right of the Legislature to prescribe the punishment of crimes belongs to them by virtue of the general grant of legislative powers. It is a power to uphold social order by competent sanctions. Unless they be restricted, and so far only as they are restricted by constitutional prohibitions, it is a power in the Legislature to accomplish the end by such means as in their discretion they shall judge best fitted to effect it. If they choose to annex as a penalty to guilt, that the offender shall in every case be mulcted, whatever other punishment may be inflicted, with the cost of prosecution, there is no authority in the land to gainsay it. If they think proper to provide that either the whole pecuniary penalty, or any part of it, fine and costs, or costs only, shall not be exacted when the prisoner is ascertained to be unable to pay, it is an act of grace which the judiciary will cheerfully carry into execution. But if they do not so provide, the relief of the unfortunate offender must then be sought not from the judiciary, but from the Governor, who can remit all punishment or any portion of it.

But there is another answer to this argument which is alike decisive. The argument assumes that the thirty-ninth section of the constitution restricts the power of the State in the collection of debts due *to*
(160) *the State.* We are satisfied that the assumption is unfounded, and that the section has no application to or bearing upon debts of this character. We think that this conclusion follows from the established rules for the interpretation of laws; from the nature of the provisions contained in the section; and from the uniform exposition which has been given to it. The rights and interests of the sovereign, whether that sovereign be a king or a people, are not to be restrained or diminished by general words not clearly referable to them. Upon this principle it was a well known rule of the common law that the king was not bound by any act of parliament wherein he was not named, unless it was an act in assertion of *public rights* or in suppression of *public wrongs,*

and not interfering with his acknowledged interest. It is a principle founded in good sense. Public rights exist for the support and well-being of the whole community. Every individual of that community has an interest in their preservation and maintenance. They are of too great importance and of too general concern to be curtailed by construction and implication, and it is a natural presumption that when an interference with *them* is designed, the purpose will be unequivocally expressed. The language of the section is not applicable to public dues. It speaks of a *bona fide* surrender of all the estate, real and personal, of the debtor *"for the use of his creditors."* Can it be believed that it was intended thereby impliedly to abolish the principle embodied in the institutions of our forefathers and supposed to be kept inviolate to this day, that the debt to the sovereign shall be preferred to all other debts? Was a surrender "for the use of the creditors of the debtor" which would violate this order of preference to the injury of the State, to draw down the special favor of the State upon the debtor? Was public delinquency to be excused because the property taken from the State was applied to the use of the defaulter's creditors? The exposition of this section which has always prevailed is, we are convinced, the true one. The object, and sole object, of the provision was to protect unfortunate debtors who had been unable to comply with their private engagements, from the malignity, resentment, and cruelty of their offended creditors; to take from *these* the power which the common law gave of incarcerating the person of their debtor for life, although he had honestly surrendered to them all the means he had of discharging their claims, and although this imprisonment deprived him of the ability to procure other means to pay what remained due. Upwards of thirty years ago it was decided in the case of the *State against Exum,* in Hillsborough superior court (then the exchequer court of the State), where the defendant had been surrendered by his bail and committed in execution upon a judgment against him as a district treasurer, that he could not be discharged from imprisonment as an insolvent; and it is confidently believed that there never has been a case in which a public debtor has been allowed the benefit of this supposed constitutional right.

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The next ground on which it is urged that the act is unconstitutional is for that it is repugnant to the tenth section of the bill of rights, which declares "that excessive bail shall not be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted." The act, it is argued, violates the principle of that part of this section which forbids the imposition of excessive fines, because it compels the court, whatever may be the nature of the offense—however trivial—to impose a fine at least equal in amount to the costs of prosecution. And what, it is asked, are the characteristics of the offense thus peculiarly visited by legisla-

tive severity? They are two: that the offender is a free person of color and that he is unable to pay a fine. His color and his poverty are the aggravating circumstances of his crime. Whether a fine be reasonable or excessive ought to depend on the nature of the offense and the ability of the offender. But the nature of the offense is left out of consideration and the *in*ability of the offender to pay is made the cause for raising the *minimum* of the fine.

Whatever force there may be in this reasoning, addressed to a body intrusted with a discretion over the subject, we are compelled to regard it solely and exclusively so far as it tends to show that the act is one which we can pronounce to be forbidden by the constitution. Now there are great, if not insuperable, difficulties in a court undertaking to pronounce any fine excessive which the legislature has affixed to an
(162) offense. It must be admitted that the language of this section of the bill of rights is addressed *directly* to the judiciary for the regulation of their conduct in the administration of justice. It is the courts that *require bail, impose fines,* and *inflict punishments,* and they are commanded not to require excessive bail—not to impose excessive fines—not to inflict cruel or unusual punishments—and it would seem to follow that this command is addressed to them only in those cases where they have a discretion over the amount of bail, the quantum of the fine, and the nature of the punishment. No doubt the principles of humanity sanctioned and enjoined in this section ought to command the reverence and regulate the conduct of *all* who owe obedience to the constitution. But when the Legislature, acting upon their oaths, declare the amount of bail to be required, or specify the fines to be imposed, or prescribe the punishments to be inflicted in case of crime, as the reasonableness or excess, the justice or cruelty of these are necessarily questions of discretion, it is not easy to see how this discretion can be supervised by a co-ordinate branch of the government. Without attempting a definitive solution of this very perplexing question it may at least be safely concluded that unless the act complained of (which it would be almost indecent to suppose) contains such a flagrant violation of all discretion as to show a disregard of constitutional restraints it cannot be pronounced by the judiciary *void* because of repugnancy to the constitution.

With respect to the act in question we cannot say that it does contain such a violation. If, which seems to have been believed below, for the sentence is to pay a *fine* only, and which, as it is a penal statute, ought to be taken to be its true construction, the court is *required* to inflict no greater or other pecuniary penalty than *the fine,* then the offender's pecuniary punishment is not necessarily greater than that which in effect is denounced and imposed on all other offenders upon conviction;

and the objection as to excess will then be that he cannot have the benefit of regarding the fine *to this extent* as a sentence to pay costs, and of obtaining a discharge from that part of it by reason of insolvency. The distinct effect of the objection thus considered will be hereafter examined.

After what has been said on the subject of excessive fines it (163) cannot be necessary to say much on the subject of cruel and unusual punishments. Our power to question the validity of a legislative act, because it denounces a punishment which we think too severe or not of an usual kind—if it can exist at all—certainly exists only in cases so enormous that there can be no doubt but that all discretion has been thrown aside. This act, whatever objections it may be exposed to because of its liability to abuse, is not subject to imputations of this kind. It contemplates, where the offender has not money nor property whereby he may be visited for his offense, that he shall not therefore escape all punishment, but shall be compelled to work out his fine. There is no penitentiary or public workhouse here, and therefore he must be put out to work under the charge of someone. Whether it was *expedient* to make that selection of that individual by an auction, and whether adequate precautions have been devised by the act to secure a proper keeper, and take from him adequate security for the humane discharge of his duties and exercise of his powers, are all inquiries exclusively belonging to legislative discretion. But the act does devise precautions designed to effect these purposes; makes the relation thereby created one well known to the law, that of master and apprentice, and subjects the master to legal visitation for inhumanity or improper treatment of such apprentice.

But it was insisted that the act in thus discriminating between the punishment of free persons of color and other free persons is arbitrary, repugnant to the principles of free government, at variance with the spirit of the third section of the bill of rights denouncing exclusive privileges, and not of the character properly embraced within the term "law of the land." We do not admit the validity of this objection. Whatever might be thought of a penal statute which in its enactments makes distinctions between one part of the community and another capriciously and by way of favoritism, it cannot be denied that in the exercise of the great powers confided to the Legislature for the suppression and punishment of crime, they may rightfully so apportion punishments according to the condition, temptations to crime, and ability to suffer, of those who are likely to offend as to produce in effect that reasonable and practical equality in the administration of justice which it is the object of all free governments to accomplish. What would be cruelty if inflicted on a woman or a child, may be (164)

moderate punishment to a man. What might not be felt by a man of fortune would be oppression to a poor man. What would be a slight inconvenience to a free negro might fall upon a white man as intolerable degredation. The Legislature must have a discretion over this subject, and that once admitted this objection must fail for the reasons already assigned in examining the objections as to the exercise of the powers admitted to be discretionary.

One more objection remains to be considered. The constitution gives to the Governor the power of granting pardons, except where the prosecution shall be carried on by the General Assembly or the law shall otherwise direct, and in this case he may, in the recess, grant a reprieve until the next sitting of the General Assembly. Now this act directs the sheriff to execute the judgment of the court during the week of its session or as soon thereafter as may be convenient, and thereby enables the sheriff to deprive the person convicted of an opportunity to apply to the Governor for a pardon or reprieve. The answer to this objection is that the execution of every sentence of a court is under the control of the court, and that the court is bound by obligations too sacred to be disregarded, to allow time to make application for a pardon in every case where time is *bona fide* desired for that purpose. Whether the Governor's pardon could or would not come too late after the offender was hired out and the fine paid, is a question not necessary to be now decided. If the remaining in service be a part of the punishment, certainly the Governor could remit what remained unexecuted of it. If the fine be the punishment and the hiring be but the mode of procuring the fine, the Governor's power over the subject would probably cease with the payment of the fine.

Upon full consideration of all the objections urged by the prisoner's counsel, we do not find such clear repugnancy between the constitution and the act of 1831 as to warrant us in declaring that act unconstitutional and void, and we are therefore of opinion that there was no error in rendering judgment against the defendant agreeably to the provisions of that act.

(165) Appeals in criminal causes annul the sentences rendered below, and whether the sentences be approved or disapproved they are not to be affirmed or reversed here. The law directs that the decision of this court shall be certified to the court below with instructions to proceed to judgment and sentence thereon agreeably to that decision *and the laws of the State.* This imposes upon us the necessity of adverting to a law which has been passed since the appeal, and since the argument, and which has an important effect on the sentence to be rendered. It is enacted by a law of the last session that *if any person* shall be convicted in any court of record in this State of any crime or misdemeanor and

shall be in execution for the fine and costs of prosecution, and shall have remained in prison for the space of twenty days, it shall be unlawful for the person so in execution to be discharged from imprisonment under the same rules and regulations as are prescribed for the discharge of debtors in execution under the first and fourth sections of the fifty-eighth chapter of the Revised Statutes, entitled "Insolvent Debtors," provided that the act shall not be so construed as to release any person from imprisonment who shall be in prison for any definite length of time under sentence of any court. This act does not repeal the act of 1831, but as the last expression of legislative will, it necessarily abrogates so much of that act as stands in the way of its enactments. The last act is one of mercy and grace, and in favor of human liberty, and is entitled to a favorable interpretation. But independently of this consideration it embraces in express terms all persons convicted of offenses of whatever kind, and imprisoned for the payment of fines imposed by reason of conviction, and therefore we cannot intend any such person to be excluded from the benefit of its provisions. We hold, therefore, that the defendant may discharge himself of the fine to be imposed under the act of 1831, by remaining in prison twenty days, and complying with the provisions referred to in the chapter of the Revised Statutes. It will be necessary, therefore, so to modify the sentence as after infliction of the fine to direct that the defendant be imprisoned until the said fine be paid or he be discharged therefrom by due course of law, and that if the prisoner shall not, within thirty days (or whatever period the court may think reasonable) be discharged by taking the oath of (166) insolvency as authorized by law, then that the sheriff be ordered to hire him out under the directions of the act of 1831.

This opinion is to be certified to the Superior Court of Sampson, with instructions to proceed to sentence accordingly.

As the defendant has not shown any error in the judgment below he must pay the costs of the appeal.

Cited: State v. Newsome, 27 N. C., 253; *State v. McIntire,* 46 N. C., 5; *State v. Glen,* 52 N. C., 324; *State v. Driver,* 78 N. C., 431; *State v. Cannady, id.,* 541; *State v. Davis,* 82 N. C., 612; *State v. Wallin,* 89 N. C., 580; *State v. Massey,* 104 N. C., 878; *State v. Parsons,* 115 N. C., 732; *State v. Nelson,* 119 N. C., 800; *Guilford v. Commissioners,* 120 N. C., 26.

DEN EX DEM. OF ELI LUNSFORD v. JAMES M. ALEXANDER.

Sub-Lease—Denial of Landlord's Title.

1. It is a general rule that a tenant shall never be permitted to controvert or raise objections to his landlord's title; and this rule extends to all parties claiming under the lessor or lessee, so that the lessee's assignee, or undertenant cannot object to the title of the lessor or his assignee any more than the lessee himself could.
2. The distinction between an assignment and an underlease depends solely upon the quantity of interest which passes, and not upon the extent of the premises transferred. When, therefore, the lessee of a house for seven years demises *part* of the house to another for the *whole* of his term, it is not underlease, but an assignment *pro tanto*.
3. Where a party is estopped by his deed, all persons claiming under or through him are equally bound by the estoppel.

THIS was an action of ejectment for a tract of land, tried at Buncombe on the last circuit, before his Honor, *Judge Dick*.

(167) The lessor of the plaintiff in support of his title produced in evidence a deed of bargain and sale to himself from one Thomas Jump, dated 11 January, 1819, for the land in controversy, and proved that after his purchase of the land he took possession of it, and in the latter part of the year 1828 leased it by deed to a Mrs. Skidmore for the term of five years from 1 January, 1829; that Mrs. Skidmore took possession in January, 1829, and in the latter part of the same year her husband leased the said land by deed for the balance of the aforesaid term to Matthew Woodson and Zadoc Halcombe; that Woodson immediately took possession of the land, and that his co-lessee, Halcombe, some time in 1830, sold his interest in the lease to the defendant Alexander, and made a written assignment thereof on the back of the deed of leases. That Woodson continued in possession of the land until some time in the year 1830, when he sold his interest in the land to Zachariah Candler, who took immediate possession of the same, and remained in possession until August, 1831, when a man by the name of Hughey went into possession, and remained so until October, 1834, when this suit was brought. The lessor of the plaintiff then produced an affidavit of the defendant in which he stated that Hughey went into the possession of the land as his tenant, and it appeared that on motion the affiant was admitted to defend this suit as the landlord of Hughey.

The defendant gave in evidence a grant from the State to the aforesaid Zachariah Candler, covering the land in dispute, dated 10 January, 1829, and also a deed for the same land to himself from Candler, dated in August, 1831. He then proved by Candler that he, Candler, purchased

the interest of Woodson in the land in dispute for the purpose of getting into the possession; that Candler sold and conveyed all his interest in the land to the defendant by the deed above stated, and gave up the possession to the defendant in August or September, 1831. That Hughey went into possession the same year, and so continued until the suit was brought.

His Honor instructed the jury that if they believed the evidence of the plaintiff's lessor he was entitled to recover; for it appeared that Candler got into possession of the premises under Woodson; that Candler sold to the defendant, and Hughey as the tenant of the defendant went into the possession of the land before the expiration of (168) the lease to Skidmore, and continued in possession until the expiration of the lease in 1834, and up to the time of bringing suit. That the defendant was estopped to deny the title of the plaintiff's lessor, and could not avail himself of the grant to Candler until he had first surrendered the possession of the premises to the lessor of the plaintiff. The lessor of the plaintiff had a verdict and judgment, and the defendant appealed.

No counsel appeared for either party in this court.

DANIEL, J. It is a general rule that a tenant shall never be permitted to controvert or raise objections to his landlord's title, which rule extends to all parties claiming under the lessor or lessee; so that the lessee's assignee, or under-tenant, cannot object to the title of the lessor or of his assignee any more than the lessee himself could. Comyn on Landlord and Tenant, 519, and the cases there cited. The distinction between an assignment and a lease depends solely upon the quantity of interest which passes, and not upon the extent of the premises transferred. When, therefore, the lessee of a house for seven years demises *part* of the house to another for the *whole* of his term this is not an under-lease, but an assignment *pro tanto*. *Crusoe den. Glencowe v. Bugby,* 3 Wilso, 234. Blk. Rep., 766. Comyn on L. and T., 52. The defendant had a moiety of the interest in the term mentioned in the case assigned to himself, and subsequently the other moiety was assigned to Candler. The two assignees entered and held the term as tenants in common. Whereupon the relationship of landlord and tenants immediately took place between the lessor and them. Candler and the defendant, by the assignment of the term to them, were privies in estate in the term covered by the original deed of lease, and each was estopped by that deed to controvert the lessor's title, before he surrendered the possession to the lessor. Co. Litt., 352, a. *Brireton v. Evans.* Cro. Eliz., 700. *Hudson v. Robinson,* 4 Maul and Selwin, 485. Where a party is estopped by his deed, all persons claiming under it through him are equally bound by the

(169) estoppel. *Stowe v. Wyse,* 7 Conn. Rep, 214. The defendant as to a moiety was estopped, being as to this part an assignee of the lease; and as to the other moiety, he could not be permitted to set up any defense to this action under a conveyance from Candler, because his grantor at the date of that deed was equally estopped to dispute the lessor's title, which estoppel bound the grantee. We think the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Farmer v. Pickens, 83 N. C., 552; *Pate v. Turner,* 94 N. C., 55; *Alexander v. Gibson,* 118 N. C., 806.

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(170) THE STATE v. JOHN H. BENNETT.

Forcible Trespass—Writ of Restitution—Conditional Sentence.

1. In an indictment for a riot and forcible trespass in entering a man's dwelling house, he being in the actual possession thereof, and taking from his possession slaves and other personal property, it is not necessary to show that the prosecutor had the right to the property, or the right to the possession, but whether he had in fact the *possession thereof* at the time when that possession was charged to have been invaded with such lawless violence, and any evidence tending to establish that possession is admissible.

2. An indictment for a forcible trespass in entering a man's dwelling house, which does not charge an expulsion from the house or a withholding of the possession thereof up to the time of the finding of the indictment, nor set forth the interest of the prosecutor, will not, in case of conviction, warrant a writ of restitution.

3. Upon a conviction for a criminal offense, it is irregular to annex to the sentence any condition for its subsequent remission. A judgment, though pronounced by the judge, is not his sentence, but the sentence of the law. It is the certain and final conclusion of the law following upon ascertained premises. It must therefore be unconditional.

4. The violence necessary to support an indictment for a forcible trespass in entering a man's dwelling house and taking from his possession personal chattels, will be sufficiently proved by showing that the defendants appeared in such numbers and under such circumstances as to deter the prosecutor from resistance, though there was no actual breach of the peace.

5. In such an indictment the presence of the prosecutor must be proved, but it need not be shown that he had hold of the chattels; it is sufficient if he were on the spot.

6. The practice which has prevailed to some extent in this State of inflicting fines with a provision that they should be diminished or remitted altogether upon matter thereafter to be done or shown to the court by the person convicted, is illegal.

7. In cases where the law gives to the judges a discretion over the *quantum* of punishment, they may with propriety suspend the sentence for the avowed purpose of affording to the convicted an opportunity to make restitution to the person peculiarly aggrieved by his offense, or to redress its mischievous public consequences, and when judgment is to be pronounced the use which has been made of such opportunity is very proper to be considered by the court in the exercise of that discretion.

THE defendant was indicted, together with three other persons, (171) at Guilford, on the last circuit, before his Honor, *Judge Pearson*, "for that they with force and arms in the county of Guilford, unlawfully, riotously, and routously, did assemble and gather together to disturb the peace of the State; and being then and there assembled and gathered together, the dwelling house of one Benjamin Curry, a free man of color, there situated, and then and there in the actual possession of the said Benjamin Curry, unlawfully, riotously and routously did break and enter, and having so as aforesaid broken and entered the said dwelling house, then and there unlawfully, riotously and routously did take and carry away out of the actual possession of the said Benjamin Curry five slaves, to wit, Phillis, Harriet, Jim, Henderson, Emily, and Wade Hampton, two beds, bedsteads and furniture, five chairs and three plates, the said Benjamin Curry being then and there actually present forbidding the said John H. Bennett, Joseph Micheaux, William Hix, and William Rail so to do; and other wrongs to the said Benjamin Curry then and there unlawfully, riotously, and routously did; to the great damage of him, the said Benjamin Curry, to the evil example of all others in the like case offending, and against the peace and dignity of the State." There was a second count in the indictment charging the breaking the house and the taking and carrying away the slaves and other property, to have been done violently, forcibly, injuriously, unlawfully, and with a strong hand," instead of "unlawfully, riotously and routously," as in the first count, but similar in other respects to that count.

On behalf of the prosecution it was proved that Benjamin Curry, a free man of color, was living in the house mentioned in the indictment, and cultivating the land on which it was situated, and on the day of the alleged trespass was ploughing in oats near the house; that he bought the land about twelve years before, about which time he also bought the negro woman Phillis, who was his wife and the mother of the other slaves; that he lived on the land ever since he bought it, during all which time, with the exception of a few weeks, he had possession of the

negroes and other personal property, up to the time of the trespass; that on the day of the alleged trespass the defendant Bennett, in com-
(172) pany with the other defendants, came to the house in the possession of Curry, and in despite of his repeated remonstrances, violently took and carried away the negroes and other personal property, and forcibly ejected Curry from the house, and put Hix, one of the defendants, in possession of it, who resided there until a few weeks before the trial, when he left the premises unoccupied.

The defense was put upon the ground that Curry was not in possession, and the defendants' counsel stated that they expected to prove that Bennett was in possession, for that Curry had sold the land, negroes, and other property to him, and executed deeds therefor, and that afterwards was surrendered to Bennett, and that he, to continue his own possession, placed these negroes there to live, and gave permission to Curry to stay there as a guest or lodger, or as his agent or overseer, he, Curry, taking care of the property in consideration of this permission to live with his wife and children. The defendants' counsel then read in evidence three deeds from Curry to Bennett, for the land, negroes, and other property in question. This evidence was objected to by the Solicitor General of the State. The defendants' counsel then introduced two witnesses, Hunt and Newsom, who gave evidence tending to establish the facts alleged in the defense.

The Solicitor General then stated that he had much evidence to offer, but being aware that it would be objected to, he would ask permission to state it to the court, that he might obtain the opinion of the court whether the whole or any part of it was admissible. He was requested to state it, which he did as follows: That the defendants' witness Hunt, and one Lindsay, had some time before the executions of the deeds by Curry to Bennett, by means of usury and extortion, obtained from Curry evidences of debt to a considerable amount, secured by a deed of trust, fraudulently obtained, upon Curry's land and negroes; that Lindsay and Hunt caused the trustee to advertise the negroes for sale, and that Curry, under great apprehension that his wife and children would be sold and carried out of the State, applied to the defendant Bennett for assistance; that Bennett promised him that if he would put the negroes in pawn to him, Bennett, he would stand his security and enable him to
(173) enjoin the sale and bring Hunt and Lindsay to a fair settlement; that while Curry was resting easy under this assurance, Bennett came to a secret understanding with Lindsay; that he, Bennett, would buy the negroes from Curry with Lindsay's claims, and Lindsay agreed to wait with him until he could send the negroes off and sell them; that a few days before the sale under the trust was to take place Lindsay refused to stand to his agreement with Bennett, upon which Bennett in-

formed Curry that he could not assist him as he had promised; whereupon Curry took the negroes and carried them to Greensborough, and applied to counsel to have a bill of injunction prepared against Lindsay and Hunt; that Lindsay and Hunt, hearing of this, went to Bennett and agreed to take one hundred dollars less for their claims than had been before agreed upon if he would hasten off and prevent Curry from filing his bill, and induce him to return with the negroes; that Bennett accordingly posted off to Greensborough, and by artful representations and fair promises of assistance, prevailed upon Curry to return with the negroes; that on the day of the sale, and just before the sale was to take place, Bennett procured Curry to execute the deeds above-mentioned, with an understanding that Bennett would bring Hunt and Lindsay to a fair settlement, and also that if Curry should pay to Bennett in twelve months the balance he, Bennett, should have to pay on the claims of Hunt and Lindsay, then the negroes and all the other property should be re-conveyed to Curry, and in the meantime he, Curry, should retain the possession; that Curry believed that all this was expressed in the deeds; that on the same day Lindsay handed over to Bennett all the evidences of debt and surrendered to him the deeds of trust, Bennett giving him his bond for the amount last agreed on. That some short time afterwards Bennett told Lindsay that Curry was determined to file a bill and expose all his usury and frauds, and moreover that Curry alleged that one of the notes was a forgery; that Lindsay thereupon agreed to compromise upon almost any terms, and finally surrendered to Bennett the bond which he, Bennett, had given him, endorsed "received and satisfied in full," and took from him a bond for less than one-fourth of the amount of the former to be paid when Bennett should sell the negroes. That all this was transacted before Bennett committed (174) the alleged forcible trespass.

The defendants' counsel objected to all this evidence. The court was of opinion that only such parts of it as tended to explain the possession and to show whether the possession was in Curry or Bennett, were admissible, as the title of the land was not at issue; and the court excluded all the evidence relative to what had been done and transacted before Bennett undertook to assist Curry, and also excluded all the evidence as to what took place between Bennett and Lindsay after the execution of the deeds by Curry, and the surrender of the trusts and evidences of debt by Lindsay and Bennett. The Solicitor then called the witnesses, who stated the transactions, substantially as set forth by the Solicitor between the time when Bennett undertook to assist Curry, and the execution of the deeds, and the surrender of the trust and evidences of debt.

The defendants' counsel, in the argument, insisted that forcible trespass could not be committed unless the person in possession had some estate in the property, and moved the court to charge that unless the jury were satisfied that Curry had an estate in the property they should find for the defendants.

His Honor charged that to sustain the indictment the State must prove that Curry was in possession of the house, negroes, and other property; that being so in possession and being actually present, he was forcibly and with a strong hand deprived of the possession by the defendants; that in this indictment it was a matter of indifference who had the title, for the law forbids even the owner of property forcibly to take that property from the possession of another who was present, because of its tendency to a breach of the peace; and that the reason why the defendants had been permitted to read in evidence the deeds under which Bennett claimed was not to enable the jury to decide who had the title to the property, but to explain the possession and enable the jury to decide whether in point of fact at the time of the alleged trespass Bennett or Curry was in possession. That if this evidence satisfied them that Curry was suffered to hold possession of the house, negroes, and other
(175) property under an agreement that he should have twelve months to redeem, and in the meantime might keep the possession, then the indictment was sustained so far as possession was concerned. Or if the evidence did not satisfy them that there was this right to redeem, but they were satisfied that after the execution of the deeds Curry was suffered to retain the house, land, and other property, and the negroes, though taken away for a time, had been sent back, with the understanding that he was to keep possession of the house and land, negroes and other property as long as he behaved himself, in the language of one of the witnesses, or until Bennett called on him to give up the possession, and in the meantime was to work on the land and hold possession of the negroes, stock., etc., then the indictment would still be sustained, so far as the possession was concerned; for though Bennett would then have the right to the possession whenever he chose to call for it, yet this case did not permit him to take possession by violence. But if the evidence satisfied them that after the execution of the deeds the possession of the house, negroes, and other property was surrendered to Bennett, and that he, with a view to continue his own possession, had put the negroes there to live, and gave permission to Curry to stay there as a guest or a lodger, or as his agent or overseer, he, Curry, having a care to the property in consideration of this permission to live with his wife and children, then the possession would be in Bennett, and they should find the defendants not guilty. His Honor further charged the jury that if they were satisfied that Curry had possession, the next question was, did the defendants

by violence deprive him of that possession, he being present at the time? That this violence would be sufficiently proved by the defendants' appearing in such numbers and under such circumstances as to deter Curry from resistance, though there was no actual breach of the peace; that to prove the presence of Curry it was not necessary to show that he had hold of the negroes, provided he was on the spot; that this offense could not be committed in Curry's absence because there would then be no danger of a breach of the peace; it was necessary that he should be present so as to make it likely that there would be a breach of the peace.

The jury returned a verdict of guilty against all the defend- (176) ants; whereupon it was ordered and adjudged by the court that the defendant Bennett should pay a fine of $100, and each of the other defendants a fine of $10. It was further ordered and adjudged that the defendant Bennett should be imprisoned for six calendar months, the imprisonment to be remitted upon said Bennett's surrendering to Benj. Curry the negroes and other personal property mentioned in the indictment, together with the debts and evidences of debt upon said Curry transferred to Bennett by Hamilton Lindsay, and executing to said Curry a reconveyance of the house and land, of the negroes, and other personal property contained in the deeds and bill of sale from Curry to Bennett, executing a release and discharge from all causes of action growing out of said deeds and bill of sale, the sufficiency of the deed of reconveyance and release to be approved by George C. Mendenhall and John A. Gilmer, attorneys of the court. It was further ordered that a writ of restitution should issue to the sheriff of the county, requiring him to place said Curry in possession of the house and land mentioned in the bill of indictment. From this judgment the defendant Bennett appealed to the Supreme Court.

W. A. Graham and J. T. Morehead for the defendant.
The Attorney General for the State.

GASTON, J. The first exception taken by the defendant in this case is because of the admission on the trial of irrelevant and improper testimony. This exception was argued by his counsel upon the assumption that the judge had received all the testimony which the Solicitor General prayed leave to introduce. We were satisfied upon the statement of the case in the transcript that such could not have been the fact, but as the statement seemed to involve some inconsistency, probably the result of clerical inaccuracy, we have caused the transcript to be compared with the original record, and upon that examination find that his Honor declared that the rule of law *excluded* (not *included* as was set forth

(177) in the transcript) all the evidence of what occurred before Bennett undertook to assist Curry, and also excluded all the evidence offered of what took place between Bennett and Lindsay after the execution of the conveyances by Curry, and after the surrender of the deeds of trust and evidences of debt by Bennett and Lindsay. We have caused the transcript to be amended accordingly. It now distinctly appears, what before the court understood to appear, that the evidence admitted, which is the subject of this exception, was confined to the circumstances attendant on and explanatory of the alleged sale by Curry to Bennett, under which the latter pretended that *he* had possession, and Curry only the *care* of the property conveyed by it. To this evidence we can see no valid objection. We perfectly agree with the judge that the guilt or innocence of the persons charged in respect to the offenses described in the indictment did not depend upon the question whether Curry had the right to the property, or the right to its possession; but whether he had in fact the *possession* thereof at the time when that possession was charged to have been invaded with such lawless violence. If the house broken into were occupied by him as his dwelling house, and the goods forcibly wrested were held by him as his goods, and the evidence brought home to the accused the violence charged, it cannot be doubted but that the peace of the State was outrageously violated, and that the accused were guilty of the riot and trespass charged upon them. We are of opinion, therefore, that there was no error in the conviction of which the defendant complains. We think, however, that there are objections to the judgment rendered upon the conviction. This was not a conviction of the offense of a forcible entry and detainer, much less of that offense under the statutes. The indictment does not charge an expulsion from the house, and a withholding of the possession thereof up to the time of the finding of that indictment, nor set forth the interest of the prosecutor in the house from which he was expelled. The conviction, therefore, did not warrant a writ of restitution. *Rex v. Bake,* 3 Bur., 1732; *Rex v. Wilson,* 8 Term, 358; Hawkin's Pleas of the Crown, Book 1, ch. 28, sec. 41. So on a conviction for a nuisance, unless (178) the indictment set forth the nuisance as still in existence, there cannot be judgment to abate it. *The King v. Stead,* 8 Term, 142.

We are also of opinion that it was irregular to annex to the sentence any condition for its subsequent remission. We know that a practice has prevailed to some extent of inflicting fines with a provision that they should be diminished or remitted altogether upon matter thereafter to be done, or shown to the court by the person convicted. But we can find no authority in law for this practice, and feel ourselves bound upon this first occasion when it is brought judicially to our notice, to declare it illegal. A judgment, though pronounced by the judge, is not his sent-

ence, but the sentence of the law. It is the certain and final conclusion of the law following upon ascertained premises. It must therefore be unconditional. When it has been rendered—except that during the term in which it is rendered it is open for reconsideration—the court have discharged their functions, and have no authority to remit or mitigate the sentence of the law. Hawkin's, Book 2d, ch. 48, sec. 25; 1 Institutes, 260; *King v. Wingfield,* Cro. Car., 251. *This* is one of the high powers of the executive.

In cases where the law gives to the judges a discretion over the quantum of punishment they may, with propriety, suspend the sentence for the avowed purpose of affording to the convicted an opportunity to make restitution to the person peculiarly aggrieved by his offense, or to redress its mischievous public consequences. And when judgment is to be pronounced, the use which has been made of such opportunity is very proper to be considered by the court in the exercise of that discretion. *Practically,* therefore, every salutary effect of these provisional judgments is attainable without a departure from the forms of law. But if it were not, no considerations of expediency, or of supposed public convenience, can justify a departure from these, which are among the strong safeguards of public right and private security.

The judgment which has been rendered against the defendant is, therefore, reversed, and this opinion is to be certified to the Superior Court of law for the county of Guilford, with directions to award sentence of fine or of fine and imprisonment against the defendant agreeably thereto and to the laws of the State. (179)

PER CURIAM. Judgment reversed.

Cited: State v. Perkins, 82 N. C., 684; *Strickland v. Cox,* 102 N. C., 412; *State v. Webster,* 121 N. C., 587.

DEN EX DEM. OF MARTHA H. IVES v. MARK S. SAWYER.

Claiming Under Same Person—Privy Examination.

1. Where both parties claim title under the same person it is not competent to either as such claimant to deny that such person had title.

2. Where neither the certificate of the commissioners appointed to take the private examination of a *feme covert* upon a deed made by her and her husband, nor any record produced, show that she was *privately* examined, the deed is void as to her.

3. The case of *Murphy v. Barnett*, 4 N. C., 14; *Burges v. Wilson*, 13 N. C., 306; *Lucas v. Cobbs*, 18 N. C., 228, and *Fenner v. Jasper*, *ib.*, 34, approved.

THIS was an action of ejectment, tried at Perquimans on the last circuit, before his Honor, *Judge Bailey*.

The lessor of the plaintiff deducted title as follows: In the year 1772 one Joseph Sutton devised the land in controversy to his son, Benjamin Sutton, who died intestate, leaving Granberry Sutton his heir at law. Granberry Sutton died in the year 1795, after making his will, in which he devised the land to the lessor of the plaintiff, who was his daughter. The Suttons had possessed and cultivated the land for many years. The defendant objected to the lessor of the plaintiff's recovery on this evidence, as no grant from the State for the land had been exhibited. Whereupon she produced in evidence a deed for the said land from her deceased husband, Jesse Ives, and herself to one James Leigh, under whom the defendant claimed, in which deed there was the follow-
(180) ing recital, "it being a part of the land formerly Granberry Sutton's deed, and fell to the said Martha H. Ives, by heirship from her father, the said Granberry Sutton." This deed, the lessor of the plaintiff contended, was void as to her, for want of her private examination thereto, though as she alleged it conveyed the interest of her husband in the land, and the recital therein estopped the defendant from denying her title under her father, Granberry Sutton. The only evidence of the acknowledgment and probate of the said deed as to the lessor of the plaintiff was the following certificates, endorsed upon the deed, to wit:

"Perq. Co. Court—February Term, 1820.

"This deed of sale, Jesse Ives and wife, to James Leigh, was duly acknowledged in open court and ordered to be registered; at the same time Thomas Long and James Summer, Esq'rs, were appointed to take the private examination of Martha Ives, wife of said Jesse, separate and apart from her said husband, touching her signature to the said deed, and report accordingly. *Test.* JOHN WOOD, Cl'k."

"Pursuant to the commission to us directed, we, the undersigned, have proceeded to examine Martha H. Ives, as touching her signature to the within deed, and on examination she says she signed the within deed of sale freely and voluntarily, and without any fear or constraint of her said husband, or any other person.

"Given under our hands and seals this 15th day of February, 1820.

THO. LONG. (Seal)

JAMES SUMNER. (Seal)"

It was proved on the part of the defendant that the 15th day of February, 1820, was during the session of the county court of Perquimans, at the February Term of that year.

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

No counsel appeared for the defendant in this court. (181)
Devereux for the lessor of the plaintiff.

DANIEL, J., after stating the case, proceeded as follows: The deed from Jesse Ives and wife, although void as to the lessor of the plaintiff, passed to Leigh under whom the defendant claims that interest in the land derived to the husband from his wife; and is an acknowledgment of the defendant, that Granberry Sutton had an estate of inheritance in the land, and that he derived title to the same as coming from the said Sutton, the identical person from whom the lessor now derives her title. Both parties claim directly from Granberry Sutton, and it is not competent to either as such claimant, to deny that he had title. *Murphy v. Barnett,* 1 Car. Law Repos., 105.

On the second point, the cases cited for the plaintiff's lessor, show clearly that the deed from Ives and wife to Leigh, is void as to the wife. The certificate of the commissioners does not show, nor is there any record produced that she was *privately examined.* The law has not been complied with and the defendant must fail on this ground. *Burges v. Wilson,* 2 Dev. Rep., 306; *Lucas v. Cobbs, ante,* 1 vol., 228; *Fenner v. Jasper, ib.,* 34. Judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Love v. Gates, post; Gilliam v. Bird, 30 N. C., 283; *Long v. Orrell,* 35 N. C., 127; *Copeland v. Sauls,* 46 N. C., 73; *Johnson v. Watts, id.,* 230; *Worsley v. Johnson,* 50 N. C., 74; *Spivey v. Jones,* 82 N. C., 181; *Christenburg v. King,* 85 N. C., 234; *Curlew v. Smith,* 91 N. C., 179; *Ryan v. Martin, id.,* 469; *Bonds v. Smith,* 106 N. C., 565; *Collins v. Swanson,* 121 N. C., 68.

(182) DEN EX DEM. OF SAMUEL S. ROSS v. ACHILLES DURHAM.

Tenants in Common—Deed by One—Estoppel.

1. Where two persons purchase jointly from the same vendor, and enter into possession of a tract of land as tenants in common, and after a common possession of several years, execute an agreement under their hands and seals, in which they acknowledge that they hold the land as tenants in common, it cannot be permitted to either of them, or to any other person claiming under either of them, until the rights thereby acknowledged shall be divested or changed, to set that possession up as hostile to the title of his co-tenant. And in such case if one of the tenants in common convey by deed the whole land to another person, and recite in the deed that *he*, the vendor, had title to the whole, and the purchaser is ignorant of the tenancy in common, it will not prevent the rule of law from attaching. The estoppel applies to the purchaser by reason of his privity with and under his vendor, not because of personal ill-faith.

2. A deed for the whole land made by one tenant in common to a third person is *color of title*, under which a possession by the purchaser for a sufficient length of time would divest the title of his co-tenant.

3. An agreement made by two persons in possession of a tract of land under a joint purchase in which they acknowledged under their hands and seals that they were tenants in common of all the lands which they had purchased from their said vendor, estops both of them from denying that their vendor had title to the land, and also estops each from averring any antecedent matter to show that the other had no title.

4. Execution includes delivery, and when it is stated of a deed as a fact that "its execution was proved," it must be understood that such evidence was offered as established its delivery *prima facie*. If it were, then the production of the deed by one of the grantees accompanied with testimony of long possession under it is a very strong circumstance to confirm the *prima facie* proof of delivery.

5. Where an agreement was made between A and B, for the purpose of settling all controversies between them, and in which they acknowledged among other things that they were tenants in common of all the lands which they had purchased from C, a memorandum endorsed on the agreement by the parties that it was not to extend to the suit of D's heirs against B and C, "and A, as agent or attorney for said heirs," cannot be understood to except from the operation of the agreement the acknowledgment of the tenancy in common in the said land between A and B, although the suit of D's heirs, for whom A was agent, was for the same land.

(183) THIS was an action of ejectment, tried before his Honor, *Judge Nash*, at Rutherford, on the last spring circuit. The lessor of the plaintiff, in order to show title to the land in dispute, offered to produce in evidence a deed from one Peter Fisher to himself and one Jacob Fisher, bearing date in 1809, which deed was objected to because it had

not been duly proved, as appeared from the certificate of registration. The objection was sustained by the court when the plaintiff's lessor proved its execution, and offered it in evidence as color of title, and showed a possession of the land under it from the year 1809 until 1818 or 1819; and he further offered in evidence a deed from Jacob Fisher to the defendant, executed in November, 1837, and proved the defendant to be in possession. The deed from the said Jacob to the defendant recited that the land was conveyed to said Jacob from the Marshal of this State. The deed from the Marshal referred to bore date in 1811. The plaintiff's lessor introduced also an agreement under seal between the said Jacob Fisher and himself, executed 10 April, 1817, wherein it was witnessed "that Samuel S. Ross and Jacob Fisher, both of the county of Rutherford and State of North Carolina, have mutually agreed and finally adjusted all their suits at law, and all matters and things of whatsoever nature from the beginning of the creation unto the present date, and both acknowledge the following statement to be correct and the true meaning of their settlement, to wit: The said Samuel and Jacob are to be joint owners and equally interested in all the land or tracts of land conveyed by Peter Fisher to the said Samuel and Jacob, to wit, etc," mentioning the land in controversy and other tracts. The deed from Peter Fisher to the plaintiff's lessor and Jacob Fisher was not registered till the year 1831, and it did not appear that the defendant, when he purchased from Jacob Fisher in 1827, had any knowledge of its existence. It also appeared in evidence that Peter and Jacob Fisher were in possession of the said land from the year 1804, and continued in possession until 1818, and also that the plaintiff's lessor removed from the land in 1818 or 1819 and went to South Carolina, and in the year 1831 instituted this suit.

It was denied on the part of the defendant that the deed from (184) Peter Fisher to the plaintiff's lessor and Jacob Fisher, bearing date in 1809, had ever been delivered, and if it had, the defendant contended that the plaintiff's lessor had by solemn acts and declarations disavowed title under it, and he offered in evidence first a bill of injunction sworn to and filed by the plaintiff's lessor in Rutherford court of equity in 1814, against Peter Fisher and others, alleging a want of title in the said Peter to the said land, and praying relief from the payment of the purchase money therefor. And to repel the effect of the compromise executed on 10 April, 1817, the defendant offered in evidence an instrument of writing executed on the same day and proved that it was executed at the same time by the plaintiff's lessor and the said Jacob Fisher, and insisted that the land in question was excluded from the compromise, and the matter left at large. The said instrument of writing was in these words: "It is hereby understood that the agreement made and con-

cluded by Samuel S. Ross and Jacob Fisher on 10 April, 1817, respecting their controversies, is to have no effect as to the suit of Mark Bird's Heirs v. Jacob Fisher and Peter Fisher and Samuel S. Ross, agent or attorney for said heirs; said suit is to stand in as full force as though there had no agreement taken place between said parties. This is acknowledged by the parties to be our act and deed on 10 April, 1817." The defendant also offered in evidence a record from Rutherford Superior Court, from which it appeared that the plaintiff's lessor as attorney in fact for Mark Bird's heirs instituted an action of ejectment on behalf of said heirs against the said Peter and Jacob Fisher for the land in controversy in the year 1812, and prosecuted the same until 1818, and afterwards. It was also proved on the part of the defendant that the administrator of Mark Bird recovered a judgment in the year 1810 or 1811 against Peter Fisher, that the plaintiff's lessor purchased said judgment and instructed the sheriff to sell the land in question under the execution on said judgment then in his hands, and that the sheriff did so, when Jacob Fisher became the purchaser and took a deed from the sheriff, dated in 1812, which deed the defendant offered in evidence and relied on. It did not appear that the land in dispute had ever been granted by the State.

(185) For the lessor of the plaintiff it was insisted that the seven year's possession under color of title made his title a perfect one. It was also insisted for him that by the agreement aforesaid and the deed taken by defendant from Jacob Fisher, and the deed from the sheriff to Jacob Fisher in 1812, the defendant was estopped from denying that the title was out of the State and in Peter Fisher.

For the defendant it was insisted that the deed from Peter Fisher to the plaintiff's lessor and Jacob Fisher had never been delivered, and if it had that the plaintiff's lessor had disavowed title in Peter Fisher by his bill of injunction, by his prosecuting a suit as attorney in fact for Bird's heirs for said lands against said Peter and Jacob Fisher, and by his purchasing the judgment aforesaid, and causing the land to be sold by the sheriff. And it was also insisted that it was a fraud in the plaintiff's lessor to cause the land in question to be sold to satisfy his own execution, and thereby mislead and entrap an innocent purchaser. The defendant contended further that the agreement of 10 April, 1817, relied on by the plaintiff's lessor was rendered inoperative as to the land in dispute by the other agreement executed at the same time, and that at most it could only raise an equity, and could not operate as an estoppel; that as the plaintiff's lessor had introduced the deed from Jacob Fisher to the defendant, which recited that said Jacob claimed under a deed and sale made by the Marshall for taxes, such recital was evidence for

the defendant and showed that said Jacob did not claim under either Peter Fisher or the plaintiff's lessor; that a seven year's possession under color of title without showing a grant from the State would not ripen an imperfect title into a perfect one; and that as to the sheriff's deed he, the defendant, was not estopped, as he claimed under both creditor and purchaser.

His Honor charged the jury that delivery was essential to every deed, but that when a deed was produced by him to whom it purports to have been made, the presumption of law was that it was rightfully in his possession, and threw upon the party denying its delivery to show by sufficient evidence that it never had been delivered. That if in this case the defendant had satisfied them that the deed from Peter Fisher to the plaintiff's lessor Ross, and Jacob Fisher never had been (186) delivered, they would lay it aside altogether in the consideration of the case, that if, on the contrary, they should be satisfied from the evidence that it had been delivered, then the plaintiff's lessor and Jacob Fisher became tenants in common, and each was estopped to deny title in Peter Fisher so far as the other was concerned, and that the estoppel extended to all claiming under them. That possession under the deed from Peter Fisher for seven years ripened the title into a good and valid one, and rendered it unnecessary for the plaintiff's lessor in this case to produce a grant from the State. His Honor instructed the jury further, that so far as Jacob Fisher or those claiming under him were concerned, the plaintiff's lessor was not deprived of any right which Peter Fisher's deed vested in him, by the filing of the bill in equity or the other facts relied on by defendant's counsel that the deed of agreement made in April, 1817, between the plaintiff's lessor and Jacob Fisher, if it did not operate as a common law conveyance, was an acknowledgment on the part of Jacob Fisher that the plaintiff's lessor was a tenant in common with him, at least from that time in the land mentioned in the agreement (and the land now in controversy was so mentioned) and estopped the said Jacob and all claiming under him from denying it; that as to the defeasance to that deed relied on by the defendant, it related to the suit then pending in the name of Bird's heirs against the Fisher's, and not to the land now in dispute. That as to the recital in the deed from Jacob Fisher to the defendant that the land was derived under a deed from the Marshall, that deed bore date before the compromise and agreement of 1817, and could not alter the relation in which the parties stood to each other at that time. The lessor of the plaintiff had a verdict and judgment, and the defendant appealed.

D. F. Caldwell for the defendant.
Clingman for the lessor of the plaintiff.

GASTON, J. The case does not set forth the evidence which was given respecting the execution of the deed from Peter Fisher to Jacob Fisher and the lessor of the plaintiff, and therefore it is impossible for
(187) us to say positively whether there is or is not error in that part of his Honor's instruction which relates to the delivery of the deed. Execution includes delivery and when it is stated as a fact that "its execution was proved," we must understand that such evidence was offered as established its delivery *prima facie* and until this evidence was contradicted or impeached. If it were then certainly the production of the deed by one of the grantees, accompanied with testimony of long possession under it, is a very strong circumstance to confirm the *prima facie* proof of delivery.

If this action had been brought against Jacob Fisher it is plain, we think, that the plaintiff would be entitled to recover. Not only had the lessor of the plaintiff and the said Jacob entered into the possession under one and the same claim of title, a deed from Peter Fisher to them as tenants in common, but on 10 April, 1817, after they had been thus in possession for more than eight years, they executed an instrument which they called an agreement under their hands and seals for the avowed purpose of settling and concluding all controversies which had theretofore existed between them, whereby they do acknowledge, declare and agree "that they, the said Samuel and Jacob, are to be joint owners and equally interested in all the land and tracts of land conveyed by Peter Fisher to the said Samuel and Jacob." It could not be permitted to either of them, holding possession after this solemn declaration, until the rights thereby acknowledged should be divested or changed, to set that possession up as hostile to the title of his cotenant. It follows, we think, that the defendant, having succeeded to Jacob Fisher's possession, and coming into that possession under him, is equally estopped from denying the right of the lessor of the plaintiff.

The declaration in Jacob Fisher's deed to the defendant that *he* had a title to the whole—or the ignorance of the defendant with respect to the right of the lessor of the plaintiff at the time when that deed was made, does not prevent the rule of law from attaching. The estoppel applies to the defendant by reason of his priority with and under Jacob Fisher, not because of personal ill faith. Jacob Fisher's deed was indeed a *color* of title under which a possession by the defendant for a
(188) sufficient length of time, would divest the title of the plaintiff's lessor. But until that title was divested it was sufficiently established against Jacob Fisher and those coming in afterwards under Jacob Fisher by showing the avowed cotenancy with him.

A brief notice will be all that is necessary of the other points in the case. The statements made in the bill in equity filed by Ross could only be material as evidence to show that Peter Fisher had not a good title at the date of his deed. But this would not effect the title of the plaintiff's lessor because the defendant was not at liberty to dispute that title. The construction which the judge placed on the proviso or memorandum attached to the agreement was the only one it could bear. As to the marshall's deed—and the sale by the sheriff under the judgment of Bird's heirs against Peter Fisher, which judgment had been bought by Ross—it is enough to say that these, as well as the bill in equity, *all* occurred previously to the execution of the judgment of 10 April, 1817, and all claims and contests under or by reason of them, were by that instrument *concluded.*

We are of opinion that the judgment ought to be affirmed.

PER CURIAM. Judgment affirmed.

RICHMOND M. PEARSON, ADMR. OF MARTHA TENNESSON v. JOHN TAYLOR.

Will—Construction of Bequest.

Where a testator bequeathed his negro woman Dice to his daughter Betsey, and added "the first born of Dice that is living hereafter to fall to Martha Tennesson," *it was held,* that the intention of the testator was to give to Martha Tennesson the first child that should be born alive of the body of Dice after the time he was speaking, to wit: the date of his will, and that she would take such first born child, whether born in the lifetime of the testator or after his death.

THIS was an action of trover for a negro slave, named Joe, tried at Davie, on the last circuit before his Honor, *Judge Settle.*

The plaintiff claimed under the following bequest in the will (189) of Caleb Webb, deceased: "And to my eldest daughter, Betsy, I will and bequeath forever to her and her heirs, one negro woman, Dice, one horse beast, one cow and calf, one bedstead and furniture for the same, the first born of Dice that is living hereafter to fall to Martha Tennesson, three sheep and one saddle to Betsey." It was alleged by the plaintiff that the slave Joe, for the conversion of whom this suit was brought, was the first born of Dice, as described in the will. There was testimony showing that there were other children born of Dice before Joe, but whether they were born before or after the date of the will did not appear.

His Honor instructed the jury that the will of the testator did not take effect until his death, and that no child of Dice born alive during the life of the testator would satisfy the bequest; but if they believed that Joe was the first born of Dice, after the death of the testator, the plaintiff would be entitled to recover. The jury returned a verdict for the defendant, and the plaintiff moved for a new trial upon the ground that the judge ought to have charged the jury that the plaintiff was entitled to recover if Joe were the first born of Dice after the date of the will, though he were born in the testator's lifetime. The motion was overruled and the plaintiff appealed.

Boyden and Cook for the plaintiff.
D. F. Caldwell for the defendant.

DANIEL, J., after stating the case, proceeded as follows: It seems to us that the intention of the testator was to give to Martha Tennesson the first child that should be born alive of the body of Dice, after the time he was speaking, to wit: after the date of his will. The first child born alive of Dice, after the date of the will, would be a specific legacy, and if that child died in the lifetime of the testator it would be the legatee's misfortune. But, on the contrary, if Joe was the first child born of Dice after the date of the will the plaintiff would be entitled to recover his value, whether he was born before or after the death of the testator. We think the judge erred when he said that no child of Dice born alive during the life of the testator would satisfy the bequest.

(190) The judgment must be reversed and a new trial granted.

PER CURIAM. Judgment reversed.

Cited: Tayloe v. Bond, 45 N. C., 19; *Carroll v. Hancock,* 48 N. C., 473.

DEN EX DEM. OF ELIAS LYNCH v. SAUNDERS D. ALLEN.

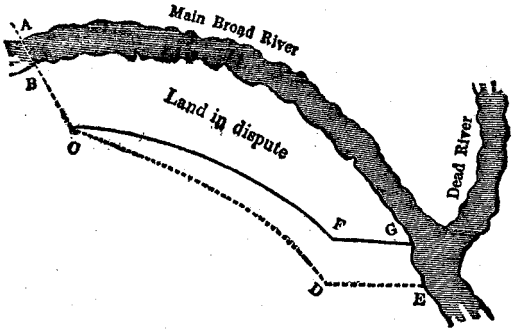
Deed—Change in Natural Boundary.

1. Where a deed calls for a line along the bank of a river, and after the date of the deed the bank of the river is changed by excessive floods, producing violent and visible alterations, the boundary will not shift with the change of the river, but will be where the bank was at the date of the deed.

2. When a deed contains a double description "along the river" and "a marked line," the natural boundary is the more important description, and will control the marked line.

THIS was an action of ejectment brought by the lessor of the plaintiff to recover a parcel of land lying between the dotted line B, C, D, E, and the river, as represented on the annexed diagram:

North



South

On the trial at Rutherford on the last circuit, before his Honor, (191) *Judge Dick,* the lessor of the plaintiff produced in evidence a deed for a tract of land lying on the northeast side of Main Broad River, and calling for a beginning in John Bradley's line, which is at A in the diagram, thence to the south branch of the river at B, thence down said river along a marked line to a willow bush, opposite the mouth of the Dead River at E, thence crossing the river to the mouth of the said Dead River, thence with the meanders of the said Dead River, etc. The lessor of the plaintiff then proved that when he purchased the land, in the year 1820, a line was run and marked on the south bank of the river from B, along the river bank to a point opposite the mouth of the Dead River; that since that time the river had encroached on the north bank by freshets, and that by accumulation of leaves, soil, etc., deposited during those freshets, the south bank of the river had been extended, so that the bed of the river had been changed. One of the witnesses, who was present at the survey in 1820, stated that he believed the south bank of the river was then at the line B, C, D, E; and another witness, who was also present at that survey, stated that he thought the south bank was at that time as far out at least as the line B, C, F, G. The surveyor who ran both those lines after the suit was brought stated that he could

find no marked trees on either of them. The defendant was proved to be in possession of the land lying north of the line B, C, F, G, and between that line and the river.

The defendant showed title to the land on the south side of the river, and his deed called for the plaintiff's line on the bank of the river, and he contended that he had a right to go to the south bank of the river, wheresoever that might be. His Honor charged the jury that "if they believed from the testimony that the line was run and marked in 1820 as alleged by the lessor of the plaintiff, and that said line was either at the line B, C, D, E, or the line B, C, F, G, and they further believed the defendant was in possession north of the line B, C, F, G, the plaintiff was entitled to recover." The lessor of the plaintiff had a verdict and judgment, and the defendant appealed.

Clingman for the defendant.
D. F. Caldwell for the plaintiff.

(192) GASTON, J. The court is of opinion that there was no such error in the instruction to the jury as to warrant a reversal of this judgment. We do not indeed hold that as the deed to the lessor of the plaintiff called for a marked line that this line, wherever established, was the boundary of that deed. We agree with the counsel for the defendant that as the deed contained a double description "along the river" and "a marked line," the natural object was the more important description, controlled the marked line, and was in law the true boundary. But it does not follow that because the river has deserted the bed in which it flowed when that deed was executed that the boundary of the land of the lessor of the plaintiff has shifted with it. Admit that such would have been the consequence if the river had receded from its southern bank by small and almost imperceptible gradations, a point upon which no opinion is intended to be expressed or intimated, this consequence does not follow from changes by sudden and violent floods. Such is stated to have been the fact in this case. The change of the bed of the river was made by *freshets,* which we must understand to be excessive floods, producing violent and visible changes; and the charge of the judge is not to be treated as an abstract proposition, but as a practical instruction to aid the jury in applying the law to the case before them.

PER CURIAM. Judgment affirmed.

Cited: Wilhelm v. Burleyson, 106 N. C., 387; *Brown v. House,* 118 N. C., 881.

JOHN W. CALDWELL v. JAMES S. SMITH. (193)

Sale of Personal Property—Defect—Question of Fact.

1. Where in a contest about the sale and delivery of a slave, it is doubtful from the evidence whether the delivery, which was made, was for the purpose of transferring the property to the vendee, or merely that he should hold as bailee until a sale should be effected by means of a bill of sale, the question should be submitted to a jury as one of fact for their determination.

2. The act of 1792, 1 Rev. Stat., c. 37, sec. 19, applies to a sale between vendor and vendee, although no third person is concerned as creditor or purchaser.

3. Where a sale is made at an agreed price, and the articles delivered do not correspond in *nature* or in *quality* with those contracted for, the vendee has a right to reject the articles altogether, but if he do not, and there is no warranty, the ordinary presumption is that he waives his objection to them, because of their not corresponding with the contract. If from the nature of the transaction it be not practicable for him to reject the articles altogether—as where they have been used before a discovery of the discrepancy—then, it has been held, he may reduce the vendor's claim to a *quantum valebant*, or to what the articles are actually worth. But where the vendee receives the very articles for which he contracted, and there was no stipulation with respect to its qualities, and these were as well known to him as to the vendor, the rule of *caveat emptor* applies, and he is bound to fulfill his contract by paying the stipulated price.

THIS was an action of assumpsit, brought by the plaintiff, to recover from the defendant the price of a negro slave alleged to have been sold and delivered. Plea: *Non assumpsit.*

Upon the trial at Rockingham, on the last circuit, before his Honor, *Judge Pearson,* the evidence was that in the year 1831, one Latta conveyed the slave in question to the plaintiff in trust to secure and pay certain debts; that afterwards Latta and the plaintiff appointed by parol one Donnell as their agent to hire out the slave and sell him as soon as an opportunity offered; that the negro was hired out by Donnell for the year 1833, to one Forrest, who lived near Hillsborough; that in November of the year 1833, Donnell went to Hillsborough and offered to sell the negro, when the defendant, who was well acquainted with him and saw him frequently, after much chaffering, agreed to take him and persons were called upon to bear witness to the bargain. The (194) price fixed on was $525, payable on demand after the 1st day of January, 1834, with interest from that date; the defendant was to take possession of the negro as soon as his time was out with Forrest, to wit, about the 1st of January, 1834, and was to notify Donnell by letter of his having done so. The evidence left it doubtful whether the defendant

was to give Donnell his note for the price at February court, 1834, in Hillsborough, or whether Donnell was to take the defendant's letter as the evidence of debt. The evidence also left it doubtful whether the parties intended that the sale should be effected merely by the above stated bargain and delivery to the defendant, or whether, besides the sale and delivery by which the parties intended to pass the property, there was an agreement that Donnell was to procure a bill of sale from the proper parties and hand it to the defendant, or whether the parties intended to effect the sale by a bill of sale to be procured by Donnell from the proper persons, and did not intend that the property should pass by delivery to the defendant, but only that he should hold the negro as bailee until the sale was consummated by the bill of sale. It was also proved that in November, 1833, Donnell appraised the plaintiff of his having made the trade, and the plaintiff assented to it; that about the 1st of January, 1834, the defendant took possession of the negro and put him to work at his trade as a blacksmith, and notified Donnell thereof by letter, in which he stated that the negro was in his possession; that he "considered him as delivered," and was ready to execute his bond, according to the contract. It appeared further that soon after February court, 1834, the negro died, and the defendant upon a demand being made, refused to pay the money or give his note. The defendant's counsel, for the purpose of reducing the stipulated price, proposed to show that at the time when the defendant took the negro into possession, he was in bad health and of little or no value; but the court rejected this evidence, there being no suggestion of fraud or of a warranty of soundness.

The defendant's counsel contended:

First, that the evidence, if true, did not prove a sale accompanied with an actual delivery so as to pass the title under the act of 1792 (see 1 Rev. Stat., ch. 37, sec. 19).

(195) Secondly, that the act of 1792 did not apply to a sale between vendor and vendee, where no third person as creditor or purchaser was concerned. The last point was reserved with leave to move to set aside the verdict, and enter a nonsuit.

His Honor charged the jury that the property in slaves might be passed in two ways, either by a bill of sale or by a sale and delivery, and it was for them to decide from the evidence which of these two ways the parties intended to adopt; that if they intended to effect the transfer of the property by means of a sale and delivery, and the defendant took possession of the slave with an intention thereby to acquire the property, and make him his own, they would find for the plaintiff, although the evidence satisfied them that there was an understanding that after the slave had thus been transferred to the defendant and became his prop-

erty, Donnell was to procure a bill of sale and hand it to the defendant for the further assurance of his title. But if the evidence satisfied the jury that the parties did not intend to pass the property by sale and delivery, but intended to effect the sale by means of a bill of sale, and that the defendant took possession of the slave as a bailee, to hold him until a bill of sale was procured, then they would find for the defendant. The jury found a verdict for the plaintiff; and the defendant moved for a new trial because of the rejection of his testimony, and also for error in the charge. This motion being overruled he moved to set aside the verdict and enter a nonsuit upon the question reserved, but this motion was also overruled and judgment pronounced for the plaintiff, whereupon the defendant appealed.

W. A. Graham and Badger for the defendant.
J. T. Morehead for the plaintiff.

GASTON, J. No error has been shown by the defendant to warrant a reversal of this judgment. The instruction of the judge was in precise conformity to the doctrine laid down by this court in the case of *Henry v. Patrick, ante,* 1 vol., 358, and the evidence justified that instruction. The testimony offered for the purpose of reducing the (196) stipulated price was properly rejected. There was no warranty of the health of the negro, express or implied, and no imputation of unfairness in the vendor. Of course the rule of *caveat emptor* applied. The purchaser bought for better for worse, and was therefore bound to fulfill his contract. The cases which have been cited in argument for the defendant, whether well or ill decided, do not apply to a sale of this character—but to sales at an agreed price where the articles delivered do not correspond in *nature* or in *quality* with those which were contracted for. In such cases the vendee has certainly a right to reject the articles altogether. If he does not and there is no warranty, the ordinary presumption is that he waives his objection to them because of their not corresponding with the contract. But if from the nature of the transaction it be not practicable for him to reject the articles altogether—as for instance where they have been used before the discovery of this discrepancy—then *according to these cases* he may reduce the vendor's claim to a *quantum valebant,* or to what they are actually worth. (Stark on Evidence, Vendor and Vendee.) But here the purchaser received the very article for which he contracted—there was no stipulation with respect to its qualities, and these were at least as well known to him as to the vendor. There can be no more reason to discharge him from part of the price because the thing purchased turned out to be less valuable than

was expected, than there could be to charge him with a higher price if it had proved more valuable than was anticipated. Where contracts are lawful and fair it is the duty of courts to enforce their execution according to the agreement of the parties. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Featherston v. Featherston, 33 N. C., 319; *Morris v. Rippey,* 49 N. C., 535; *McEntyre v. McEntyre,* 34 N. C., 302; *Odom v. Harrison,* 46 N. C., 403; *Waldo v. Halsey,* 48 N. C., 108; *Hobbs v. Riddick,* 50 N. C., 81; *Smith v. Love,* 64 N. C., 441.

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(197) PENELOPE DOBBS v. WILLIAM H. GULLIDGE.

Trespass Quare Clausum Fregit—Survival of Action—Constructive Possession.

1. The action of trespass *quare clausum fregit,* being a remedy for an injury to the possession, cannot be maintained by him who had not possession when the wrong was done. But where there is no actual possession in another, the law adjudges him in possession who has the property; and this possession, which is usually called constructive possession, is fully sufficient to maintain the action.

2. The action of trespass *quare clausum fregit* is purely a personal action, sounding wholly in damages, and if permitted to survive the person damaged, survives to his executor or administrator. It cannot be revived by the heir or devisee of the person injured.

THIS was an action of *trespass quare clausum fregit,* brought originally by William Dobbs, but during the pendency of the suit he died, and the present plaintiff, "the widow and devisee under the last will and testament of William Dobbs, came into court and became party plaintiff." On the trial at Anson, before his Honor, *Judge Nash,* on the last circuit, the plaintiff exhibited a clear title to the tract of land on which the trespass was committed, but she had no other possession than that which the law annexes to the title. The defendant was the owner of an adjoining tract, and about two years before the action was commenced cleared a field of about two acres, fenced it in and cultivated it, and continued in the possession up to the time of the trial. At the time the defendant cleared the field, he declared that he did it with the view of taking possession. Upon this case the defendant moved that the plaintiff should be nonsuited on the ground that she ought to have brought an action of ejectment, and that trespass could not be maintained. His Honor refused to nonsuit the plaintiff, but instructed the jury that the

action was well brought; that as the defendant was a mere intruder without title, his possession extended only to the boundaries of his enclosures; that the plaintiff was not entitled in this action to any damages for the rents and use of the land within the fence of the defendant; but was entitled to damages for the entry on her land by the defendant. Under these instructions the plaintiff had a verdict and judgment, and the defendant appealed.

Winston for the defendant. (198)
Mendenhall for the plaintiff.

GASTON, J. The exception taken by the defendant to the charge of the judge is untenable. Trespass being a remedy for an injury to the possession cannot be maintained by him who had not possession when the wrong was done. But where there is no actual possession in another, the law adjudged him in possession who has the property. This possession, usually called with us constructive possession, is fully sufficient to maintain the action.

If there was no other objection to the judgment below it would be affirmed. But there is an error apparent *on the record* which the appellate insists upon, and on account of which the judgment must be reversed. Wm. Dobbs, who instituted the action, died pending the suit, and thereupon "Penelope Dobbs, the widow and devise under the last will and testament of William Dobbs, came into court and was made party plaintiff." At common law the action of trespass could not be maintained by or against representatives. By our act of 1799, ch. 532, it is declared that the action of trespass "where property is in contest, and such action is not purely vindictive," together with certain other actions therein enumerated, shall not abate or be discontinued by the death of either party plaintiff or defendant, but the same shall and may be revived in the manner prescribed for the revival of other actions. The manner referred to is by an application to the court of the heirs, executors or administrators of the plaintiff, if *he* hath died, or by bringing into court the heirs, devisees, or executors or administrators of the defendant, if it be *his* death that renders a revival of the suit necessary. Whether the action is to be revived by or against heirs—or by or against the personal representatives—must depend upon the nature of the action. Trespass is purely a personal action sounding wholly in damages. A right to recover a recompense for damages sustained is a chose in action, which, if permitted to survive the person damaged, survives to his executor or administrator. The heir or devisee has no interest in or claim to it—and cannot therefore either originally prosecute a suit for it, or revive one that has been instituted in the life of the person injured. *McPherson v. Seguine,* 3 Dev., 153.

(199) As a judgment has been erroneously rendered for the plaintiff below, when no judgment ought to have been rendered for either party, that judgment is reversed—and judgment on the verdict is arrested.

PER CURIAM. Judgment reversed.

Cited: Patterson v. Bodenhammer, 33 N. C., 9; *Brooks v. Stinson,* 44 N. C., 73; *London v. Bear,* 84 N. C., 272; *State v. Reynolds,* 95 N. C., 619.

WILLIAM M. JOHNSON ET UXOR v. JAMES W. ENGLAND.

Judgment—Married Woman—Statute of Presumptions.

1. A judgment confessed to a married woman as if she were single, comes within the operation of the act of 1826 (1 Rev. Stat., ch. 65, sec. 13), prescribing the time within which the presumption of payment or satisfaction on judgments shall arise, notwithstanding the coverture, and although the *scire facias* to revive the judgment is sued out in the name of the husband and wife.

2. If a woman sues, and afterwards marries, and the marriage is not pleaded in abatement *puis darrein continuance,* she may have judgment, which cannot be reversed for error.

3. The husband has entire control over a judgment confessed to or obtained by his wife during coverture, and the proper way for him to proceed to enforce it is by making himself a party by *scire facias* as in case of a judgment obtained by a *feme covert dum sola,* and who had married before execution.

THIS was a *scire facias* to revive a judgment, to which the defendant pleaded "payment."

It appeared upon the trial at Moore, on the last circuit, before his Honor, *Judge Nash,* that the judgment, to revive which this *scire facias* was brought, was confessed by the defendant at the August Term, 1819, of Moore County Court, to the *feme* plaintiff, who then was, and still continued, the wife of the other plaintiff. On this judgment two consecutive executions issued, the last of which was returned to Feb-

(200) ruary Term, 1820, after which no other execution ever issued in the case. The *scire facias* to revive the judgment was issued on the 4th day of August, 1836. The defendant contended that from the lapse of time between the issuing of the last execution on the judgment and the *scire facias* to revive it, the act of 1826 (see 1 Rev. Stat., ch. 65, sec. 13), raised a presumption of its payment. The plaintiffs on the other hand contended that as the judgment was confessed to a *feme*

covert, the presumption of payment could not arise from the lapse of time. His Honor charged the jury in favor of the defendant on the operation of the act of 1826, and he had a verdict and judgment, from which the plaintiffs appealed.

Winston for the plaintiffs.
No counsel appeared for the defendant in this Court.

DANIEL, J., after stating the case, proceeded as follows: The act of 1826 (1 Rev. Stat., ch. 65, sec. 13), declares that the presumption of payment of a judgment shall arise within ten years after the right of action on the same shall have occurred, and on the same rules as now exist at law in such cases. The judge, in his charge, told the jury that the law presumed the debt was paid. The plaintiff's counsel now contends that the circumstance of Mrs. Johnson being a *feme covert* at the time the judgment was confessed to her, and her continuing so up to this time, was sufficient to repel the presumption of payment; and therefore the judge erred in his charge to the jury. We are of a different opinion from the counsel. Suppose an action had been commenced by a *feme,* whilst she was single, and she had married pending the suit, and at common law the defendant had not pleaded that fact in abatement since the last continuance, she would, notwithstanding her marriage, have had final judgment in her favor which could not have been reversed in a writ of error. The present judgment, it seems to us, stands upon the same footing; the husband in each case would have had entire control over it, and might have issued execution and collected the money. Two executions have been issued on this judgment, which we must understand to have been ordered by the husband, as the wife had not legal ability to execute a power of attorney to cause the executions to be issued. (201) The more correct way would have been for the husband to have made himself a party by *scire facias,* as in the case of a judgment obtained by a *feme dum sola,* and who had married before execution. But the husband has elected to act on this judgment; and the cases cited for the plaintiff of a bond or promissory note given to a *feme covert* (and not dissented to or sued on by the husband) surviving to the wife or her administrator, does not here apply. The fact of these executions having been issued, goes to strengthen the presumption of payment. There is no saving clause in the act of 1826, or in any of the rules of the common law therein referred to, to take this case out of its operation. Therefore the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Summerlin v. Cowles, 101 N. C., 478.

(202) MARY M. CONNER v. JOSEPH D. SATCHWELL, ADMINISTRAROR OF WILLIAM H. PRICE.

Will—Construction of Bequest—Assent of Executor.

1. Where a testator, after leaving all his negroes to his wife for life, and giving to his son after his wife's death, a negro woman named Suck, bequeathed to his daughter as follows: "After my wife's decease, I give and bequeath to my daughter, M. M. C., one negro boy, and if my negro woman Suck should have another child, I give it to my daughter, M. M. C.;" and after the testator's death and during the life of his widow, Suck had two children, of whom the elder died in the life-time of the widow and the other survived her: *It was held*, that by the bequest only *one* and that the *first born* child of Suck was given to the daughter, that in such *first born* child she took a vested interest immediately upon the death of the testator; and that although such child died in the life-time of the widow, yet the daughter had no title, upon the death of the widow, to the other child of Suck, which was then living.

2. Where a testator bequeathed a negro woman to his wife for life, and if the negro woman should have another child, then after his wife's decease that his daughter should have the child: *It was held*, that the assent of the executors to the legacy of the negro woman to the wife for life, was an assent of the bequest of the child to the daughter, although such assent was given before such child was born.

3. The case of *Ingrams v. Terry*, 9 N. C., 122, approved.

DETINUE for a negro slave named Eli—plea *non-detinet*, upon which issue was joined, and the cause tried at Beaufort, on the last circuit before his Honor, *Judge Toomer*.

The plaintiff claimed the slave in question under the will of her father, William W. Mallison, in which, among others, were the following clauses: "I lend unto my beloved wife, Sarah Mallison, during her natural life, or widowhood, all my negroes, and stock, all that I possess, and all my household furniture." "After my wife's decease I give and bequeath to my daughter, Mary M. Conner, one negro boy named Tom, one bed and furniture, half dozen silver table spoons, and half dozen tea-spoons, one bureau, and glass. And if my negro woman Suck should have another child, I give it to my daughter, Mary M. Conner, and one loom." "After my wife's decease, I give and bequeath to my son, Francis Mallison, one negro boy named Jack, and one negro woman named
(203) Suck, one feather bed and furniture, one silver ladle, one table, one chest." It was admitted on the trial that the testator had but one negro woman named Suck; that the executors proved the will and assented to the legacy to Sarah Mallison, who took possession of Suck as legatee for life; that Sarah Mallison died before the commencement of this suit; that after the probate of the will, and while she was

held by the tenant for life, Suck had a child named Sid, and about two years thereafter she had another child called *Eli,* the subject of this controversy; and that the child Sid died before the death of Sarah Mallison.

The defendant insisted that the plaintiff acquired by the bequest no title to Eli; that if she acquired title by this bequest to any child of Suck it was to Sid, and not to Eli. The defendant also insisted that if Eli was bequeathed by this clause of the will to the plaintiff, the legatee for life of Suck had no interest in him, but the plaintiff had a right to him at his birth, and that it was not a bequest to the plaintiff in remainder, and therefore the assent of the executors to the bequest of Suck for life was no assent to the bequest of Eli to the plaintiff. It was admitted that the executors refused their assent to the claim of the plaintiff to Eli, and that they never assented to such legacy, unless their assent to the legacy of Suck to Sarah Mallison for life was in law an assent to the alleged bequest of Eli to the plaintiff. His Honor intimated an opinion against the claim of the plaintiff, whereupon she submitted to a nonsuit and appealed.

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

GASTON, J. We concur in opinion with the judge who presided at the trial that the plaintiff did not make out a title to the negro for which her action was brought.

In the second clause of the will which we are called on to expound the testator bequeaths to his wife all his negroes during her natural life or widowhood—and in a subsequent clause he gives, after his wife's decease, a negro boy named Jack, and negro woman Suck to his son, Francis. In the clause under which the plaintiff claims title he expresses himself thus: "After my wife's decease I give to my daughter Mary M. Conner, one negro boy named Tom, and if my negro (204) woman Suck should have another child I give it to my daughter Mary." It is probable that the testator did not contemplate the probability of Suck having more than one child; but, however this may be, it is certain that he has made no *express* disposition of more than one such child. To hold that he bequeathed to the plaintiff by these words all the issue, however numerous, which Suck might have, would be to extend the testator's expressions beyond their obvious import. We see no sufficient reason to justify such a license; we do not find in the will any evidence that such was the deliberate purpose of the testator, and we cannot attribute the intention to him by mere conjecture. Whether a different construction might not obtain had the words used been any child (a case put by the plaintiff's counsel), it is unnecessary to decide,

for if a different construction were then to prevail it would be because of the more comprehensive import of the adjective "any," rendering it susceptible of application to one or more objects, and approaching closely to that of "every." But *another* means *one other*—and *it* alone is given. The next inquiry is, if both the children of Suck did not pass by this clause to the testator's daughter, did either? and if so, which of them did so pass? We entertain no doubt but that she became entitled to one of these children. The gift of Suck to his son Francis carried with it, as part of Suck, all the issue she might thereafter have, with the exception of what was bequeathed to his daughter. The gift to her of the child of Suck, should she have but one, afford a moral certainty of his intent that this bounty was not to be taken away if the provision for his son from which it is excepted should prove more extensive than the testator contemplated.

The plaintiff contends that the gift to the plaintiff was to take effect at the death of the widow, and therefore must operate upon the subject, then answering to the description of the thing given. We do not assent to this position. We hold that the *gift* was immediate, although the possession was postponed until the widow's death. The law favors the vesting of legacies, and therefore where a disposition is made by will of a personal thing in successive fractional interests, unless there be (205) a clear manifestation of an intent, that the ulterior legatee shall not *take* but in the event of surviving the expiration of the interest of the preceding legatee, the bequests are in the nature of a particular estate and remainder, and both vest at the death of the testator. Thus there can be no question but that the bequest to Francis of Jack and Suck, though expressed as a gift "after his wife's decease," vested in Francis upon the death of the testator at the same moment when the bequest of them for life vested in the widow. So in the clause directly before us the gift of Tom passed an immediate interest to the plaintiff, postponed as to enjoyment only during the life of the widow. The gift of "the child which Suck might have," is part of the bequest in which Tom was given, and comes within the operation of the same rule which governs that gift. This child, though not actually in being, yet as potentially existing, was bequeathed to the widow for life, and after her death to the plaintiff. In one sense indeed the legacy may be termed *contingent*, because if no such child should be born, neither of the legatees would derive an actual benefit therefrom. It was therefore contingent as to possession—but the right was in no respect contingent—this was absolute—was susceptible of disposition by either of the legatees, and upon the death of the daughter before the thing given came into possession, was transmissible as a vested interest to her representatives. Considering, therefore, the bequest in question as operating upon

the death of the testator, so as to transfer the right to the plaintiff, and that this, her right, was limited to one child only of Suck's, we are necessarily conducted to the conclusion that upon the birth of Suck's first child, that child answering fully to the terms of the gift, became the property of the plaintiff. Before its birth she was entitled to the child which Suck might have. Upon its birth she was entitled to the child which was then born. The thing given was in law always the same—though at times in a different state. Before birth it was potentially in existence, and after birth it was actually in being—the whole bounty of the testator was thereby fulfilled—and whether the thing given afterward lived or died, it lived or died the property of the plaintiff. In the circumstances which have occurred this construction is an unfortunate one for the plaintiff, but those circumstances ought not to effect the construction. If we adopt that which she now contends (206) for, *viz.*: that the gift was not to operate until the death of the widow, and would pass to the legatee only the thing which *then* answered to the description in the will—the legatee would take nothing if the widow died before Suck had issue, although such issue was born afterwards. Or if the widow had lived many years, and the first of Suck's children or Suck's only child (had there been but one) died before the widow, leaving a numerous progeny, the legatee would be entitled to none of these. Or if the legatee had died before the widow, the legacy must have lapsed, and the legatee's representatives could have claimed no benefit from it. The case comes within the range of all the motives which induce courts to favor the vesting of legacies.

On the point which was made with respect to the assent of the executor the court feels no difficulty. The assent of the executor to the taking of the thing bequeathed by the legatee for life was an assent to the subsequent interests therein bequeathed by the will. The case of *Ingrams v. Terry,* 2 Hawks, 122, is decisive on this point.

PER CURIAM. Judgment affirmed.

Cited: McCoy v. Guirkin, 102 N. C., 23.

JOSEPH ALLEN ET AL. *v.* HOLLOWAY PASS. (207)

Construction of Will—Extra-territorial Effect of Statute.

1. Where a testator, after bequests of slaves to each of his three grandsons "and their heirs forever," and leaving them his executors and residuary legatees, bequeathed to his granddaughter as follows: "I give to my granddaughter, J. T. A., ten negroes, by name Jane, etc., to have and to

enjoy the said negroes during her natural life, and at her death to be equally divided amongst the heirs of her body, or in case she should die without a surviving child or children, that the said negroes with their increase shall return to my three grandsons as above named or their heirs:" *It was held*, that the granddaughter took only a life estate in the slaves with a contingent remainder to such of her children as should be living at her death.

2. The Statute of Virginia, which provides that "if any person or persons possessed of a life estate in any slave or slaves shall remove or voluntarily permit to be removed out of this commonwealth such slave or slaves, or any of their increase, without the consent of him or her in reversion or remainder, such person or persons shall forfeit any such slave or slaves so removed, and the full value thereof, unto the person or persons that shall have the remainder or reversion," cannot apply to any case except where there is a tenant for life with a *vested remainder or reversion* thereon dependent.

3. Whether the Virginia Statute, above referred to, is to be regarded in the light of a penal law—or simply as a law regulating the enjoyment and transmission of property? Whether, supposing the law to be one regulating property, the forfeiture of the tenant's interest be complete until the property has passed beyond the limits of Virginia—or does it take effect upon the property reaching the line of that State—or when it is completed does it operate from the commencement of the act of removal? And in case the fortfeiture of the tenant's interest be not complete until the property has passed beyond the limits of Virginia, will the courts of this State allow an extra-territorial operation to the laws of another State? Whether the enactment was intended to apply, and according to its fair construction does apply, to a case where the tenant for life had *bona fide* acquired and held the slaves under an absolute purchase, and has removed them without fraud, under the belief that they were absolutely his? Qu?

THIS was an action of detinue for ten slaves, tried at Caswell, on the last circuit, before his Honor, *Judge Pearson.*

On the trial much testimony was introduced and many questions were raised, which it is unnecessary to state. The facts upon which the case finally turned were these: Stephen Woodson, a resident of the (208) State of Virginia, died in the year 1813, leaving a will duly executed in that year, in which, among others, were the following clauses, to wit: "I give unto my grandson, Henry H. Woodson, sixteen negroes, by name Robin, etc., with their future increase, to him and his heirs forever."

"I give unto my grandson, Joseph R. Woodson, thirteen negroes, by name James, etc., with their future increase to him and his heirs forever."

"I give unto my grandson, Stephen T. Woodson, ten negroes, by name Rachel, etc., with their future increase, to him and his heirs forever."

"I give unto my granddaughter, Judith T. Allen, ten negroes, by name Jane, etc., *to have and to enjoy the said negroes during her natural life, and at her death to be equally divided amongst the heirs of her body, or in case she should die without a surviving child or children—that the said negroes with their increase shall return to my three grandsons as above named or their heirs.*"

By subsequent clauses in his will, the testator appointed his three grandsons above named, his executors and residuary legatees.

Judith T. Allen was at the time of the above bequest the wife of one Fountleroy Allen, a resident of Virginia, who, in the year 1818, sold the slaves in question, being part of those bequeathed to his wife by her grandfather, to the defendant, also residing in Virginia, who, in the year 1833, brought them into this State without the consent of the plaintiffs, who were the children of the said Judith T. Allen. The plaintiffs, of whom two were born before and the others after the time of the above bequest, alleging that their mother took only a life estate in the said slaves, with a remainder to them, and that the defendant had by a statute of the State of Virginia forfeited the right to the slaves which he had acquired by his purchase from the husband of the said Judith T. Allen by removing the slaves from the State of Virginia, made a demand of them from the defendant, and upon his refusal to deliver them up, brought this suit. The Statute of Virginia relied upon by the plaintiffs and produced in evidence by them was in the following words: "If any person or persons possessed of a life estate in any slave or slaves, shall remove or voluntarily permit to be removed out of this (209) commonwealth such slave or slaves, or any of their increase without the consent of him or her in reversion or remainder, such person or persons shall forfeit any such slave or slaves so removed and the full value thereof, unto the person or persons that shall have the remainder or reversion, any law, usage or custom to the contrary notwithstanding. It appeared that the mother of the plaintiffs was still living. Under the instruction of his Honor the jury returned a verdict for the plaintiffs—subject to the opinion of the court upon certain questions reserved. One of these was upon the construction of the bequest to Judith T. Allen in her grandfather, Stephen Woodson's will. Upon that, his Honor was of opinion that by the rule in Shelly's case Mrs. Allen took the entire estate in the slaves, subject to be displaced by a shifting use to the grandsons of the testator. That by this will under the clause "to be equally divided amongst the heirs of her body," the same persons were intended to take the same estate as they would take by descent. That there was no clause to restrain the technical meaning of the words "heirs of her body." The words "at her death to be equally divided," pursued the statute of distribution by which it was admitted all the

children share equally, and the clause "surviving child or children" did not seem to have been intended to limit or restrain the preceding limitations to the heirs of her body; but simply to provide for a contingency, to wit: her death, without leaving heirs of her body; for the words "surviving child or children," taken literally, would cut down the estate and pass it to the grandsons of the testator, if at her death there were no child living, although there might be many of her grandchildren living and requiring the testator's bounty. That from the whole will it appeared that the testator had four objects of bounty; his three grandsons, to each of whom he gave many slaves to them and their heirs forever, and his granddaughter, Mrs. Allen, to whom he gave ten slaves, and not wishing them to pass out of his family he intended to provide that in the event of her death without leaving heirs of her body the slaves and their increase should return to his three grandsons or their heirs. Under this view of the question as to the construction of the bequest to Mrs. Allen, his Honor deemed it unnecessary to consider the other questions reserved, but directed a judgment of nonsuit,
(210) from which the plaintiffs appealed.

William A. Graham for the plaintiffs.
Badger and J. T. Morehead for the defendant.

GASTON, J. The first question presented for our consideration in this case is, what is the proper construction of that clause of the will of Stephen Woodson, under which the plaintiffs set up title to the negroes in dispute. The will was executed in Virginia, and the testator was domiciled in that State. The law of Virginia, therefore, governs its exposition. It would have been gratifying to us had we been furnished with judicial decisions of Virginia, showing the construction there placed on bequests of a similar character; but none such have been presented. We must therefore presume, and such is admitted by the counsel on both sides to be the fact, that this bequest would be interpreted in Virginia, precisely as a similar bequest made in this State would be here interpreted.

The clause is in these words: "I give unto my granddaughter, Judith T. Allen, ten negroes, by name Molly, etc., to have and enjoy the said negroes during her natural life, and at her death to be equally divided amongst the heirs of her body, or in case she should die without surviving child or children, that the said negroes, with their increase, shall return to my three grandsons as above named or their heirs." The three grandsons here referred to are Henry T. Woodson, Joseph R. Woodson, and Stephen T. Woodson, to each of whom "and to his heirs forever," the testator hath in preceding clauses of his will bequeathed sundry

negroes absolutely, and whom by subsequent clauses he hath constituted his executors and residuary legatees. The court below held that under this clause the testator's granddaughter, Judith, took the entire property in the slaves bequeathed, subject only to a contingent executory limitation to the testator's grandsons, in the event that the said granddaughter should leave no child living at her death. The argument by which this construction is upheld is understood to be this: It is a general principle that where a bequest is made of personalty by words of (211) limitation, which either directly or constructively give an estate-tail in freehold property, such bequest passes the entire interest therein.

It is also an established and well known rule (commonly called the rule in Shelly's case) that where, by the same instrument, there is a limitation of a particular estate of free-hold to an ancestor, and a limitation of the inheritance to the heir or heirs of the body of such ancestor, as a remainder expectant thereon, the latter shall not be allowed to take effect as an independent remainder to such heirs, or to confer any estate on them by purchase, but shall operate by annexation to the former to pass the entire estate in fee or in tail to the ancestor. If this were a devise of realty, the rule in Shelly's case would apply to it *proprio vigore,* because there is an estate for life therein given to the granddaughter, and a remainder on the determination of that particular estate, to the heirs of her body, whereby an immediate estate-tail vests in the granddaughter. As it is, however, a bequest of personalty which cannot be entailed, it passes the entire estate to her—nor is this construction inconsistent with the subsequent provision that if she shall leave no child surviving her, the negroes bequeathed shall become the property of his grandsons, for this provision is but a declaration that the interest or estate previously given, shall, on a subsequent contingency happening within a reasonable time, shift from the person to whom it has been given, and vest in others designated by the testator.

Although the correctness of the general principles asserted in this argument is not to be questioned, nevertheless we do not adopt the conclusion drawn from them. Before the application of the rule in Shelly's case it is always proper first to ascertain whether on the true interpretation of the words of the gift there *is* a limitation of the inheritance in remainder to *the heirs* or to the *heirs of the body* of one to whom a precedent freehold is given—such a limitation *does* exist when the gift is to them in the *quality of heirs*—embracing the same number in succession of objects and conferring the same extent of interest as would be embraced and conferred where the inheritance has been limited to the ancestor. The word "heirs" is so peculiarly appropriate to the expression of the legal idea of a class of persons succeeding by (212)

inheritance from one generation to another—that *ordinarily* in grants and donations of land and other conveyances thereof *inter vivos,* no other word or set of words is deemed adequate to its expression—and therefore ordinarily a gift in remainder after a life estate in such an instrument will not be understood to be made to any persons as *heirs* unless the term heirs be expressed. But in devises where *legal* words of inheritance are not indispensable to declare an intention of passing an inheritable interest, although the expressions "heirs" or "heirs of the body" in the gift of the remainder are not used, but "issue," "children," or any others manifesting, either of themselves or from connection with the context, an intent that the gift is to those so called *as heirs* or *heirs of the body*—comprehending the whole line of succession—the rule in Shelly's case is to be applied.

On the other hand, as the law will not entrap men by words incautiously used, if in the limitation of a remainder by any instrument of conveyance, the phrase "heirs" or "heirs of the body" be expressed, but it is unequivocally seen that the limitation is not made to them *in that character,* but simply as a number or class of individuals thus attempted to be described; then the whole force of the phrase is restricted to this designation or description—it shall have the same operation as the words would have of which it is the representative; there is not in fact a limitation to "heirs," and of course there is no room for the application of the rule.

In conducting this preliminary inquiry, however, it is to be borne in mind that all expressions to which the law has attached a definite meaning are to be understood in that sense unless there be clear evidence that a different meaning was intended to be conveyed by them. The words "heirs of the body" are technical expressions. In limitations of real property they are the most apt and appropriate terms to describe the whole direct line of inheritable successors, and therefore in construing a limitation to "heirs of the body," especially in England, where estates-tail or inheritances descendible in the direct line only, are recognized;
(213) these terms will not be understood in a different or less extensive sense, without unequivocal evidence that they have been used by mistake. This principle obtains in the construction of all conveyances as well by will as by deed, but with this distinction, that in the latter, where greater accuracy of expression is required, the technical sense is controlled with more difficulty than in the former, which are often made without an opportunity of legal advice. It is not necessary for forming an opinion on the bequest before us that we should determine whether, if it had been a devise of lands and a devise made before our act of 1784 abolished estates-tail, there be such unequivocal evidence of the misapplication of these terms as would warrant their being inter-

preted in a different sense from that which properly belongs to them. In determining that question we should have to encounter many clashing adjudications in the English Courts; but we believe, and have so decided in the case of *Ross v. Toms,* 4 Dev., 376, upon a will made in 1777, that the better opinion is that the direction for an equal division among the heirs of the body would not be sufficient to overrule the technical meaning of those words; and probably even the addition of the subsequent limitation to the grandsons, on Judith Allen dying without a living child or children, would be ineffectual for this purpose.

The clause which we have to interpret contains a bequest of personalty only. Now the term "heirs of the body" in a gift of such property is not an appropriate, much less a technical term. It does not import a succession in the direct line of descents, because by law there is not and never was such a succession in the case of chattels. It must have some other meaning, and therefore in prosecuting the inquiry what is that meaning, so strong a demonstration that the phrase was used as a designation of individuals is not demanded as is indispensable where, as in devises of real estate, it is attempted to overrule its precise legal signification. Yet if a chattel be bequeathed to one and the heirs of his body, although the latter words are not technically correct as words of limitation, nevertheless as they import an intention of the testator that the thing is so given that it may be transmitted from and through the legatee to his issue, and as this intent cannot well be effectuated, unless the whole interest be vested in the legatee; standing alone it furnishes a clear legal inference of a gift of the whole interest. So (214) when a bequest is made to one for life with remainder to the heirs of his body—inasmuch as in such limitations where the phrase heirs of the body is properly used, the legal operation is the same as in a direct gift to one and the heirs of his body—the law will infer from it, if unexplained, the same intent of a complete gift to the first taker. But when to such a bequest, limitations are added which are inconsistent with, and repugnant to the presumption of an intent to vest in the legatee an interest to be transmitted from and through him to his issue, it is settled that these words "heirs of the body" shall be regarded as designating a class of individuals, the personal and direct objects of the testator's bounty, described by a term unapt indeed, yet sufficiently intelligible to permit of their being ascertained. And when from other expressions in the will explanatory of this inartificial description—or by fair inference from the context—it can be collected who are really thereby meant, the bequest will be construed throughout as though this meaning had been declared in the most explicit language, and the persons had been named instead of being described.

Upon the clause before us we think it manifest that by the term "heirs of the body," the testator did not contemplate a class of persons to take by transmission from and through the first donee, in the nature of heirs, but that he did intend a class of individuals to take as original and independent objects of his bounty. And we also think that he has pointed out these individuals with such distinctness as to leave no fair doubt of the persons by him intended. After the gift of the slaves to his granddaughter, which he expressly declares shall be for her life, his words are "and at her death to be equally divided between the heirs of her body": this division which the testator expressly directs to take place the moment her life interest expires—at her death—is irreconcilable with the supposition of a gift of the entire interest in her. Such a gift in this case would have vested the whole property in the husband, if reduced into possession during coverture; and if not so reduced would at her death—when the equal division is ordered—have passed it to her executor or administrator. This equality of division manifests an (215) intention that the legatees shall take distributively and as purchasers—not in succession, but all at the same time; that they were regarded by the testator as having personal claims upon his bounty, and were, therefore, the direct objects of this provision—receiving it through him, and not dependent for its enjoyment on the prudence or favor of others. But when with this evidence we combine that furnished by the immediately succeeding part of the clause, not only is this intention almost irresistibly indicated, but the objects of his personal bounty are plainly declared. The words are "or in case she should die without a surviving child or children, that the said negroes should return to my three grandsons or their heirs." The division directed to be made at her death is not peremptory and unconditional. It is but one alternative of an entire disposition, and we collect its intent the more distinctly by looking at the other alternative. If at the death of Judith Allen there be children of hers living, the property is to be divided among certain *persons* whom he describes as being "the heirs of her body," but if there be no such children then it is to go to his grandsons. "Children" we have seen may mean "heirs of the body"; and "heirs of the body," when not a term of description but of purchase, do mean either "children or issue." The testator here tells us almost as plainly as if he had subjoined a definition of heirs of the body, that he means by them children. This exposition seems to us to derive confirmation from an examination of the entire will. Every disposition of the testator's property, except what is contained in this clause, is made to one or the other of his grandsons, and to them collectively is given all the residue of his estate, real and personal. In each disposition to his grandsons the words of donation are absolute and full—"unto him and his heirs or unto them and their heirs

forever." But when he is about to provide for his granddaughter and the offspring of his granddaughter, he changes the form and mode of disposition. He limits the provision which for this purpose he takes out of his estate, in the first place to her, to be enjoyed for the term of her natural life—then at her death to be equally divided between the heirs of her body, provided she leaves any child or children surviving her—but if not, then to return to his estate which he has given his grandsons.

The reason for this modified provision is so obvious that we can scarcely doubt about it. An absolute gift to her, might and prob- (216) ably would put it in the power of her husband or of her husband's creditors to strip her and her offspring of the whole of this provision. He intended it for her benefit as long as she lived, and for the benefit of her children afterwards, if at her death she left any. For these purposes only he took it out of his general property—and failing these, it was to fall back into that general property.

Rejecting the interpretation which makes the words "heirs of the body" words of limitation, and considering them as designating the children of Judith Allen, our next inquiry is, whether, under this bequest, these children have taken a vested interest in the subject-matter of it; or whether the legacy be yet contingent, awaiting the event of the said Judith leaving a child or children living at her death. The counsel for the plaintiff contends that by the terms of this bequest an immediate interest passed upon the death of the testator to the two children then alive—postponed as to enjoyment until the death of their mother—and defeasible or liable to be divested on the event of her leaving no child living at her death. He further insists that upon the birth of subsequent children, antecedent to the time of division, this vested legacy opened to take them in, and that upon the death of one of the children, after the death of the testator and before the time of the division, the share of that child passed unto his personal representatives. If the primary position that the bequest to the children is a vested legacy, be well founded, the inferences above stated are correct. Upon the best consideration, however, which we have been able to give to the case we are of opinion that the position is not well founded.

The question whether a legacy be vested or contingent is one almost as much overloaded with decisions as those arising upon the extent and application of the rule in Shelly's case. In examining this question we shall forbear, as we have done with respect to those arising upon that rule, from attempting to reconcile these decisions with each other; or where this cannot be done, from examining into their relative claims to our respect; but adopting what all acknowledge to be the true principles of construction, endeavor to apply them to the bequest before us. The first great rule is to follow out what, upon consid- (217)

eration of the whole frame of the will, appears to have been the testator's purpose. Was it his intention to pass to the legatee a certain interest in the subject of the gift, previously to, and independent of its enjoyment, or was it his intention that the legatee should not *take* except in the mode, under the circumstances, and at the time prescribed for its enjoyment? To effect uniformity of decision, as far as practicable, many subsidiary rules have been sanctioned—but these are subject to so many exceptions—and especially to the great exception that they must all give way when the intent is otherwise made plain—that they have but very imperfectly accomplished that uniformity so much desired. It may be laid down as among the first of these that the law leans to the vesting of legacies—and where the intention is left ambiguous, the law holds them to be vested—but as this inclination is mainly founded upon the presumption that the testator's intention will thereby be the more effectually promoted—this presumption yields readily to evidence which repels the inference of such intent. Another rule on which at one time great stress was laid, and which although it savors of critical nicety, is still deemed worthy of respect, is founded upon the peculiar words of the bequest, as either making or not making an *express* distinction between the gift and the time of enjoyment. When the gift and the time of enjoyment are in terms distinct—according to this rule the legacy is to be regarded as *debitum impresenti solvendum in futuro*—but when there is no distinct gift in terms from the direction for its enjoyment—the legacy does not vest before the appointed time of enjoyment. But this rule also is controlled by indications of a different intention. Whether we confine our attention to the clause immediately under consideration, or extend it to the general scope of the testator's will, we are satisfied that it was his purpose to make the bequest in question depend on the contingency of his granddaughter's leaving a surviving child or children—and that it must be understood as a bequest to such of these children as may be living at her death. The legacy is not in terms given *impresenti* to be enjoyed *in futuro*. There are no express words of gift; but the
(218) gift is implied from, comprehended in, the direction for a division, and this division is not to take place until the death of the legatee for life. Nor is the division then to take place if she should survive her children, for in that event the property is to go to his grandsons. This last disposition is unquestionably contingent—for it is preceded by express words of condition—"in case." It is not a limitation even after the determination of the former bequest—but is a substitute provided in case of failure of that bequest. The two bequests are connected by the disjunction "or," which both in common speech and in grammatical construction is adversative, that is to say—indicates an opposition of meaning between the parts of the sentence thus connected.

One or the other is to take place, not both—and which shall take place will depend upon the result of the same event—accordingly as that result shall be affirmative or negative. Although therefore these words of condition, "in case," are not expressly subjoined to the original bequest as they are to the substituted bequest, yet they are affixed to the former by obvious implication, almost as strongly as though they had been subjoined in positive terms. These bequests are alternative limitations, dependent on a contingency with a double aspect. Both are contingent, and which of them shall vest is to be determined by the state of things at the death of Judith Allen. Other considerations concur to strengthen this construction. The only purpose designed to be effected by this clause was a provision for the testator's granddaughter during life, and afterwards for her children; and it was intended to place this latter provision beyond the power of the granddaughter's husband. The testator did contemplate the probability of some of these children dying before their mother; for he has declared that if *all* so died the provision should sink into his estate for the benefit of his residuary legatees. He did not contemplate the probability of these children dying before their mother, *leaving children,* or he would have made some modification of the bequest by which to secure to Judith Allen's *grandchildren* the benefit of his bounty. The term children unexplained cannot comprehend grandchildren. The word children does not, properly speaking, comprehend grandchildren or issue. These are included in that term only in two cases, the one from necessity, where the will (219) would be imperative unless the sense of the word children were extended beyond its natural import, the other where the testator has shown by other words that he did not intend to use the word children, in its proper meaning, but in a more extensive sense. Now can any reasonable motive be assigned for the testator's will that the provision should fail altogether, if none of Judith Allen's children should survive her, except that the provision was intended for those only who might survive her? Can it be believed that it was his purpose, as any of her children might die off in infancy before the bequest could operate beneficially, their father should succeed to shares in this legacy as next of kin, rather than that the fund should be preserved for the survivors? If, in order to provide for a case not contemplated by the testator, that is to say, of some one or more of Mrs. Allen's children marrying and having children, and then dying before her, a suggestion should arise that he intended to vest the legacy instanter, whereby a share or shares might be transmitted to the children of those so dying, how can we reconcile this presumption to the strange provision by which these transmitted shares are divested? The portions of the deceased children are to pass to their children—but these portions thus transmitted, are to be *taken away* from

them, if unfortunately—at the moment appointed for beneficial enjoyment—they should not have an uncle or aunt in being. The technical construction of the particular clause—its natural and obvious import—and the whole plan of the will, make the legacy in question a contingent legacy.

This construction of the legacy being established we are of opinion that the plaintiffs are not entitled to the slaves, which they claim as forfeited under the statute of Virginia. The enactment of the statute relied upon is in these words: "If any person or persons possessed of a life estate in any slave or slaves shall remove or voluntarily permit to be removed out of this Commonwealth such a slave or slaves, or any of their increase, without the consent of him or her in reversion or remainder, such person or persons shall forfeit every such slave or slaves so removed, and the full value thereof unto the person or persons that shall have the remainder or reversion, any law, usage or custom to the contrary notwithstanding."

(220) Several questions have been raised upon the argument respecting the operation and construction of the statute which we deem it unnecessary to decide.

One of these is whether the statute is to be regarded in the light of a penal law—or simply as a law regulating the enjoyment and transmission of property. If it be a penal law it is strictly local, affects nothing more than can be reached and seized by virtue of the authority of Virginia, and therefore cannot be enforced in this state.

If it be a regulation of property, and if also it attached to these slaves in Virginia, so that when they left Virginia they were of right the slaves of the plaintiffs, then it is the duty of the courts of this State to aid the plaintiffs in the operation of their rights. Another question is, supposing this law to be one regulating property—whether the forfeiture of the tenant's interest be complete until the property has passed beyond the limits of Virginia—or does it take effect upon the property's reaching the line of that State—or when it is completed does it operate from the commencement of the act of removal? and in the case first put, will the courts of this State allow an extra territorial operation to the laws of another state?

A third question is, whether this enactment was intended to apply, and according to its fair construction does apply, to a case where the tenant for life had *bona fide* acquired and held the slaves under an absolute purchase, and has removed them without fraud, under the belief that they were absolutely his? These questions are now mentioned merely to repel any inference that we have judicially passed upon them. We do not decide them, because if they were all determind in favor of the plaintiffs, the judgment of nonsuit ought nevertheless to stand.

The statute of Virginia cannot, we think, giving it the most extensive operation consistent with a fair interpretation of its language, apply in any case except where there is a tenant for life with a *vested remainder* or *reversion* thereon dependent. When what is called a remainder is wholly uncertain and contingent—a mere executory limitation, which has not vested, and may never vest in interest—there is no one whose consent to the removal is to be asked by the tenant for life under the penalty of forfeiture—no one who in the language of the (221) statute, at the time of removal *hath* the reversion or remainder of the slaves removed—no one who upon the misconduct of the tenant hath a right to consider *his* interest determined, and to take possession of the things which had been the subject of that interest.

The judgment below is to be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Donnell v. Mateer, 40 N. C., 9; *Ward v. Jones, id.,* 405; *Lowe v. Carter,* 55 N. C., 385; *Hooper v. Moore,* 50 N. C., 134; *Alexander v. Torrence,* 51 N. C., 262; *Patrick v. Morehead,* 85 N. C., 67; *Leathers v. Gray,* 101 N. C., 164; *Temple v. Pasquotank,* 111 N. C., 41; *Hooker v. Montague,* 123 N. C., 158.

DEN ON DEM. OF EMANUEL SHOBER ET AL. *v.* DANIEL HAUSER. (222)

Usury—Sale by Trustee.

1. A deed of bargain and sale for land, made in trust to secure the payment of money borrowed upon an usurious agreement, is an "assurance for the payment of money" denounced by the statute against usury, and is absolutely void; and a sale by the trustee to one purchasing even without notice of the usury, will convey no title to the purchaser.

2. A requisition by the lender of the borrower, as a condition of a loan, that the borrower shall take up notes held by the lender on an insolvent man, would *per se* be usury in law; and if the securing the doubtful debt formed any part of the lender's inducement, it raises a suspicion of an agreement for more than lawful interest upon the money lent, which calls for an explanation on the part of the lender. But if the doubtful notes would be good in the hands of the borrower, or if the maker of them had requested the borrower to take them up, and he had agreed to do so, or if the lender *bona fide* believed the facts to be as here supposed, then in truth he did not intend to take a higher profit upon the sum loaned than lawful interest, and the agreement would not be usurious.

3. It is a common remark that courts of law do not notice trusts. Certainly they do not for the purpose of administering them, for this is the pecu-

liar function of courts of equity. But all courts must notice the legislative will duly expressed, and therefore deny validity to what that will *for any cause* denies a legal existence.

4. It is immaterial how the illegal purpose is manifested, whether by way of trust or covenant, or collateral engagement; the moment that illegal purpose is judicially ascertained, the penalty of the law attaches to the denounced transaction.

5. There is no instrument, whatever, claiming to operate merely by the assent of the parties thereto, which may not be impeached at law for usury. Fines, feoffments, grants, leases, although in form executed contracts, may be averred to have been executed as assurances or securities upon usurious agreements, and upon such averment being established, are as much avoided thereby as bonds, covenants, notes, or other contracts executory in their nature are avoided by the plea of usury.

6. It does not follow that a contract is merely voidable and not void, because the rules of pleading require that the matter, by reason whereof validity is denied to it, should be brought *legitimo ordine* to the court.

7. The inability of the borrower to recover from the lender, money actually paid upon an usurious contract, does not result from the contract being voidable and not void. If it were voidable only, then by the payment, he confirmed the contract, and could not recover the usurious excess which he certainly may. The contract is absolutely void. The apparent creditor has no right to a cent of it; but he may, with a clear conscience, keep what was in conscience due to him; and if the borrower has *voluntarily paid that,* then *volenti non fit injuria.*

8. If the purchaser from the trustee had required the borrower to join with the trustee in the conveyance, then he might have made title directly from the borrower upon a new and distinct contract with him, and this contract being free from illegality, his title under it would have been valid.

9. If a purchase be made *bona fide,* the debtor standing by and encouraging the sale, or by his silence practicing fraud upon the purchaser, though a court of law will be compelled to hold that no title passed, on account of the conveyance to the trustee being to secure an usurious debt, a court of equity is competent to remedy the mischief.

THIS was an action of ejectment in which the plaintiff declared on the several demises of Emanuel Shober, Charles F. Bagge, and Salathiel Stone; and the defendant having entered into the general consent rule pleaded *not guilty.*

On the trial at Guilford on the spring circuit of 1837, before his Honor, *Judge Dick,* the plaintiff to establish title in his lessors gave in evidence a deed duly executed by the defendant, Daniel Hauser and Elizabeth Lash of the one part, and the said Emanuel of the other, bearing date 2 April, 1831, whereby it was witnessed that in consideration of five dollars paid by the said Emanuel to the said Daniel and Elizabeth, and also in consideration of the matters thereinafter recited, the said Daniel and Elizabeth bargained and sold the land in controversy

to the said Emanuel, to have and to hold to him, his heirs and assigns forever, upon the special trust and confidence thereinafter declared. The indenture proceeded to declare this special trust and confidence to be that, whereas, on the day of the date the said Daniel and Elizabeth had executed their bond to Charles F. Bagge for the sum of $1,200, payable two years after date, with interest from the date, payable annually; if the bond should not be paid when it became due, or the annual interest thereof should not be paid as stipulated, the said Emanuel, at the request of the said Charles, should sell the land at public sale, and after paying off, by the proceeds of such sale, the debt aforesaid, and retaining a reasonable compensation for his services, account for and pay (224) over the residue of the proceeds to the said Daniel and Elizabeth; and if the said Daniel and Elizabeth should pay off the said debt in any other way, then the said Shober should convey the said land to the said Daniel and Elizabeth and their heirs, or to that one of them and his or her heirs who should thus pay it off; and furthermore it was covenanted by the said deed that until a sale should be made as aforesaid, the said Daniel and Elizabeth should retain the possession of the land. The plaintiff further proved that in pursuance of the stipulations of this deed of trust the land was duly sold by Shober and bought by Salathiel Stone, the other lessor; and exhibited in evidence a deed from the said Shober to the said Stone effectual in form to convey the land. The defendant acknowledged himself in possession, but contended that the plaintiff was not entitled to recover, because, as he averred, the deed of 2 April, 1831, was utterly void, it having been made as an assurance or part and parcel of an assurance for the payment of money loaned by the said Bagge unto the bargainors in said deed, or one of them, at an usurious rate of interest.

Upon the evidence it appeared that at the request of the defendant the trustee Shober had applied to Bagge to borrow the sum of $1,000; and being informed by Bagge that he was not then in funds Shober shortly thereafter communicated this information to the defendant, who then requested him to say to Mr. Bagge that if he would make the loan of $1,000, the defendant would become responsible for two bonds of his father, Christian Hauser, held by Bagge; thereupon Shober applied again for the loan and delivered this message, when Bagge informed him that he was then in funds, and would lend the money. A short time thereafter the defendant and Bagge came to Shober; the two bonds of the defendant's father, on which there was due two hundred dollars for principal and interest, were given up by Bagge, and the thousand dollars lent, a bond for the sum of $1,200, payable two years after date, with interest from the date, was executed by the defendant and Elizabeth Lash, and the deed hereinbefore referred to was also drawn up by

(225) Shober at the request of the parties, and executed as a further security. It was in evidence also that at this time the defendant was in good credit, was engaged in negro speculations, and that his father, the said Christian, was in his service—that Bagge was an old friend of the said Christian—that the said Christian was supposed to be embarrassed, if not insolvent, and his property was covered by fraudulent alienations to his friends, so that his creditors could not readily reach it—that a few months after this transaction he confessed judgment to the defendant, without any evidence of debt, for $120—that at the instance of the said Christian, executions were levied upon property of the said Christian, and that at the sale under these executions every article of property was bid off at a single bid by the defendant, except one article, which was bid off by the said Christian's son-in-law—that the said Christian seemed always to have the means of paying debts which he chose to pay, and that in August and November, 1831, the said Christian became surety for the defendant in his purchases of negroes, and that the defendant then represented him as perfectly solvent and worth at least three thousand dollars.

Upon this evidence his Honor charged the jury that if from the evidence they believed that Christian Hauser, at the time of the loan to defendant, was insolvent, or even in doubtful circumstances, and it was any part of the motive with Bagge in making the loan to secure the debt from said Christian, the transaction was usurious, the bond and deed void, and they should find a verdict for the defendant. The jury found a verdict for the defendant; the plaintiff moved for a new trial because of misdirection to the jury. The new trial was refused and judgment rendered for the defendant, from which the plaintiff appealed.

This case was argued at length at the last term by

Badger for the lessors of the plaintiff, and by
J. T. Morehead and Boyden for the defendant,

and after an *advisari* until the present term, the opinion of the Court was delivered by

GASTON, J., who having stated the case as above, proceeded as follows: The plaintiff had no claim to recover except upon the demise of
(226) Salathiel Stone. There was no evidence of title in Bagge, and if Shober ever had any legal estate it passed by his conveyance to Stone. The correctness of the instruction is therefore to be considered in reference to *his* demise.

In the argument of the case several questions of law were discussed, which heretofore have not been decided in the courts of this State. As

well on this account as because of their importance to the community they have been considered by us very deliberately.

On the part of the plaintiff it was contended that, admitting the debt referred to in the deed to have been tainted with usury, and therefore the bond and the *trust* to sell for payment of the debt void, yet the deed passed the *legal* estate to Shober. In support of this position it was argued that the statute avoids "bonds, contracts and *assurances* for payment of any money to be lent upon usury; that a court of equity, which looks upon the conveyance of the legal estate as formal only and considers the trusts declared as the substance of the conveyance, and which has jurisdiction of trusts and is competent to decide on their character, might pronounce the deed, to the extent of these trusts, a mere security, and as such set it aside upon payment of what was equitably due; but that at law the conveyance is absolute—contains no provision whereby the estate thereby granted is to return to the bargainors on payment of the money lent, and therefore it is not in the contemplation of a court of law an assurance for the payment of money" avoided by the statute. It seems to us that this argument could not be answered if, in determining what is an "assurance" prohibited by the statute, we are to be governed by the form of the instrument, and are not at liberty to look into the purposes designed to be accomplished by it. In form the deed is a bargain and sale from Hauser and Lash to Shober, and *they* are the only parties to it. The sum of $5, thereby acknowledged to have been received from Shober is the consideration of the sale, and raises an use to Shober, which draws after it the entire legal estate. But in truth there was no consideration passing from Shober. It was not a *sale to him,* or to any other person, and if the pretended bargainors be at liberty to aver and to show this fact, then no use was raised to Shober, and of course, no estate passed by the deed. They show that the deed (227) was a part of a plan between Bagge, the lender, and Hauser and Lash, the borrowers, of a sum of money, by which through the medium of a sale to be made by Shober in case the borrowers did not pay the money, its payment might be assured to the lenders. They show that, *in fact,* it was intended as a security, executed as a security, operated as a security, and was not intended nor executed, and therefore, they insist, ought not to operate for any other purpose. The statute denounces *all* assurances for the payment of money loaned on an usurious contract, and is entitled to receive from every court, not ostensible but real obedience. It must be, therefore, so expounded as to render it efficient of the objects for which it was enacted. It is the duty of courts to look not merely at the words, but at the substance of the transaction; on the one hand not to be governed by the words, if the substance go to defeat the provision of the statute; and on the other,

not to rely on the words so as to defeat the contract, if in substance the transaction be legal. The statute meant to put it in the power of every borrower to impeach every contract made on usurious terms, and to treat as utterly void, whatever assurance he may have made for performing that contract. Whatever may be the form of the contract—or the form of the assurance for compelling its execution, he is not *estopped* from averring the usury. He has averred it here, and if he has established his averment—the necessary consequence seems to be that the *deed* itself is void; and if void, no estate passed thereby.

It is a common remark that courts of law do not notice trusts. Certainly they do not for the purpose of administering them, for this is the peculiar function of courts of equity. But all courts must notice the legislative will duly expressed, and therefore deny validity to what that will, *for any cause,* denies a legal existence. Suppose a conveyance made of land or goods, and upon the face of it, it is declared that the same is made in trust that the bargainee shall sell the property and pay himself the sum of money therein recited to be advanced as the consideration thereof, with ten per cent interest thereon, and return the surplus to the bargainer. Can it be possible that with this corrupt agreement (228) staring them in the face a court of law must hold the conveyance good, and leave the validity of the trust to be examined by a court of equity? It is immaterial how the illegal purpose is manifested, whether by way of trust or covenant, or collateral engagement; the moment that illegal purpose is judicially ascertained, the penalty of the law attaches to the denounced transaction. Thus conveyances made with intent to defraud creditors or purchasers are, as against them, avoided by statute. Now if this intent appear not in the conveyance of the *legal* estate, but in the trusts for the grantor thereby declared, or by secret trusts for the grantor, a court of law looks through the formal parts of the conveyance to the object intended to be accomplished; and because of *these trusts,* declares the conveyance itself void, and holds the property, notwithstanding that conveyance, to be the property of the grantor—so a capacity is given by our laws to religious societies, of holding property conveyed to them for the benefit of the society. But if a conveyance formally so made is discovered to have been made upon a secret trust for others, a court of law, because of that trust, pronounces the conveyance itself void. *Trustees v. Dickinson,* 1 Dev., 190. In ascertaining what is a "security for the repayment of money" within the statute, the same great rule is to be observed which has been established for determining what is a "loan of money" under the statute; get at the *nature* and the *substance* of the transaction, according to the true intent of the parties. And therefore it is that there is no instrument whatever, claiming to operate merely by the assent of the parties thereto, which may not be

impeached at law for usury. Fines, feoffments, grants, leases, although in form executed contracts, may be averred to have been executed as assurances or securities upon usurious agreements; and upon such averment being established, are as much avoided thereby as bonds, covenants, notes, or other contracts executory in form, are avoided by the plea of usury. *Burton's case,* 5 Co. Rep., 69; *Fermon's case,* 4 Co. Rep., 79; *Dodd v. Ellrington,* Rall's Rep., 31, p. 18; Co. Lit., 36, 4a. In spite of every effort of the courts to carry into complete effect the legislative will, no doubt the true character of usurious securities is very frequently concealed under cunning contrivances; but when that (229) character is *seen,* whatever may be the contrivance, the court must and will act upon the transaction such as in truth it is. The cases which have been cited by the plaintiff's counsel, do not profess to be decided upon any other principle. In the case of *Doe v. Chambers,* 4 Camp., 1, the lessors of the plaintiff, who were the assignees of the bankrupt, Trustram, claimed title to the premises under a building lease for 53 years, which had been made to the bankrupt, and the defendant resisted the recovery by showing an absolute assignment of that lease to him from the bankrupt. The assignees insisted that this assignment was void because made to secure the payment of money lent at usurious interest. They showed that the assignment was made in consideration of the sum of £900 advanced by the defendant to the bankrupt; that at the time of the assignment an underlease for seven years, at the rent of £70 a year, was executed by the defendant to Trustram, with a covenant of the defendant to reassign in case Trustram should repay the £900 at any time within the seven years, and with covenants on the part of Trustram, to insure the premises, keep them in repair, and pay the ground rent and taxes. And they further showed that this assignment and under-lease were made in pursuance of an agreement at the time the money was advanced. If the position taken by the plaintiff's counsel be correct there was no ground upon which the assignment could be declared void at law. It was on its face absolute. Connected with the under-lease there was yet no provision by which the assignment was defeasible, and the term assigned directed to revest on the payment of the money advanced. There was no bond, covenant, or other engagement on the part of the assignor for the repayment of the money advanced. The covenant of the defendant in the under-lease only made him responsible in damages if he did not reassign upon payment of that sum. Yet the assignment was held to be void, because it was, according to the intention of the parties, a *security* for the repayment of £900, lent at the usurious interest of £70 *per annum.* In the language of the court the question was, "whether this transaction was a contrivance to receive usurious interest for the loan of money. Therefore if assignment *was*

(230) *intended* as a security for the advance, and not as a purchase of the lease, it is void." Again, "the defendant advanced money by way of loan; and it was *in the contemplation of the parties that this should be repaid;* it was never put in hazard; and interest above the rate of 5 *per cent* was to be paid for the forbearance. The *assignment* executed in pursuance of this agreement is therefore *void,* and the legal estate is in the assignees of the bankrupt." It is true that the very learned judge remarks that the "assignment and the under-lease are parts of the same agreement, and the whole must be received together; and that without the covenant to reassign, the transaction could not be set aside in a court of law as usurious. It might be a very hard bargain, and a court of equity might grant relief, but the assignment would be sufficient to vest the legal estate in the defendant." In other words—if the transaction were in truth what, from looking at the assignment alone, it would seem to be, a sale out and out, a court of law could not pronounce it void, because then there would be no pretense for holding it a security. But the covenant to reassign contained in the under-lease, showed that it was in the contemplation of both parties that the money advanced should be paid—and therefore, according to the intention of the parties, the assignment was a security for the repayment of money advanced on a loan at usurious interest. The case of *Doe on demise of Grimes v. Gooch,* 3 Barn. and Ald., 664, was exceedingly like this. It was the case of an assignment of a lease from a debtor on one day and a reassignment at an increased rent on the day following with a stipulation that the original assignor might on six months notice repurchase the lease, and it was left to the jury to say whether the transaction was in truth a purchase and a lease from the purchaser, or only a *security upon a loan.* The jury found it to be the latter, and the loan usurious, and the assignment void.

On a motion for a new trial the court refused it, saying the true question is, Was this a purchase or a loan? If the latter was the case, then whatever might be the form given to it by the parties, it will not vary the real nature of the transaction, nor prevent it from being usurious. The same distinction has been taken in an old case, that of *Cotteral v. Harrington,* Brownlow, 180, which is noticed in most of the elemen-

(231) tary treatises. In a replevin the defendant avows under an annuity (a rent charge) for £20 granted for years, payable on demand, and alleges a demand. The plaintiff demands *oyer* of the deed, and by the deed it appears that for £110, one rent of £20 was granted for eight years, and another of £20 was granted for two years, if E, R, and I should so long live; the plaintiff pleads the statute of usury and sets forth the statute and a special usurious contract. *Per Curiam:* "If it had been laid to be upon a loan of money, then it was usury; if it be a bargain for

an annuity, it is no usury; but this was alleged to be upon a lending." It is difficult, if not impossible, we admit, to reconcile all that was said by the learned judges who decided the case of *Den v. Dodds,* 1 Johns. Cases, 158, and *Flint v. Shelden,* 13 Mass., 443, with the doctrine laid down in the cases just examined, and which we believe to be the true doctrine applicable to this subject; but the *principles* on which these decisions profess to be bottomed are not at variance with it. The former, *Den v. Dodds,* whether well or ill decided, proceeded avowedly upon two grounds: the first, that the conveyance there under consideration was made, not cotemporaneously with the illegal loan, nor for the purpose of assuring the payment of money borrowed, but was made after the day of payment had passed and *in satisfaction* of antecedent debts; and secondly, that some of the debts were free from the taint of usury. *Flint v. Shelden* was determined upon what was alleged to be the settled construction of the Massachusetts statutes—that parol evidence should not be received of an illegal trust to impeach an absolute conveyance. And it is manifest that the decision would have been otherwise if the instrument in that case had been *in its terms* substantially a security.

Now, independently of the parol evidence in this case, no one can look at the deed before us and not see that the sole object contemplated by it was the securing of the debt therein mentioned. It recites a bond of the same date executed to secure payment of money advanced. Until and unless there shall be failure in paying that bond, the bargainors are to retain the possession. The possession is to be yielded only after such failure, and a demand of the creditor that the property (232) pledged be sold to pay the debt. If the debt be paid without a sale the trustee is to reconvey to the bargainors. If the land be sold, all the proceeds remaining after payment of the debt and the expenses of the sale are to be paid over to the bargainees. If such a deed be not in law a security, then the enactments of the statute against usurious assurances would seem to amount to but legislative trifling. Deeds of this character have been regarded with much suspicion and distrust, as a species of irredeemable securities or mortgages rendered absolute without foreclosure. If we add to this quality the privilege of exemption from the legal penalties of usury they will become invaluable to the extortioner in enabling him to take from his needy neighbor "all that he hath."

It has been further insisted on the part of the plaintiff that if the deed of trust can be regarded as a security, and therefore void or voidable if set up by Shober, yet that after a sale has been made under it and a conveyance executed to the purchaser, it ceases to be a security, and the title of the purchaser cannot be impeached because of usury in the original transaction. To this position we are unable to give our assent. We take the rule of law to be that every contract which is founded in usury, and

every security given to carry such contract into effect, is *ipso facto* void; and neither *that contract* nor *that security* can be rendered valid by the subsequent act of the parties. It matters not whether the contract has been carried into execution—the usurious contract and the usurious security are *extinct* at their very inception. We also take the law to be settled that a stranger must take heed to his assurance at his peril; and cannot set up his ignorance of the corrupt contract in support of a claim or title derived under a security which originated in usury. The plaintiff's counsel contends that although the rules of law have been *usually so* laid down, nevertheless they must be understood as not quite so rigid and inflexible. He urges that the usurious contract and security are not absolutely void, but voidable only; for that when an action is brought thereupon, the borrower must aver the usury; and if the form of action permit, he must aver it by special plea, or he is forever con-
(233) cluded; moreover, that if the borrower pays the usurious debt he cannot recover it back, as money had and received; which he ought to be permitted to do, if the contract were utterly void. It does not follow that a contract is merely voidable, and not void, because the rules of pleading require that the matter, by reason whereof validity is denied to it, should be brought *legitimo ordine* to the notice of the court. The great object of the rules of pleading is to apprise the adverse party of the ground of defense so that he may be prepared to contest it, and may not be taken by surprise. Some of the distinctions made by these rules are very subtle, and the reasons for them are not always obvious. Thus it is laid down that where a bond is void at common law *ab initio,* the defendant may give such matter in evidence under the general issue, but where it is void *ab initio* by reason of a statute, such matter should be pleaded specially, and *Whelfdale's case,* in 5 Coke, is cited as authority for the position. Yet it is certain that in many cases, the defendant is not permitted upon the general issue to go into evidence to show a bond void because of illegality at common law (see Chitty's Rep., 1154, and *Cotton v. Goodrich,* 2 Black, 1108), and equally certain that he has been permitted thus to show it void by an act of Parliament, *Thompson v. Rock,* 4 Man. and Sel., 399. There is, however, an acknowledged propriety in requiring a plea of usury to a specialty. The corrupt contract ought to be *particularly* set forth, and the usurious interest, that the party may know what to answer. The party against whom it is pleaded may be aware of the contract, but he cannot otherwise know in what particulars it is meant to be assailed or wherein the other side imputes vice to it. *Hill v. Montague,* 2 Man. and Sel., 337. Nay, there appears to be good reason in the doctrine, although it has been doubted that a specialty cannot be avoided because of usury appearing in the condition, but the facts must be pleaded and the defendant cannot demur; for peradven-

ture the plaintiff may show that the apparent usury was by mistake, and there was no corrupt agreement between the contracting parties, *Buckley v. Guildbank,* Cro. Jas., 678. That the party shall be concluded from afterwards averring usury, if he will not do it when he has an opportunity of bringing it forward by plea, establishes no more (234) than that the law requires of every man to make defense in due order and apt seasons, and that after a judgment is rendered, he is precluded from availing himself of any pre-existing matter which might have been set up as a bar to the recovery. If a man will not plead to a forged bond or one utterly void by reason of fraud, he cannot after judgment rendered aver the forgery or fraud for relief—*Transit in rem adjudication.* Yet such is the solicitude of courts to carry the enactments of the statute into full execution, that when a judgment has been entered up by *confession,* and execution thereon issued, even after time asked and given, they will regard such a judgment in the nature of an *assurance* given by the borrower; set aside the execution; vacate the judgment, and order the warrant of attorney to be delivered up and cancelled on the ground of usury, without compelling the party to pay what is equitably due. Their language is, "we cannot impose such terms; the instrument is void; it is not good at law." *Roberts v. Goff,* 4 Barn. and Ald., 92. The inability of the borrower to recover from the lender money actually paid upon an usurious contract does not result from the contract being voidable and not void. If it were voidable only, then by the payment he confirmed the contract and could not recover the usurious excess, which he certainly may. The contract is absolutely void. The apparent creditor has no right to a cent of it—but he may, with a clear conscience *keep* what was in conscience due to him; and if the borrower has *voluntarily paid that,* then *volenti non fit injuria.*

It has been said that the sale in this case to Stone cannot be distinguished from one in which the title would be good, as where a borrower executes a letter of attorney authorizing the lender to sell property in payment of the usurious debt, the vendee's title would not be affected by the usury. If it would not it is because, in that case, the vendee would derive title directly from the borrower, and if *he* be a stranger to the usury, he sets up no claim under an usurious security. But in this case it was indispensable for the vendee to show title in his immediate vendor, for if the latter had *none* he could confer none—and he had no title if the law annulled the conveyance to him, because it was tainted with usury. If indeed Stone had required of the defendants to join (235) with the trustee in the conveyance, then he would have been in a situation analogous to that supposed—then he might have made title directly from the defendants upon a new and distinct contract between him and them, and this contract being free from illegality his title under

it would have been valid. But a mere derivative title cannot be better than that from which it is derived, and according to our opinion upon the first question nothing passed by the deed from the defendants to Shober, if that deed was a collateral security for the payment of an usurious debt. The case of *Jackson on dem, of Bartlett v. Henry,* 10 John., 185, has been passed upon us as a decision in point. There are several observations to be found in the opinion delivered in that case, which considered *per se* would seem favorable to the purpose for which the case has been cited. In that opinion the decisions in *Cuthbert v. Haley,* 8 Term, 390; *Ellis v. Wares,* Cro. Jas., 33, and *Hussey v. Jacob,* 1 Ld. Ray., 18, are quoted with approbation, in which it was held that if the maker of an usurious note executed a bond for the amount to an indorsee of the note, who had received it for valuable consideration, and without notice of the usury, the *bond* is not affected by the usury between the maker and the payer of the note. Assuredly, it is not, for the bond is a *new* contract between the borrower and a *third* person, and is wholly untainted by any corrupt agreement. But can the *lender,* or the trustee of the lender, by any sale or assignment, make *that* good and effectual which was unlawful and void in its inception? It is further remarked in the opinion referred to, that in the construction of the statute of 27 Eliz., against fraudulent conveyances, it is a well settled principle that a purchaser for a valuable consideration without notice has a good title although he purchases of one who had obtained the conveyance by fraud; and the true reason is assigned for this established principle, viz: that the statute by an *express* provision, excepts the case of such a purchaser from the denunciations of the statute; but the statute which we are now expounding contains no exception, and therefore we can make none. The true ground, however, upon which the case of *Jackson v. Henry* was decided, is so distinctly set (236) forth in the subsequent case of *Jackson on dem. of Sternbury v. Dominick,* 14 John, 435, that we cannot regard it as sanctioning in the least the position for which it was introduced. That principle is, that a statute of New York (to which we have nothing analogous here) makes a sale, under a power in a mortgage to a *bona fide* purchaser, without notice of usury in the mortgage, a valid and complete title. The inconvenience which would result to the community from permitting the titles of innocent persons at sales under deeds of trust to be destroyed by showing usury between the debtor and creditor, has been urged with great force, and has been sensibly felt. It is to be remarked, however, that there are inconveniences of a very serious kind that would probably follow from holding such titles exempt from this scrutiny. Needy borrowers are not free agents. In the pressure of the moment they will assent to any terms, however

extortionate and oppressive, and execute any instrument asked for as securities. If, the moment a sale is made, their mouths are closed to impeach the validity of a deed of trust, as an usurious security, they may be stripped of their home, their all, for little or nothing, while the purchaser may be but the secret agent of the creditor; and thus the most valuable provisions of the statute, designed for his protection, be rendered nugatory. It is to be remembered, too, that purchasers may avoid this dreaded hazard by refusing to buy unless the debtor will join in the conveyance or there be proper covenants for title, and moreover, if a purchase be made *bona fide,* the debtor standing by and encouraging the sale, or by his silence practicing a fraud upon the purchaser, though a court of law will be compelled to hold that no title passed, a court of equity is competent to remedy the mischief. But on which ever side the balance of inconveniences may be found, we have but to execute the law, such as we find it, and must leave the consideration of these to another department of the government.

Having arrived at the conclusion that the deed of trust in this case was absolutely void, if the debt for the security of which it was executed were usurious; and that a sale under it by the trustee did not purge the usury and could not give legal operation to the deed, the only remaining inquiry is, whether his Honor's charge on the question of (237) usury be correct. It is to be regretted that the case did not set forth the *allegations* of the respective parties, and the questions of law raised upon these allegations, so that we might distinctly perceive the application of the charge to the matters controverted. The case states simply the evidence given, and then, in very general terms, an instruction from the court for the guidance of the jury in their finding upon that evidence. But it purports to set forth *all* the evidence, and to direct the attention of the jury to the only questions of fact which, upon that evidence, it was material for them to consider. We are obliged, therefore, to understand it as tantamount to an instruction, that if Christian Hauser, at the time of the loan to the defendant, was in doubtful circumstances, and the securing of his debt to Bagge constituted any part of the motive of the latter in making the loan to the defendant, then in law such loan was usurious. Thus understanding the instruction, we hold it to be erroneous. To constitute a loan usurious, it is necessary that there should be an agreement between the parties for the lender to take a greater profit by way of discount or interest on the amount loaned, than after the rate of six dollars for the forbearance of one hundred dollars for one year. It signifies not in what shape the agreed profit upon the money lent is to accrue; it is sufficient that such profit should exceed the legal rate in order to bring the transaction within the statute. It is also wholly unimportant in what form, by what device or under what pre-

tence this reservation of unlawful profit be made, if, according to the agreement of the parties, it is designed as a profit upon the sum advanced. But the hope or confident expectation of some collateral benefit from making the loan does not necessarily show that there was a corrupt agreement to take exorbitant interest. It may indeed excite a suspicion—and in some cases a very strong suspicion—that such was the agreement in fact. Nay, when it distinctly appears that the lender is to receive, and the borrower to part with something valuable besides the lawful interest on the sum lent—and there is no consideration shown other than the loan for this additional advantage to the lender, or the (238) consideration shown is plainly inadequate, the influence of an usurious contract is so irresistible, that it is properly regarded as an inference of law. We hold, therefore, that the instruction would have been perfectly correct had it stated that a requisition by the lender of the borrower, as a condition of the loan, to take up the notes of an insolvent man or one in doubtful circumstances would *per se* be usury in law—and that if the securing of this doubtful debt formed any part of the lender's inducement to make the loan, it raised a suspicion of an agreement for more than lawful interest upon the money lent, which called for an explanation on his part; and that unless, upon this explanation, the jury believed that in truth there was no such agreement, it would be their duty to find the transaction usurious. There were circumstances—strong circumstances—fit to be considered by the jury as explanatory of the actual agreement. Christian Hauser was the father of the defendant—in his employment, and in the most confidential relations with him. He had ability to pay debts when he was willing, and manifested more than ordinary willingness to pay demands which the defendant either had or pretended to have against him. It was not shown what disposition the defendant had made of his father's notes. The defendant knew of their existence when he applied for the loan, and proposed to make himself personally responsible therefor. Now if the father's notes, though doubtful when Bagge's property were worth, in the son's hands, the money which they called for; or if the father had requested his son to take up these notes, and *he* had agreed to do so—or if Bagge *bona fide* believed the facts to be such as are here supposed, then in truth Bagge did not intend to take a higher profit upon the sum loaned to the defendant than the lawful interest, and there was not the corrupt agreement which the statute denounces. Whether the evidence would have induced the jury to draw any of these inferences, it becomes us not even to conjecture. But we decidedly think it was *relevant* and *tended* to establish them—and if, in the judgment of the jury, it did establish any one of them, their verdict ought to have been for the plaintiff.

Upon this view of the case we think it our duty to reverse the judgment and remand the cause for a new trial.

PER CURIAM. Judgment reversed.

Cited: Norwood v. Marrow, post; Brannock v. Brannock, 32 N. C., 429; *McCorkle v. Earnhardt,* 61 N. C., 301; *McNeill v. Riddle,* 66 N. C., 294; *Morris v. Pearson,* 79 N. C., 257; *Moore v. Woodard,* 83 N. C., 534; *Pritchard v. Meekins,* 98 N. C., 247; *Meroney v. Loan Assn.,* 116 N. C., 908; *Miller v. Ins. Co.,* 118 N. C., 618.

(239)

THE STATE v. JOHN F. FAUCETT.

Indictment—Retailing Without License.

In an indictment for retailing spirituous liquors by the small measure without a license under the statute of 1825 (1 Rev. Stat., ch. 34, sec. 81), it is necessary to aver that the retailing was to some particular person or persons, or to some person or persons to the jurors unknown.

THIS was an indictment tried before his Honor, *Judge Pearson,* at Caswell, on the last circuit. The indictment was as follows:

"The jurors for the State, upon their oath, present that John F. Faucett, late of the county of Caswell, laborer, on 7 May, 1828, with force and arms in the county of Caswell aforesaid, did sell and retail spirituous liquors by the small measure, to wit, by a measure less than a quart, without first having obtained a license according to law so to do, against the form of the statutes in such case made and provided, and against the peace and dignity of the State."

The defendant was convicted, and moved in arrest of judgment because the indictment did not aver that the retailing was to any particular person or persons. This motion was overruled, and judgment pronounced, from which the defendant appealed.

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

DANIEL, J. The statute (1 Rev. Stat., c. 34, s. 81) declares that (240 "if any person shall retail spirituous liquors by the small measure, in any other manner than is permitted by law, such person or persons so offending shall be subject to indictment, and upon conviction shall be fined at the discretion of the court a sum not less than five dollars for

each and *every offense.*" In an indictment for an offense it is not sufficient to charge the defendant generally with having committed it, but all the facts and circumstances constituting the offense must be specially set forth, every necessary ingredient in the offense must be set forth. In an indictment for extortion charging that the defendant took extorsively for every horse so much, and for every twenty sheep so much, was holden bad, because it charged the defendant with extortion generally, and not upon any particular person. *Rex v. Roberts,* 4 Mad., 103. So when a constable was indicted for behaving badly and negligently in the execution of his office without specifying any particular instance of negligence. *Rex. v. Witherington,* 1 Stra., 2. The only exception to this rule are indictments against a common barrator, a common scold, for keeping a common gambling house, or bawdy house, without stating those circumstances which it may be necessary to give in evidence to show that it is a house of that description. The facts and circumstances which make up the body of the offense should be stated, that the defendant may determine the species of offense they constitute, in order that he may prepare his defense accordingly—that he be enabled to plead a conviction or acquittal upon this indictment. Archb. C. Prac., 41, 42. It seems to us that the statute on which the defendant was indicted constitutes each and every act of unlawful retailing a distinct offense. The indictment charges that the defendant "did sell and retail spirituous liquors"—but the vendee or vendees are not named; nor does it state that they are persons unknown. This way of charging the offense seems to us according to the above authorities to be too general. Certainty to a certain extent in general, is always required in framing indictments. Co. Litt., 303, and *Rex v. Long,* 5 Co., 121a; Archb. C. Prac., 43. On this indictment the defendant could not well know how to defend himself. He might have been surprised on the trial by testimony on behalf of the State, which, if the charge had been more particular and had
(241) stated the name of the vendee of the spirituous liquors, he could have repelled by other evidence. *State v. Blythe, ante,* vol. 1, 199. The judgment, we think, must be reversed.

PER CURIAM. Judgment reversed.

Cited: S. v. Hill, 79 N. C., 659; *S. v. Miller,* 93 N. C., 516.

THE STATE v. ANDREW HEMPHILL ET AL.

Forcible Trespass—Variance.

An indictment charging a forcible trespass for taking a slain deer, is not supported by evidence of the forcible taking of a deerskin severed from the body of the deer.

THE defendants were tried at Burke on the last circuit before his Honor, *Judge Dick,* upon an indictment for forcibly and with a strong hand taking from the possession of the prosecutor a slain deer. The evidence offered showed that the defendants were hunters, and were, with their dogs, in chase of the deer, and that the prosecutor, not being one of the hunting party, shot and killed the deer. A dispute arose between the defendants and prosecutor as to who had the better title to the game thus taken. They compromised the matter, and it was agreed that the deer should be then skinned and that the carcass should be the property of the defendants and the skin should be the property of the prosecutor. In pursuance of this agreement the deer was skinned and the defendants immediately thereafter, with strong hand, took the skin from the possession of the prosecutor. His Honor was of opinion, and so instructed the jury, that this evidence supported the indictment. The jury found the defendants guilty and judgment being pronounced thereon the defendants appealed.

No counsel appeared for the defendants in this Court.
The Attorney-General for the State.

DANIEL, J., after stating the case as above, proceeded: It is (242) not necessary for us to decide the question who in law was entitled to the slain deer, if no agreement had been made between the parties concerning it. The parties having first disputed the title are now bound by the compromise and agreement. The carcass was, by the agreement, the property of the defendants; the skin, when severed from the body of the deer, was the property and in the possession of the prosecutor. We do not agree with the judge that the evidence of a forcible trespass in taking a deer skin, severed from the body, will support an indictment charging the defendants with forcibly taking a slain deer. These articles of property are very different and distinct. If a man, indicted for forcibly taking one species of personal property, could be convicted by proof that he took another species of personal property, no man would know how to defend himself; he would be constantly liable to be entrapped. We are of opinion that there must be a new trial.

PER CURIAM. Judgment reversed.

BENJAMIN F. PARROTT v. BENJAMIN HARTSFIELD.

Trespass—Killing Dog—Justification.

1. The owner of sheep is justified in killing a dog which had destroyed some of his sheep, and returned upon his premises apparently for the purpose of destroying others, although the dog at the time he is killed, be not *in the very act* of destroying or worrying the sheep; and although it be not shown that the owner of the dog was cognizant of his bad qualities, or that there was no other means of preventing the injury.
2. Where a dog is chasing animals *ferae naturae*, or combating with another dog, a necessity for killing him must be made out, or the killing will not be justified.

THIS was an action of trespass *vi et armis* for killing a dog. Pleas: *General issue* and *justification.*

(243) On the trial at Lenoir, on the last circuit, before his Honor, *Judge Toomer,* the ownership and possession of the dog by the plaintiff and the killing by the defendant were not denied. The defendant, in support of his plea of justification, then proved that on a certain day, about sunrise in the morning, the dog was discovered in his enclosed pasture in the act of killing his sheep; that two of the sheep had been killed and four others dangerously wounded; that the defendant was notified of the fact and went in pursuit of the dog with his gun; that the dog escaped at that time, but returned about two hours afterwards to the premises of the defendant, and was near the pasture fence where the sheep were, when the defendant saw him and immediately shot and killed him. The plaintiff insisted that in order to support the plea of justification the defendant must prove that he could not otherwise preserve his sheep than by killing the dog, or that the dog was shot in the *very act* of killing the sheep, and desired the court so to charge the jury. His Honor instructed the jury "that the defendant was justified in killing the dog, if the evidence satisfied them that the dog had destroyed the sheep and had returned two hours thereafter, and was on the premises of the defendant, near his pasture, under circumstances calculated to produce a belief in an ordinary man that the dog was lurking about the enclosure to commence again the work of destruction, and was killed under a reasonable apprehension that it was necessary to prevent a repetition of the mischief." The defendant had a verdict and judgment, and the plaintiff appealed.

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

GASTON, J. The exception taken by the plaintiff to the instruction of the judge, is not, in our opinion, well founded. The law authorizes the act of killing a dog found on a man's premises in the act of attempting to destroy his sheep, calves, coneys in a warren, deer in a park, or other reclaimed animals used for human food and unable to defend themselves. *Wadhurst v. Damme,* Cro. Jm., 455; *Barrington v. Sumers,* 3 Lev., 28; *Leonard v. Wilkins,* 9 John., 233. Nor is it essential to the defendant's justification that the owner of the dog should be cognizant of his bad qualities, or that there was no (244) other mode of defending the things assailed. Com. Dig. Pleader, 3 m. 33, 1 Sid., 336. The law is different where the dog is chasing animals *ferœ naturæ,* such as hares or deer in a wild state, or combating with another dog. In these cases a necessity for the act of killing must be made out or the killing will not be justified. *Wright v. Ramscot,* 1 Saun., 82; *Vere v. Ld. Cawdor,* 11 East., 567. The object of the law in conferring this authority is not to punish past wrongs, but to prevent wrongs impending or menaced. It may, therefore, be exercised before the injury is begun, if in truth it be imminent—for otherwise the preventive remedy may be too late. Thus in the case of *Wadhurst v. Dammæ,* the plea was that the dog *had* killed conies before, and defendant finding the dog *running* at conies (not in the act of killing them) he there killed the said dog. So in *Barrington v. Turner,* the justification was that the hounds had chased a deer in the defendant's park and killed her, and to prevent further mischief by them the defendant took and killed them. In this case the plaintiff's dog had actually killed several of the defendant's sheep upon his premises and had returned apparently for the purpose of repeating the injury. It hath been always taken for the law, and universal usage is high evidence of the law, that a sheep-stealing dog, found lurking about, or roaming over a man's premises where sheep are kept, incurs the penalty of death.

The judgment below is affirmed.

PER CURIAM. Judgment affirmed.

Cited: Morse v. Nixon, 51 N. C., 295; *Williams v. Dixon,* 65 N. C., 417.

Dist.: Runyan v. Patterson, 87 N. C., 345; *State v. Neal,* 120 N. C.,

(245)

JOHN W. BLACKWELL, ADMR. OF LEMUEL BEKERDITE
v. WILLIAM B. LANE ET AL.

Alteration of Bond—Delivery.

1. No particular form is necessary in the delivery of a bond; the mere throwing it on the table or any act or word from which the intention of the obligor to put the bond in the possession of the obligee may be inferred, is sufficient. Hence, where the obligor had signed the bond while it was blank as to the amount, and the agent of the obligee, after it was filled up, presented it to the obligor and told him the amount, at which the obligor expressed his surprise, but acknowledged his signature to the bond, and did not object to the agent's retaining it as his, the obligor's act and deed: *It was held*, to be sufficient evidence from which to infer a delivery.

2. A person's putting his name to a bond as a subscribing witness without the knowledge or consent of the obligor, is not such an addition to, or alteration of, the bond as to vitiate and render it void.

3. If a person who subscribed a bond as a witness without the knowledge or consent of the obligor, die, proof of his handwriting would not be sufficient evidence of the due execution of the bond; other evidence would be required as proofs of the handwriting of the obligor, his acknowledgment or the like.

4. The case of *Holloway v. Lawrence*, 8 N. C., 49, approved.

THIS was an action of debt upon a bond for $116, tried at Guilford, on the last circuit, before his Honor, *Judge Pearson.*

On the trial one Leach, whose name was subscribed to the bond as attesting witness, swore that the plaintiff had put in his hands a list of articles purchased by Winningham, one of the defendants, at plaintiff's sale as administrator, with a request that he would procure Winningham's note with security for the amount; that for that purpose he applied to Winningham at Ashborough, in Randolph County, who soon afterwards brought to him the bond in question, signed and sealed by Winningham, the defendant Lane, and one Swearingen. The bond was blank as to the amount, and Winningham requested witness to insert the proper amount, which he did, when Winningham acknowledged it to be his bond and requested Leach to attest it as a subscribing witness.

Leach observed that he must see Lane and Swearingen, and imme-
(246) diately stepped out into the street where Lane was standing, presented the note to him and asked, "Do you acknowledge this to be your signature?" Lane, without having the note in his hand, replied, "I do," and asked, "What is the amount?" Witness answered, "$116," whereat Lane either said something or made some motion or gesture, which witness thought was expressive of surprise that the amount was

so much. Witness immediately stepped to Swearengen, who was standing in the view of Lane, and who acknowledged the bond, whereupon the witness retired to his office, a few paces distant, but not in sight of either Lane or Swearengen, and wrote his name upon the bond just under the word "Attest." Witness stated that he did so without supposing there was the slightest impropriety in it; and under the impression that if the parties had been present they would not have objected to it—but that he did so without the knowledge or consent of Lane and Swearingen; and that he afterwards handed the bond to the plaintiff, who resided in the county of Guilford.

No defense was made by Winningham, who was insolvent. As against Lane, the counsel moved the court to instruct the jury: 1st, That there was no evidence of a delivery. 2d, That the act of Leach in putting his name to the paper as subscribing witness vitiated and rendered the bond void in law, as there was no evidence that he did so with the knowledge or consent of Lane.

His Honor left it to the jury to say from the evidence whether the bond had been delivered as the act and deed of Lane, instructing them that to find the issue for the plaintiff they must be satisfied that after the bond was filled up it was delivered by Lane as his act and deed; that to constitute a delivery it was sufficient if, the bond being present, the obligor made use of words showing his intent that the obligee should take it as the act and deed of the obligor;—that in this case, if they were satisfied that when the bond was presented to Lane by Leach he acknowledged his signature with the intent that Leach should retain it as his, Lane's, deed and upon being told the amount did not object, then, although it was for more than he expected, if it was retained by Leach as his, Lane's act and deed, they should find that there was delivery.

On the 2d point his Honor told the jury that there was no evi- (247) dence that Leach had put his name on the bond with the knowledge and consent of Lane, but if they believed that his name was put there under the circumstances stated by him it did not vitiate the bond and render it void in law. The jury returned a verdict for the plaintiff, and the defendant appealed.

Mendenhall and Winston for the defendant.
No counsel appeared for the plaintiff in this Court.

DANIEL, J. First: The defendant moved the court to instruct the jury that there was no evidence of a delivery of the bond declared on. The court charged that to constitute a delivery it was sufficient, if the bond being present, that the defendant made use of words showing his intention that the obligee should take it as the act and deed of the obli-

gor. That when the bond was presented to Lane, if he acknowledged his signature with the intent that Leach (the plaintiff's agent) should retain it as the defendant's deed, and upon being told the amount did not object, then, though it was for more than he expected, still if retained by Leach as the defendant's act and deed, the jury should find there was a delivery. We do not perceive any error in this part of the charge. No particular form is necessary in the delivery of a bond; the mere throwing it on the table, or any act or word from which the intention of the obligor to put the bond in the possession of the obligee may be inferred, is sufficient. Co. Lit., 36a; Hurlestone on Bonds, 8.

Secondly: The defendant contended that the act of Leach in putting his name to the paper as a subscribing witness vitiated and rendered the bond void in law—as there was no evidence he did so with the knowledge or consent of the defendant. On this point the court charged the jury that if they believed the name of Leach was put on the bond as a subscribing witness under the circumstances stated by him it did not vitiate the bond and render it void in law. We think in principle the case of *McCrow v. Gentry,* 3 Campb., 232, is very much like this. Action against the maker of a promissory note, which purported to be attested by two witnesses. One of these being called to prove it, stated (248) that he did not put his name to it in the presence of the defendant, nor was he ever called upon by the defendant to attest it; but he saw the defendant deliver it as his note of hand to the payee, and he afterwards put his name to it without the defendant's knowledge. *Lord Ellenborough:* "I cannot receive the evidence of this person as of an attesting witness to the note. He was no attesting witness, but a mere volunteer. If the other person whose name is on the note as attesting witness really was so, it can only be proved by his evidence. It appeared, however, that this person had not put his name to it exactly under the same circumstances as the other, and the defendant's acknowledgment was considered sufficient to fix him. So the plaintiff had a verdict." The defendant acknowledged to Leach (the plaintiff's agent) that it was his bond. Leach was a competent witness to prove that fact. The name of this witness having been placed on the paper, purporting to be a subscribing witness when in fact he did not put it there at the request or in the presence of the defendant, is not in our opinion such an addition or alteration of the bond as will vitiate or render it void. *Lord Ellenborough,* in the case quoted, did not consider the signature of the names of the two persons who had signed the note as if they were subscribing witnesses, such an alteration or addition as to destroy the instrument. If the witness had been dead, it is true, proof of his handwriting under such circumstances would not have been sufficient evidence to let the case go to the jury, for them to infer the due execution of the

bond; other evidence would have been required, as proofs of the handwriting of the obligor, his acknowledgment, or the like. *Holloway v. Lawrence,* 1 Hawks, 49. In the case of *Talbert v. Hodson,* 2 E. C. L. Rep., 91, it appears that the attesting witness to a bond wrote the attestation when the obligor was not present and without seeing the obligor execute it. The court, notwithstanding, permitted other evidence to be given of the execution by the obligor, and the obligor had a verdict and judgment. This is a strong case against the position taken by the defendant's counsel that the bond is void. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: *S. v. Gherkin,* 29 N. C., 209; *Dunn v. Clements,* 52 N. C., 60.

(249)

DAVID MAY v. EPHRAIM GENTRY.

Sale of Chattels—Delivery—Evidence.

1. If parties agree as to the terms of the sale of a chattel, the property of the chattel will not be vested in the vendee, where it appears that there was no delivery of the chattel, no earnest paid, nor any acceptance by the vendor of the vendee's money, or notes in lieu of earnest or as a security for the price.

2. A man's previous declarations may be received, though it is but slight evidence to show the extent and true character of the dealings between him and another person; and they will be evidence against one claiming under him by a cotemporaneous or subsequent contract.

3. If evidence strictly irrelevant has been admitted, a right verdict ought not to be set aside on account of its reception, unless it is perceived that it worked a prejudice to the party.

THIS was an action of trover for a stud horse, tried at Surry on the last circuit before His Honor, *Judge Settle.*

The plaintiff alleged that there was a conspiracy between the defendant and one William May, fraudulently to deprive him of his horse, and called several witnesses who testified that they were at the storehouse of the defendant when a trade for the horse in question was spoken of between the plaintiff and William May; that the contract proposed was that William May should pay $27 in specie and $175 besides for the horse; that the $27 in specie and $100 of the balance was to be paid down before the trade took place and that on the payment of $127 the plaintiff was to take the bond of William May for the sum of $75, payable six months after date, in horse flesh. These witnesses further testified that William May proposed to the plaintiff to go with him and one Howell out of the company, where they could trade to a better advant-

age; that in a short time they heard the plaintiff exclaim that if "that is what you are for, I will have nothing more to do with you"; and that both plaintiff and William May started towards the horse in a run; that William, being younger and more active than the plaintiff, got to where the horse was tied first and took possession of him, the plaintiff at the time forbidding him to do so, and calling upon the bystanders "to
(250) take notice that William May had robbed him of his horse"; that shortly afterwards William May obtained from the defendant a bridle, which he put upon the horse and rode him off. The witnesses testified further that some short time afterwards the horse was found in the possession of the defendant, who refused to deliver him up on the plaintiff's demand. Caleb Parsons, one of the witnesses examined for plaintiff, stated that he was present at the store of the defendant when the transaction above spoken of took place; that he went out to the parties where they had withdrawn themselves, and the plaintiff requested the witness to read a paper which had been prepared by William May and Howell, when William May objected and said that Howell could best read it. Witness saw a paper handed to the plaintiff and in a few minutes he heard the plaintiff say, "If that is what you are for, I will have nothing more to do with you"; the plaintiff threw down the note and the race to the horse took place as described by the other witnesses. This witness further stated that he heard some person (the particular individual he could not name) state in the hearing of the defendant the terms of the trade, which as well as witness could recollect were that William May was to give $175 for the horse, to be paid by giving his, William's, note for $75, due six months after date, and payable in horse flesh, and by paying off and discharging a note of about $40 which plaintiff owed one Kellar, and by purchasing a certain gray mare in the neighborhood. This and all the other witnesses who spoke of the alleged trade stated that when the plaintiff threw down the note and said that if that was the way he would have nothing more to do with them, William May said a note closed all former dealings between parties to the note, and that the plaintiff might pick up his note, for that was all he, William, owed him or would pay him. This was at the instant that the plaintiff and William May started to run for the horse. It was proved also that some minutes before the plaintiff was induced to take the note of $75 in his hand, William May privately requested Howell to stand by him, and he would shortly get the plaintiff's horse. One witness stated that some months before the transaction at the defendant's store he heard William May say that he would have the plaintiff's stud horse, if he had to take him by force.

His Honor charged the jury that if they believed the testimony
(251) given for the plaintiff he was entitled to the verdict. A verdict

was accordingly rendered for the plaintiff and the defendant's counsel moved for a new trial on the ground, first, that the plaintiff was not entitled to a verdict on the testimony of Caleb Parsons; and, secondly, because of the admission of the testimony to prove the declarations of William before the time when he took the horse from the plaintiff. The motion for a new trial was overruled and the defendant appealed.

Boyden for the defendant.
Cooke for the plaintiff.

RUFFIN, C. J. The recovery is proper against the defendant, unless he shows a valid contract of sale from the plaintiff to William May, under whom the defendant claims. To say nothing of the suspicious circumstances of circumvention, on which the case might have been left to the jury, as authorizing the plaintiff to rescind the contract at any time before the actual delivery of the horse or the entire fulfillment of his part of the contract by William, a sufficient reason for the instruction to the jury consists in the fact that it does not appear that the parties ever came to any final agreement as to the terms of the sale. It is nearly certain that they did not. But if they had it does not appear that anything was done in execution of such agreement so as to vest the property of the horse in the supposed vendee. There was no delivery of the horse; no earnest paid, nor any acceptance by the plaintiff of the other's notes in lieu of earnest or as a security for the price.

Upon the point of evidence we see no objection except the inutility of that offered. But if it had been strictly irrelevant, a right verdict ought not to be set aside on account of its reception, unless it worked a prejudice to the party, which is not perceived in this case. Those previous declarations of William May were, however, evidence from which the jury might, in a slight degree, be aided in determining the extent and true character of the dealings between the plaintiff and the other two persons, William May and Howell. If they could have been received against the person who made them, they were also competent against the defendant, who claimed under him by a cotemporaneous or subsequent contract. (252)

The judgment must, therefore, be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Satterwhite v. Hicks, 44 N. C., 108; *Lumber Co. v. Wilcox,* 105 N. C., 38; *Bank v. McKethan,* 84 N. C., 584; *Glover v. Flowers,* 101 N. C., 144; *Shaffer v. Gaynor,* 117 N. C., 24; *Croom v. Sugg,* 110 N. C., 261.

Overruled in part: *Jenkins v. Jarrett,* 70 N. C., 256.

THE SURVIVING PARTNERS OF MASSEY, McKESSON & CO. v. JAMES McDOWELL.

Usury—Question of Fact.

1. Where, upon the endorsement of a note, the endorsee took more than six *per centum per annum* by way of discount, but the excess was small and was allowed by the endorser *expressly* for the trouble the endorsee would be at in traveling to make a demand upon the maker of the note: *It was held*, that the transaction on its face was not so unreasonable as to warrant the court in declaring the endorsement to be usurious, but that it ought to have been left to the jury as a question of fact to say whether the allowance to the endorsee was intended *bona fide* as a remuneration for trouble, or was designed as a cover to hide an agreement for excessive discount.

2. Where the *general issue*, *statute of limitations*, and *usury* are pleaded, and the jury find for the plaintiff upon the two first pleas, and for the defendant upon the last, upon which he has judgment in his favor; on an appeal, the Supreme Court cannot, if there were error in the charge of the judge on the last plea, refuse to reverse the judgment upon the ground that the jury ought to have found differently on the two first pleas, because the Court cannot judicially see that the finding was wrong, and if they could, the verdict while it stands is conclusive of the facts which it declares, and the Court have not the power to modify or alter it.

(253) ASSUMPSIT brought by the plaintiffs as endorsees against the defendant as endorser of the following bond of one James Allen: "On the third day of November next I promise to pay William Suttle the sum of one hundred and thirty-five dollars for the hire of two negroes, Gabriel and Alfred, which slaves I am to feed and clothe well, pay their taxes, and return them well clothed at the expiration of said time. Witness my hand and seal this the 11th day of February, 1827. James Allen. (Seal.)" The bond was endorsed by Suttle, the payee, to the defendant, and by him to the plaintiffs. The defendant pleaded the *General issue, Statute of Limitations,* and *the Statute against usury,* and the cause was tried at Burke, on the last circuit, before his Honor, *Judge Dick.*

The plaintiffs proved the endorsement of the defendant on 9 February, 1831, and further that the defendant requested the agent of the plaintiffs to present the bond to Allen, and request payment, which was done, and the defendant notified thereof; that the defendant then requested the plaintiffs to bring suit against Allen, which they did in September, 1831, and obtained judgment in January, 1833; that a *fi. fa.* was issued upon the judgment and about $25 of the money collected, which was all that could be made out of Allen. This suit was brought in September, 1834.

The defendant proved on the cross-examination of John Reynolds, a witness for the plaintiffs, that he, Reynolds, was a clerk in the store of the plaintiffs and was their agent in purchasing the bond in question from the defendant; that defendant proposed selling the bond to him, saying that Allen was good and was at that time engaged in mining in the county; witness at first objected to buying, alleging that he would be at the trouble of going to see Allen, a distance of eighteen miles; but after a short time witness and the defendant made a calculation of the interest due on the bond, and found that there was then due for principal and interest $161.46, when the defendant proposed that if witness would take the bond he might have it for $159.93, and remarked that the balance due on the bond he might have as compensation for his trouble in going to see Allen. To this proposal of the defendant witness assented, and the endorsement was made upon those terms. The defendant contended that the plaintiffs were not entitled to recover, first, because their right of action was barred by the statute of limitations; second, because the endorsement of the defendant to the plaintiffs was (254) usurious.

His Honor charged the jury that the plaintiff's right of action was not barred by the statute of limitations for that the defendant by his endorsement of the bond became the surety of Allen. On the second ground he charged that if Reynolds gave a correct account of the transaction between the defendant and himself, the endorsement was usurious, and the plaintiffs could not recover on it. The jury found a verdict for the plaintiffs upon the two first issues, and for the defendant upon the last. A new trial was moved for and refused, and the plaintiffs appealed.

No counsel appeared for the plaintiffs in this Court.
D. F. Caldwell for the defendant.

GASTON, J. The Court is of opinion that there was error in the instruction to the jury on the question of usury. To render a contract usurious there must be an agreement to take for forbearance of payment upon a loan of money or other commodities, a greater sum than at the rate of six *per centum per annum* by way of discount or interest; and where in truth there is such a corrupt agreement, no color, contrivance or device shall save the usurious contract from the visitation of the law. The trifling sum which in this case was deducted from the amount of Allen's note when passed to the agent of the plaintiffs was allowed *expressly* as a remuneration for the trouble of traveling to make a demand on Allen. It is not on its face so unreasonable as to warrant the Court in declaring that the parties did not mean what they expressed. Whether the allowance was intended *bona fide* as a remuneration for trouble, or was de-

signed as a cover to hide an agreement for excessive discount, was a question of fact, and should have been submitted as such to the consideration of the jury. *Carstairs v. Stein,* 4 Man. and Sel., 192.

It has been insisted, however, by the counsel for the defendant that notwithstanding this error the judgment should not be reversed, for that the defendant was entitled to a verdict in his favor upon the pleas of the *general issue* and *statute of limitations.* This, however, we cannot (255) judicially see, and if we could we cannot give him such a verdict.

A verdict has been rendered for the plaintiffs on all these pleas. This, while it stands, must be conclusive of the facts which it declares, and it is not in our power to modify or alter it. Upon a second trial the defendant will be at liberty to insist that the bond not being an obligation simply for the payment of money was not in law negotiable, and, therefore, that the plaintiff is not an endorsee nor the defendant an endorser in the proper sense of those terms.

The judgment is to be reversed and cause remanded for a *venire de novo.*

PER CURIAM. Judgment reversed.

Cited: Miller v. Ins. Co., 118 N. C., 618.

BENJAMIN SHARP, ADMR. OF ANNA SHARP, v. MOSES FARMER.

Against Public Policy—Executory Contract.

1. No action can be sustained in affirmance and enforcement of an executory contract to do an immoral act, or one against the policy of the law, the due course of justice, or the prohibition of a penal statute. Therefore no action can be sustained upon a promise to settle an estate and pay over the distributive shares to those entitled, without taking out letters of administration upon such estate.

2. No distinction is now recognized between an act *malum in se* and one merely *malum prohibitum;* for the law would be false to itself if it allowed a party, through its tribunals, to derive advantage from a contract made against the intent and express provisions of law.

THIS was an action of assumpsit, commenced in the name of Benjamin Sharp and his wife, Anna, and upon the death of the wife, continued by the said Benjamin as her administrator. The defendant pleaded the *general issue,* and upon the trial at Edgecombe on the last circuit before his Honor, *Judge Saunders,* it appeared that the plaintiff was entitled

in right of his wife to a distributive share of the estate of one (256) Jerusha Farmer, deceased, and thereupon made an agreement with the defendant, who was also a distributee, that the latter, instead of taking out letters of administration on the estate of the said Jerusha, should collect and sell the estate, and, after paying the debts, divide the residue among those entitled to distribution.

The defendant, in pursuance of this agreement, sold the property and paid the debts of the said Jerusha, and a balance remaining in his hands, the plaintiff demanded the share to which he was entitled in right of his wife, and upon the defendant's refusal to pay the same brought this suit.

His Honor being of opinion, upon these facts, that the right of action vested in the plaintiff alone in his own right, and not in the plaintiff and his wife, directed a nonsuit to be entered, and the plaintiff appealed.

Iredell for the plaintiff.
J. H. Bryan and B. F. Moore for the defendant.

RUFFIN, C. J. The point, whether the right of action on this contract, supposing it to be a lawful and valid contract—is in the husband in his own right, or survived to him as administrator of the wife, involves much nice learning. We are relieved from going into it by other matter apparent in the record, upon which we are satisfied that neither the husband nor the husband and wife together could have an action upon this contract. It is an agreement between the next of kin of an intestate for an administration of the estate and its distribution by one of them without obtaining letters of administration, or taking the oath of office, or giving bond. This is prohibited by the act of 1715, Rev., ch. 10, ss. 4 and 5, under a penalty of fifty pounds. (See 1 Rev. Stat., ch. 46, sec. 8.) After a vast number of cases upon the subject it seems to be now perfectly settled that no action will be sustained in affirmance and enforcement of an executory contract to do an immoral act, or one against the policy of the law, the due course of justice, or the prohibition of a penal statute. The distinction between an act *malum in se* and one merely *malum prohibitum* was never sound, and is entirely disregarded; for the law would be false to itself if it allowed a party through its tribunals to derive advantage from a contract (257) made against the intent and express provisions of the law. *Lankton v. Hughes,* 1 Maul and Selw., 593, and *Bensley v. Bignold,* 5 Barn. and Ald., 341, establishes this principle upon consideration of all the previous cases. It will be seen at once that the court could not give the plaintiff a judgment; since by the very act of receiving the sum recov-

ered the plaintiff would be executor *de son tort,* which is a consequence which a court cannot allow itself to be made accessory.

The nonsuit must therefore stand and the judgment be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Futrill v. Vann, 30 N. C., 404; *Allison v. Norwood,* 44 N. C., 416; *Ramsey v. Woodard,* 48 N. C., 510; *Jenkins v. Sapp, id.,* 512; *Ingram v. Ingram,* 49 N. C., 189; *Carter v. Greenwood,* 58 N. C., 411; *Melvin v. Easley,* 52 N. C., 372; *Powell v. Inman, id.,* 29; *King v. Winants,* 71 N. C., 472; *Covington v. Threadgill,* 88 N. C., 188; *Griffin v. Hasty,* 94 N. C., 443; *Puckett v. Alexander,* 102 N. C., 97; *Burbage v. Windley,* 108 N. C., 362.

DEN EX DEM. OF JOHN MUSHAT ET AL. UXOR V. JOHN MOORE.

Admissions—Evidence.

1. The affidavit of a party made to obtain a *certiorari* may be used against him to prove any facts which are of a character to be proved by mere admissions or representations. But the admissions in such affidavit will not be sufficient evidence against the party making them, to supersede the necessity for the other party's producing matters of record or a deed under which he claims.

2. The *affidavit* for a *certiorari* is properly no part of the record.

EJECTMENT, tried at Iredell on the last circuit, before his Honor, *Judge Settle.*

The action was commenced in the county court and a judgment being there obtained by the lessors of the plaintiff, it was removed into
(258) the Superior Court by *certiorari.* In his petition and affidavit for the *certiorari* the defendant stated, among other things, that the land in controversy was sold under an execution upon a judgment against him at the instance of one Robert Simonton; that one George L. Davidson became the purchaser at a certain price, with the understanding that the defendant should redeem the same; and that Davidson afterwards conveyed the land to his daughter, the *feme* lessor of the plaintiff and wife of the other lessor. On the trial in the Superior Court the only evidence of title offered by the lessors of the plaintiff was the petition and affidavit above stated; but his Honor deeming that insufficient, directed a nonsuit, and the lessors of the plaintiff appealed.

No counsel appeared for the lessors of the plaintiff in this Court.
D. F. Caldwell for the defendant.

GASTON, J. There is no ground for setting aside this nonsuit. The affidavit of the defendant for a *certiorari* might have been properly read in evidence against him to establish any facts which were of a character to be proved by mere admissions or representations of a party. But the affidavit was not an admission of record. It properly formed no part of the record, for that consisted of the pleadings only—and *these* distinctly put in issue the title of the plaintiff's lessors. This title was alleged to have been derived to them from the conveyance of Davidson, who derived his title from the conveyance of the sheriff, who derived his authority from an execution issued upon a judgment. Now these were matters not to be proved by witnesses—nor by admissions equivalent at best but to proof by witnesses—but by the exhibition of the deeds, execution and judgment. The affidavit carried with it no more binding effect than would an admission by a defendant in an answer in chancery. And it has been held that such an admission is but secondary evidence of the execution of a deed, and does not supersede the necessity of proving it by the subscribing witness. *Call v. Dunning,* 4 East, 53; *Abbott v. Plumb,* Doug., 216. And certainly it does not supersede the necessity of exhibiting the deed to speak for itself. (259)

The judgment below is affirmed with costs.

PER CURIAM. Judgment affirmed.

Cited: Coble v. Coble, 82 N. C., 342; *Mason v. McCormick,* 85 N. C., 228; *Black v. Baylees,* 86 N. C., 533.

DEN EX DEM. JOSEPH KING ET AL. v. MERRIMAN FEATHERSTON.

Judgment for Costs—Execution.

1. Where the execution under which the plaintiff claimed, commanded the sheriff to levy a certain sum which the State had recovered against the defendant for costs and charges, and on the execution was endorsed a bill of costs containing officers' fees and witnesses' dues, but without specifying whether they were costs expended by the State or were the costs of the defendant, and the only record of a judgment produced in support of the execution merely showed that the defendant had been indicted and acquitted: *It was held,* that there ought to have been a special judgment in favor of the officers of the court and the defendant's witnesses, and an execution issued thereon and conformable thereto, and that the court

could not presume from the record produced that there had been such a special judgment, and then permit the plaintiff by parol evidence to trim and shape the execution offered so as to fit such presumed judgment.

2. When a defendant is acquitted on a criminal charge he is entitled to the common-law judgment that he go without day as to the indictment, but at the foot of such judgment there should be a judgment under our statute (1 Rev. Stat., ch. 1055, sec. 24), against the defendant in favor of the officers and the defendant's witnesses for his costs due to them, to be taxed by the clerk, upon which he should issue execution, not for the State, but in favor of the said officers, etc., against the defendant.

EJECTMENT for a tract of land containing seven hundred and forty-five acres, tried at Buncombe, on the last circuit, before his Honor, *Judge Dick.*

(260) The lessors of the plaintiff, in support of their title, produced a deed from the sheriff of Buncombe County to themselves for the land in question. They then produced the execution under which the said land was sold. It commanded the sheriff that of the goods and chattels, lands and tenements of Merriman Featherston, he cause to be made "the sum of one hundred and fifty-five dollars, which the State in our Superior Court of Law, held for Buncombe County, at the court-house in Asheville, recovered against him for costs and charges in the said suit expended, whereof the said Merriman Featherston is liable, as appears to us of record," etc. On the execution a bill of cost was endorsed containing officers' fees and witnesses' dues, but without specifying whether they were costs expended by the State or were the defendant's costs. The lessors of the plaintiff then produced in evidence the record of certain proceedings on an indictment against the defendant in Buncombe Superior Court upon which said execution issued.

The defendant contended that there was no judgment of the Superior Court of Law for Buncombe County against him which would authorize the issuing of the execution produced, and that said execution and all the proceedings under it were void. The record upon which the said execution was issued was not sent up as a part of the case, but the case states that upon an inspection of it the facts appeared to be as follows: "The defendant was indicted for perjury, and on his trial was acquitted. The execution in question was issued for the costs incurred by the defendant in the progress of the cause, and which were due to the court officers and the defendant's witnesses." His Honor overruled the defendant's objection, and charged the jury that the clerk of the Superior Court of Law for Buncombe County was authorized by law to issue the execution aforesaid for the defendant's costs; that said execution authorized the sheriff to sell and that the lessors of the plaintiff acquired title by their

purchase. The lessors of the plaintiff had a verdict and judgment and the defendant appealed.

Clingman and Battle for the defendant.
D. F. Caldwell for the lessors of the plaintiff.

DANIEL, J. In this State it has been repeatedly decided that (261) a purchaser deriving title under a sheriff's sale must show a judgment as well as an execution. In this case the plaintiff produced an execution against the defendant, under which he purchased. The execution commanded the sheriff to make $155, "which the State, in our Superior Court of Law held for the county of Buncombe at the courthouse, recovered against him for cost and charges in the said suit expended, whereof the said Merriman Featherston is liable, as appears to us of record," etc. On the back of the execution there is a bill of cost containing officers' fees and witnesses' dues, but it does not specify whether it was cost expended by the State or defendant's cost. If we look only at the execution and bill of cost annexed, no other conclusion can arise but that it was cost expended on behalf of the State in some suit on record in that court against the defendant, in which suit the defendant had been cast or convicted. The plaintiff failed to produce any judgment in favor of the State to authorize such an execution. The plaintiff on the trial alleged that the recital in the execution, that it issued on a judgment in favor of the State, was a mistake of the clerk. He then gave in evidence a record of an indictment in the Superior Court of Buncombe County against the defendant, which showed that he had been tried and acquitted. The plaintiff contended that the court had authority by virtue of the acts of the Legislature to render judgment on that acquittal in favor of the officers of the court and defendant's witnesses for the amount of their fees and dues from him, to be taxed by the clerk, or that the clerk at the instance of said officers and witnesses had a right to issue execution for the same without any formal judgment being rendered. That this execution instead of being to enforce a judgment for the State was intended to be in favor of the officers of the court and the defendant's witnesses for fees and dues to them in the State case. That if under the acts it was necessary that a judgment should be rendered in favor of the officers, etc., before execution could issue, then the court should presume such a judgment was rendered. If on the other hand no formal judgment was necessary, then the court ought to take this execution as having been issued by the clerk to cover the defendant's cost in said indictment. When the defendant was acquitted he was entitled to (262) the common-law judgment that he got without day as to the indictment, but at the foot of that common-law judgment there should

have been a judgment under the statute against the defendant in favor of the officers and defendant's witnesses for his cost due to them, to be taxed by the clerk, upon which the clerk should issue execution, not for the State, but in favor of the said officers, etc., against the defendant. The act says (see 1 Rev. Stat., ch. 105, sec. 24) "that it shall be lawful for clerks, on fees not being paid by the party from whom they are due, to make out execution directed to the sheriff, and the said sheriff shall levy the same by virtue of the said execution as in other cases; and to the said execution shall be annexed a copy of the bill of cost of the fees on which execution shall issue." Under this act the practice has been to include cost due the parties, witnesses' as well as the officers' fees, etc. Taking the act literally, it seems to address itself only to the clerks; but in construing it we must say it is a law addressed to the courts, to command by order their ministerial officers to do what is there required. Such a construction is consonant to the principles of the common law, and then harmony will be kept up in the forms of the proceedings of the courts. The plaintiff asked the court *first* to presume that such judgment was rendered as the court might have rendered when the defendant was discharged on the indictment. And *secondly* to permit him by parol proof to rectify the mistake of the clerk and apply this execution to the said presumed judgment. The court below yielded to the prayer of the plaintiff on both points, and he recovered 745 acres of land, for which he gave at the sale only $205. Those persons who attended the sale might have refrained from bidding because they knew there was not to be found on the record any such judgment as that referred to in the execution. Whether a proper judgment against the defendant can now be obtained by the officers, etc., *nunc pro tunc,* is a question not now before us. From the loose practice in our State the courts in favor of justice are in many cases compelled to presume that such a judgment has been rendered as the plain facts on the record demanded
(263) should have been rendered. But we are of the opinion that in this case the judge extended the indulgence too far to presume such a special judgment as that suggested; and then again to permit the execution offered to be trimmed and shaped by parol evidence to fit such presumed judgment. In our opinion the plaintiff failed to produce any judgment, and therefore there must be a new trial.

PER CURIAM. Judgment reversed.

McGLENSEY & WOLFE v. SAMUEL FLEMING.

Statute of Limitations—New Promise.

In order to repel the statute of limitations there must be either an express promise to pay, or an explicit acknowledgment of a subsisting debt from which the law can imply a promise to pay it. But if the debtor, at the time he acknowledges the debt, refuses to pay it, or offers to pay a smaller sum, saying that if his offer is not accepted he will plead the statute of limitations, there is nothing from which the law can imply a promise to pay the debt, and it will not be taken out of the operation of the statute.

THIS was an action of assumpsit brought by the plaintiffs to recover of the defendant the amount of an account for goods, wares and merchandise sold and delivered in the year 1832. The suit was commenced on 24 April, 1837, and the defendant pleaded the *general issue* and the *statute of limitations.*

Upon the trial at Burke, on the last circuit, before his Honor, *Judge Dick,* the plaintiffs, after proving an acknowledgment of the justness of their account by the defendant in year 1833, proved by William McKesson, a witness, that in June, 1834, he received a letter from the plaintiffs containing their account against the defendant, the amount of which was $655.10, with instructions to apply to the defendant for the amount due them, and if he refused to pay it, then to propose to him that the plaintiffs would take $600 rather than have a suit with him. This witness stated further that shortly after receiving the letter containing the account he applied to the defendant for payment and stated to (264) him the amount of the plaintiff's demand, to wit, $655.10, when the defendant admitted that he got the goods from the plaintiffs and that he had not paid for them, and he did not object to the amount of the account, but refused to pay. Witness then stated to him that he, witness, was authorized to take $600 and give him a discharge rather than have a lawsuit; the defendant refused to pay $600, but said he would pay $500. Witness stated further that some time after the above conversation and before this suit was brought he had another conversation with the defendant in which the defendant said he would not pay more than $500, and if the plaintiffs would not take that sum he would plead the statute of limitations.

His Honor instructed the jury "that to take a case out of the statute of limitations there must be either an express promise to pay by defendant or an explicit acknowledgment of a subsisting debt, within three years from the time of bringing the action. That if they believed the witness McKesson, the first conversation he had with the defendant was

in June or July, 1834, within three years of the time of bringing this action, the writ having issued 24 April, 1837, and if they further believed that the defendant in said conversation had made an explicit acknowledgment of the subsisting debt due from him to the plaintiffs, the case would be taken out of the operation of the statute, and the plaintiffs would be entitled to recover." The plaintiffs obtained a verdict and judgment and the defendant appealed.

No counsel appeared for the defendant in this Court.
D. F. Caldwell for the plaintiffs.

RUFFIN, C. J. To take a case out of the statute of limitations, it was held in *Smallwood v. Smallwood, ante,* 2 vol., 330, and in other cases, that there must be a promise to pay the debt within three years. It need not be an express promise, but it may be implied from such an acknowledgment of the debt as imports its present subsistence, and a continuing liability of the defendant for it, or his willingness to pay it, notwithstanding the lapse of time since the debt was first con-
(265) tracted. But we then thought, and still think, that a promise to pay cannot be inferred simply from an admission that the debt had been contracted and was originally just; or from the further admission that it had not been paid, if at the same time the defendant denied his liability and did not, in some way, indicate his intention or willingness to pay. It is immaterial on what ground the defendant denies his liability or places his refusal to pay; whether it be because, as he says, the debt was never due, or because he had paid it, or because he insisted on a legal protection from the payment. In either case the refusal to pay repels the idea of the promise to pay; and there must be such a promise, either expressed or implied, to prevent the bar of the statute.

The rule was, therefore, in our opinion, inaccurately expressed to the jury when it was said "that there must be either an express promise to pay by the defendant or an explicit acknowledgment of a subsisting debt." It should have been added, "from which the law could imply a promise to pay the debt." No acknowledgment can be sufficient unless it furnishes a plain inference that the defendant thereby intended to engage to pay the debt.

For the same reasons it appears to the Court to have been erroneous to leave it to the jury to find the requisite acknowledgment upon the evidence in the case. The instructions properly assume that there was not an express promise. To imply one the express and repeated refusals of the defendant to pay, as proved by the plaintiff's own witness, constitute an insuperable obstacle. But it is said the defendant did not refuse unequivocally, but he acknowledged the debt and agreed in a qualified man-

ner to pay part of it; and it is insisted that this defeats the operation of the statute as to the whole debt. That there has been a period when this argument would have received the concurrence of the courts is not doubted. But it cannot be sanctioned without overthrowing the principles of the modern decisions. We hold that a defendant is entitled to have his words upon this subject, as upon every other, fairly considered and interpreted, so as to arrive at his real meaning. Thus treated, they import in this case neither an acknowledged liability nor willingness to pay the plaintiffs' demand, but directly the contrary. The (266) original debt, and the less sum the agent of the plaintiffs proposed to take, the defendant positively refused to pay. There is nothing more in the case, except that the defendant then proposed on his part to pay a still smaller sum on certain terms, but simultaneously declared that if those terms were not accepted he would plead the statute of limitations. The terms have never been accepted and this action is not brought on that proposition. If it had been it could not be supported, because it never became a contract by the assent of the plaintiffs. For the same reason it is not a contract to revive the original promise, or for any other purpose. In fine, insisting on the statute of limitations is not, in our opinion, a waiver of it.

PER CURIAM. Judgment reversed.

Cited: Vass v. Conrad, 52 N. C., 89.

DEN EX DEM. OF THOMAS RITTER, ET UXOR, v. WILLIAM BARRETT.

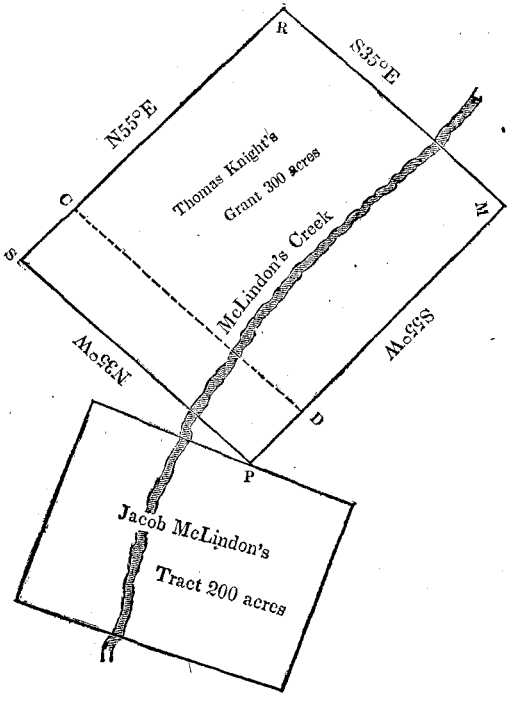
Inaccuracy of Description in Deed Supplied.

1. Any inaccuracy or deficiency in the description contained in a deed may be corrected or supplied by a reference to another deed, if the deed referred to contains a more particular and certain description of the land intended to be conveyed. Thus, if to the description by courses and distances in a deed be added the further description "containing three hundred acres sold by Jacob McLindon to Isaac Sowell," the courses and distances shall be controlled, if necessary, by the description in the deed given for the land by McLindon to Sowell.

2. The case of *Campbell v. McArthur,* 9 N. C., 33, approved.

THIS was an action of ejectment, brought to recover the strip of land represented on the annexed diagram by the lines D P, P S, S C, and C D.

(267)



The lessors of the plaintiff, on the trial at Moore, on the last circuit, before his Honor, *Judge Nash,* exhibited the following chain of title, to wit: A grant to Thomas Knight, in the year 1760, a deed of bargain and sale for the same land from Knight to Jacob McLindon, in 1762, and a deed from McLindon to Isaac Sowell for the same in 1772. They then proved that Isaac Sowell died intestate previous to 1784, leaving a widow, Mary, and a son, John, who was his oldest son. They then produced in evidence a deed bearing date in 1786 from John and Mary Sowell to Margaret Sowell, the *feme* lessor of the plaintiff and wife of the other lessor. The description of the land in the grant to Knight was as follows: "Lying on both sides of McLindon's creek, beginning at a maple on the south side of McLindon's creek, and runs
(268) S. 55°, W. 240 poles up to a pine, in the lower line of Jacob Mc-

Lindon's land on said creek, thence N. 35′, W. 200 poles, crossing the said creek with said Jacob's line, to a pine, thence N. 55°, E. 240 poles down to a red oak, thence S. 35′, E. 200 poles, crossing the creek to the mouth of a branch to the first station, containing three hundred acres." This description of the land was the same in all the *mesne* conveyances, except in the one from John and Mary Sowell to Margaret Sowell, the difference in which, however, need not be stated, as it is unnecessary to the understanding of the question upon which the case was decided. For the defendant it was insisted that the title of the land in dispute was not in the lessors of the plaintiff but in one John Sowell, to whom the said lessors had conveyed it by a deed bearing date 23 March, 1791, in which the land was described as follows: "A certain piece or parcel of land in the county of Moore, situate, lying, and being as follows: on both sides of McLindon's creek, beginning at a maple by a branch, running thence S. 55°, W. 240 poles, thence N. 35°, W. 240 poles, thence N. 35°, W. 200 poles, thence N. 55°, E. 240 poles, thence S. 35°, E. 200 poles to the beginning, containing 300 acres, sold by Jacob McLindon to Isaac Sowell." It was agreed that the grant to Knight began at the letter M, as represented on the diagram, and that the first line terminated at the letter P, and that that line was twelve poles longer than the distance called for in the grant, which gave out at the letter D. It was admitted by the defendant that he was in possession of the disputed land.

The defendant contended that the deed from the lessors of the plaintiff to John Sowell conveyed all the land covered by the grant to Knight, and moved the court to instruct the jury that they were at liberty to disregard the distance called for in the first line of that deed, and that the defendant was not obliged to stop at the letter D, where the distance gave out, because the words "sold by Jacob McLindon to Isaac Sowell," contained in that deed controlled the distance therein mentioned. His Honor declined giving those instructions, but charged the jury "that those words did not control the course and distance called for in the deed; and that as there was no evidence to show that the (269) first line in that deed had actually been run by the parties to McLindon's line, it must stop where the distance gave out, as it did not call for McLindon's line or the pine." The lessors of the plaintiff had a verdict and judgment and the defendant appealed.

Winston for the defendant.
Badger and Mendenhall for the lessors of the plaintiff.

GASTON, J. We are of opinion that there was error in refusing to instruct the jury, as prayed by the defendant's counsel, that they were at liberty to disregard the distance called for in the first line of the deed

of the lessors of the plaintiff to John Sowell, and to extend that line to the pine, the *terminus* called for in the deed of Jacob McLindon to Isaac Sowell. In the case of *Campbell v. McArthur,* 2 Hawks, 33, it was recognized as a settled principle that a mistake in the course or distance of a deed shall not be permitted to disappoint the intent of the parties, if that intent appears, and if the means of correcting the mistake are furnished either by a more certain description in the same deed, or by reference to another deed containing a more certain description. This principle we think applicable to the present case. In the deduction of title to the lessors of the plaintiff for the land in dispute, the plaintiff had exhibited a deed of *bargain and sale* from Jacob McLindon to Isaac Sowell, dated 7 January, 1772, in which the tract conveyed is thus described: "300 acres of land lying on a branch of McLindon's creek called Black creek, beginning at a maple on the south side of McLindon's creek, and runs south 55°, west 240 poles up to a pine in the lower line of Jacob McLindon's land on the said creek, thence north 35°, west 200 poles crossing the said creek with the said Jacob's line to a pine, thence north 55°, east 240 poles, down to a red oak, thence south 35°, east 200 poles, crossing the said creek at the mouth of a branch to the first station." The defendant then offered in evidence a deed from the lessors themselves to John Sowell, conveying, as the defendant alleged,
(270) this very tract to the said John. This deed, dated 23 March, 1791, describes the land as "lying and being on both sides of McLindon's creek, beginning at a maple by a branch running thence south 55°, west 240 poles, thence north 35°, west 200 poles, thence north 55°, east 240 poles, thence south 35°, east 200 poles, to the beginning, containing three hundred acres sold by Jacob McLindon to Isaac Sowell." So far as the description goes in this deed it corresponds with that in the former. There is the same beginning—the same courses and distances—and the same quantity of acres in both—and the only difference between the two descriptions is that the former is more circumstantial in pointing out where the *termini* are to be found of the lines described by course and distance.

The lessors of the plaintiff exhibited no evidence of any other *sale* from Jacob McLindon to Isaac Sowell than the sale evidenced by the deed of McLindon. It was therefore to this sale as authenticated by *this* deed that the reference was made in *their* deed, and the very purpose of the reference would seem to be to ascertain with more particularity what it was apprehended might not have been otherwise sufficiently described. They therefore declare their intent to convey unto John Sowell the same land which Jacob McLindon sold to Isaac Sowell. If, therefore, in the description of this land thus conveyed there be found any inaccuracy or deficiency, that inaccuracy is corrected and that deficiency supplied the

moment we ascertain the true boundaries of Isaac Sowell's purchase, and these appear upon the face of McLindon's deed.

The judgment is reversed and the cause must be sent back for another trial.

PER CURIAM. Judgment reversed.

Cited: Everett v. Thomas, 23 N. C., 256; *Cooper v. White,* 46 N. C., 392; *Henley v. Wilson,* 81 N. C., 408; *McAlister v. Holton,* 51 N. C., 333.

Dist.: Kissam v. Gaylord, 44 N. C., 119.

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JACOB HUBBARD v. WALTER A. WINBORNE.

Debtor Agent for his Trustee.

1. The debtor may act as agent for his trustee in selling or exchanging articles of the trust property, and an exchange made by the debtor without any precedent authority from the trustee, but subsequently ratified by him, will vest the title of the article taken in exchange, in the trustee, as against the debtor or those claiming as his creditors, if not from the exchange itself, at least from its ratification.

2. To permit the debtor, who remains in possession after conveying his property in trust, to exchange articles of the trust property for others by the assent of the trustee, is not such an evasion of the statute requiring the registry of deeds of trust as to prevent the trustee from acquiring the legal title to the article taken in exchange. How far it may go as an argument of fraud from the deception on creditors to which it tends, *Qu?*

THIS was an action of trover, brought to recover the value of a mare. Plea, the *general issue,* upon which issue was joined, and the cause tried at Guilford, on the last circuit, before his Honor, *Judge Pearson.*

The facts were agreed on, and it was also agreed that if his Honor should think that upon the facts the plaintiff was entitled to recover, the jury should return a verdict in his favor for the value of the mare; otherwise the verdict was to be rendered for the defendant. The facts as agreed on were these: One Bryant, being much indebted, made a deed to the plaintiff, conveying, among other things, an old gray horse, in trust to sell and pay certain debts therein mentioned. This deed in trust was duly registered; the property was left in the possession of Bryant until the day of sale. Soon after the registration of the deed, Bryant exchanged the gray horse for a brown mare, and brought the mare home, and immediately informed the plaintiff of the exchange, and he,

thinking it was a good swap, ratified and agreed to it. The defendant, a few days afterwards, levied on the mare under executions which he had in his hands as an officer against Bryant, and sold her at public sale. Before the levy the defendant was notified of all the above facts; and the sale was forbid by the plaintiff, who claimed the mare in place
(272) of the horse mentioned in the deed of trust. The question was whether the plaintiff could recover the value of the brown mare. His Honor, being of opinion that he could, a verdict for the plaintiff was returned by the jury and the defendant appealed.

W. A. Graham for the defendant.
J. T. Morehead for the plaintiff.

RUFFIN, C. J. The court does not perceive any objection to the plaintiff's recovery. The defendant imputes no fraudulent purpose to the deed, to the possession remaining with the debtor, nor to the ratification of the exchange of horses by the trustee. Supposing all those acts done with an honest intent—and there is no evidence or suggestion to the contrary—the title of the horse sued for vested in the plaintiff immediately upon his assent to the swap. As trustee he may incur a responsibility to the creditors by thus dealing with the trust property; but that cannot, in a court of law, effect his legal right to sell or otherwise dispose of the effects conveyed to him. It seems to be supposed, however, that it amounts to an evasion of the statutes requiring the registry of deeds of trust, since the deed will embrace one article and the debtor will be found in possession of another. How far that may go as an argument of fraud from the deception on creditors to which it tends, or which was actually practiced on the execution creditor in this case it is not for us now to say. Our province at present is simply to inquire whether a trustee be not in any case permitted *bona fide* to constitute the debtor his agent to sell or exchange an article of the trust property. That he may, we cannot doubt. If the authority precede the disposition, it is clear he may, for then the property never vests even apparently, or for a moment in the debtor; but the contract is made in the name, and on behalf of the trustee, to whom the property passes directly from the former owner. In the case before us the result is the same. The ratification is not merely pretended, but is stated as a real and honest one; immediately following the exchange, beneficial to the trust fund, and before the levy of any execution or other lien, or interest gained by another creditor.

The assent of the plaintiff thus given, it would seem, as against
(273) the agent or those claiming as his creditors, must have vested the

property in the plaintiff, if not from the exchange itself, from its ratification; and the last is sufficient for the plaintiff, as that preceded the lien of the execution under which the defendant alleges a justification.

PER CURIAM. Judgment affirmed.

Dist.: Sharpe v. Pearce, 74 N. C., 603.

CHRISTOPHER C. TAYLOR ET AL., EXRS. OF SKELTON TAYLOR, v. GEORGE BROOKS ET AL.

Administration de bonis non.

Until the settlement and distribution of an estate the administration is incomplete and must, upon the death of the administrator, be committed to some person as administrator *de bonis non* of the intestate, for the goods of the intestate go to such administrator *de bonis non*, and not to the executor of the administrator, and this although the administrator was, as one of the next of kin, entitled to a share of the estate. The right as next of kin did not attach to any particular chattels, and *prima facie* the unsold and undivided specific goods were held by the administrator in his official character, and therefore his representatives do not succeed to them.

DETINUE for five slaves, tried at Stokes, on the last circuit, before his Honor, *Judge Pearson.*

It appeared in evidence on the trial that one Clackson, who resided in the State of Virginia, upon the marriage of his daughter with one Abraham Taylor, in the year 1814, put a negro woman named Amelia and her children into the possession of his son-in-law Taylor, who remained in possession of them, treating them as his own, until his death. That Clackson died in 1817, leaving a will, of which Abraham Taylor, after the renunciation of the executors therein named, was appointed administrator. That by said will the testator gave the negro woman Amelia and her children to Abraham Taylor and his wife for life, with remainder to his, the testator's, heirs. That Abraham Taylor died in 1819 intestate, and in 1823 Skelton Taylor was appointed his administrator. That in 1831 Skelton Taylor died and the plaintiffs (274) qualified as his executors. That in 1836 Elizabeth Taylor, the widow of Abraham Taylor, sold five negroes, being part of those descended from the woman Amelia, to the defendants, who were negro traders, and who immediately after their purchase, and in the night time, run the negroes out of the State of Virginia, where all the above

transactions took place. It was also in evidence that from the death of Abraham Taylor his widow remained in possession of Amelia and her children until the sale of a part of them to the defendants. That Abraham Taylor and his wife had no children, and that Skelton Taylor, the testator of the plaintiffs, was the father of Abraham, and, according to the laws of Virginia, was the person entitled to his, Abraham's, negroes, as next of kin, his widow being entitled to one-half of them during her life. It also appeared that the defendants had notice before their purchase that the representatives of Clackson claimed the negroes under his will, subject to the life estate of Mrs. Taylor, and that they were also claimed by the executors of Skelton Taylor. A demand and refusal before suit was also shown.

The counsel for the plaintiffs read to the court the law of Virginia as to distribution of intestates' estates, and also the law of that State imposing a forfeiture of an estate for life in negroes when the tenant for life attempted to sell or otherwise run them out of the State.

His Honor charged the jury "that to enable the plaintiffs to recover they must prove that the negroes belonged to them; that if the evidence satisfied the jury that Clackson had made an absolute gift of the negroes to Abraham Taylor, and that after his death, the negroes were alloted to his widow for life as her share under the Virginia statute of distribution, and that while she thus held them for life, she made the sale to the defendants with a view, or having reason to believe, that the defendants would run them out of the State, then under the law of Virginia the life estate was forfeited, and the plaintiffs were entitled to recover. That whether there was an absolute gift to Abraham Taylor or merely a loan as the defendants contended, was a question for their decision.
(275) That a parol gift in Virginia was valid, and that by the law of Virginia, negroes being put into the possession of a son-in-law was *prima facie* a gift and not a loan, but that the presumption might be rebutted, and if the evidence satisfied them that it was a loan the plaintiffs were not entitled to recover; that whether the negroes were allotted to the widow as her dower right, as it was termed, after the death of Abraham Taylor, was also a question for them to decide; that if there were not such an allotment, then there was no forfeiture, and the plaintiffs were not entitled to recover, although there had been an absolute gift to Abraham Taylor."

The plaintiffs' counsel then moved the court to instruct the jury that if there were an absolute gift to Abraham Taylor, but no allotment to his widow as her dower right after his death, and in point of fact the negroes were suffered by the administrator of Abraham to remain in the possession of the widow, subject to an allotment and division whenever he thought proper to make one, then a sale while she thus held them would

be a forfeiture of her right to a life estate in one-half, and as the other half belonged to the representatives of Skelton Taylor, as distributee of his son, the plaintiffs would be entitled to recover. The court refused so to charge, because, in the first place, the evidence did not, in the opinion of the court, raise the point. Secondly, because if there were a forfeiture by a sale under such circumstances the effect of such forfeiture in the first instance was not to displace the legal title which remained in the administrator of Abraham until distribution, and the action ought to have been in his name, and not in the name of the present plaintiffs. Thirdly, because the act did not create a forfeiture under such circumstances.

The defendant's counsel moved the court for instructions which were either refused or reserved, and which it is unnecessary to state, as the jury found a verdict for the defendants. A motion for a new trial was made on the part of the plaintiffs, because of misdirection in the charge and the refusal of the court to charge as requested by them. This motion was overruled and the plaintiffs appealed.

Boyden for the plaintiffs.
J. T. Morehead for the defendants.

RUFFIN, C. J. We are of opinion that the judgment must be (276) affirmed, because this action cannot be maintained by the plaintiffs, as executors of Skelton Taylor.

One of the facts disputed on the trial was whether the slaves had been given or loaned by Clackson, the father-in-law, to Abraham Taylor. The plaintiffs contended that they had been given absolutely, and upon that founded their claim of title in the following manner: They insisted that after the death of Abraham Taylor intestate the title became vested in their testator, Skelton Taylor, who became his administrator. The plaintiffs further insisted that by the sale by Abraham's widow of the slaves, with the intent that they should be removed out of Virginia, his life estate was under a statute of that State forfeited, and was now vested in the plaintiffs as the executors of Skelton Taylor, who was also the father of the intestate, Abraham Taylor, and as his next of kin entitled to one-half of his slaves in possession at his death, and to the other half in reversion after the death of his widow, or other sooner determination of her estate for life. This the plaintiffs insisted on as true, whether there had been a division of the estate left by Abraham Taylor between the father and widow, and upon such division the slaves afterwards sold to the defendants had been allotted to the latter for life in her share, or whether there had been no such division, but the slaves had been allowed

by the father and administrator to remain in possession of the widow undivided, but still subject to division.

Upon those propositions of the plaintiffs it was left to the jury whether there was a gift or a loan, and if the former whether there had been a division between the next of kin or not; and they were instructed that the plaintiffs were entitled to recover, if there had been such gift and division, but that they were not entitled to recover if there had not been an allotment of these slaves to the widow.

As the verdict was for the defendant it removes from our consideration the important affirmative instructions on behalf of the plaintiffs upon the effect of the laws of Virginia, common or statutory, and therefore upon none of those points is an opinion given. It also excludes from our notice the instructions prayed on the part of the defend-
(277) ants, because they having been denied or reserved, could have had no influence in producing the verdict. The verdict makes the conclusion a necessary one, that the jury thought either that there was no gift, or that the negroes had never been allotted to the widow in her share of her husband's estate, but that the estate remained unsettled and subject to distribution. The court cannot see that the jury proceeded on the matter of fact first mentioned, and it may therefore be that they went on the ground that there had been no division, and that the legal consequence therefrom was that specified by the court.

The case is therefore reduced to the single point, whether the court properly refused the prayer of the plaintiffs for an instruction that they ought to recover, although there had been no division of the slaves of the intestate between his next of kin.

His Honor gave for his opinion several reasons, of which one seems to us so plain and decisive against the action that we do not embarrass ourselves with the others.

The plaintiffs declare in detinue, as the executors of the will of Skelton Taylor. In him, therefore, they must show the title that was once in Abraham Taylor by the gift of Clackson. It is not sufficient that Skelton was the administrator of Abraham, for upon the death of an administrator the goods of the intestate do not go to the executor of the administrator, but to the administrator *de bonis non* of the intestate. The plaintiffs must, therefore, show in their testator something better than a title as administrator merely. This was attempted by urging that as he was also father and next of kin it might be and was, upon the circumstances, to be inferred, that at his death he held *in jure proprio,* and not as administrator. But we think that an inadmissible inference, and indeed that it is completely repelled. Skelton Taylor was never, in fact, in the possession of the slaves, as appears by the evidence, and as is admitted in the prayer of the plaintiffs themselves. They were in the

possession of the widow, who was entitled to one-half in value, and in severalty for her life, as her distributive share. Now if to this be added the farther fact as found by the jury that there was no division and allotment between the parties entitled, it is clear that the estate had not been administered by Skelton Taylor, but that the important (278) parts of accounting and distribution yet remained to be performed by some person. Until distribution certainly the administration is incomplete, and must be committed to some person *de bonis non*. If the administrator here had not been next of kin there would have been a necessity, upon his death, for a further administration to settle and divide. It is equally necessary, although the administrator was, as next of kin, entitled to a share of the estate; for that right did not attach to any particular chattels. *Prima facie* the unsold and undivided specific goods were held by the administrator in his official character; and therefore his representatives do not succeed to them.

PER CURIAM. Judgment affirmed.

Cited: S. v. Johnston, 30 N. C., 382; *S. v. Johnson, id.,* 399; *S. v. Britton,* 33 N. C., 112; *Morton v. Ashbee,* 46 N. C., 314; *Duke v. Ferebee,* 52 N. C., 11; *Latta v. Russ,* 53 N. C., 113; *Lansdell v. Winstead,* 76 N. C., 369; *Ham v. Kornegay,* 85 N. C., 122.

(279)

DAVID CARPENTER ET AL. v. WILLIAM WALL.

Verbal Endorsement—Statute of Frauds.

1. Where a purchaser of property in payment therefor transferred to the vendor notes upon third persons, and upon being requested to endorse the notes for the purpose of enabling the vendor to sue in his own name, refused to do so, but said "they were good": *It was held,* that the words "they were good," used in the manner they were, did not furnish *any* evidence of a promise to make the notes good.

2. Whether such words, if they amount to a promise to make the notes good, do not come within the act of 1826 (1 Rev. Stat., ch. 50, sec. 10), declaring that "no action shall be brought, whereby to charge the defendant upon any special promise to answer the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party charged therewith, or some other person thereto by him lawfully authorized," *Qu.?*

3. A guaranty is a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person, who is himself in the first instance liable to such payment or performance.

4. If a vendor receive from the purchaser the note of a third person at the time of the sale (such note not being forged), and there being no fraudulent misrepresentation on the part of the purchaser as to the solvency of the maker), it is deemed to have been accepted by the vendor in satisfaction unless the contrary be expressly proved.

THE defendant purchased of the plaintiffs a tract of land and paid for the same in notes and judgments on third persons, some of which securities ultimately proved unavailable. This was an action of assumpsit, in which the plaintiffs declared on a *verbal guaranty,* made by the defendant of the goodness of the notes and judgments. Plea: *Non assumpsit.* On the trial at Anson, on the last circuit, before his Honor, *Judge Nash,* it appeared that at the time when the notes and judgments were passed it was proposed by a witness who was present that the defendant should endorse the notes to enable the plaintiffs to sue in their own names. The defendant said he would not endorse them, *"but they were good."* It was at that time supposed by all the parties that the notes and judgments were good. His Honor left it to the jury to say whether
(280) the defendant meant to guarantee the goodness of the papers passed; if so, they were at liberty to find for the plaintiffs. The jury found a verdict for the plaintiffs and the defendant submitted a motion for a new trial, "because the court ought to have told the jury that there was no evidence before them to prove a guaranty, and therefore that the court erred in leaving it to them." The motion for a new trial was overruled and judgment pronounced, from which the defendant appealed.

Mendenhall for the defendant.
Winston for the plaintiffs.

DANIEL, J., after stating the case as above, proceeded as follows: A *guaranty* is a promise to answer for the payment of some debt, or the performance of some duty in the case of the failure of another person who is himself in the first instance liable to such payment or performance. Tell on Guaranties, 1; Smith on Mercantile Law, 277. The evidence shows that the defendant expressly refused to endorse. Did the words, "but they are good," which he appended to this refusal, amount to a promise that he would guaranty the goodness of the paper transferred? The judge left it to the jury to ascertain whether the defendant intended to bind himself as guarantor by using these words. We think that the words used in the manner they were used did not furnish *any* evidence of a promise to make the notes and judgments good. We understand the true rule on this point to be that if a vendor receive from the purchaser the note of a third person at the time of the sale (such note not being forged

and there being no fraudulent misrepresentation on the part of the purchaser as to the solvency of the maker) it is deemed to have been accepted by the vendor in satisfaction, unless the contrary be expressly proved. *Whitbeck v. Van Ness,* 11 Johns., 409. There is another point which on a subsequent trial may be worthy of examination. Our act of 1826 declares that "no action shall be brought whereby to charge any executor or administrator upon a special promise to answer out of his own estate, or to charge the *defendant* upon any special promise to answer the debt, default, or miscarriage of another person, unless the agree- (281) ment upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party charged therewith, or some other person thereto by him lawfully authorized." 1 Rev. State., ch. 50, sec. 10. The point to which we would draw attention is, whether the claim of the plaintiff is not upon a verbal guaranty, within the meaning of this statute, and, therefore, that a recovery cannot be had on it.

There must be a new trial.

PER CURIAM. Judgment reversed.

Cited: Carter v. McGehee, 61 N. C., 432; *Coleman v. Fuller,* 105 N. C., 329.

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(282)

JOHN T. DODSON v. GEORGE MOCK.

Trespass—Killing Dog.

1. It is not necessary for the maintenance of an action for killing a dog that the dog should be shown to be of some pecuniary value. Dogs belong to that class of domiciled animals which the law recognizes as objects of property, and what it recognizes as property it will protect from invasion by a civil action on the part of the owner.

2. A dog may be of such ferocious disposition or predatory habits as to render him a nuisance to the community, and, if permitted to go at large, he may be destroyed by any person. But the law does not require exemption from all fault as a condition of existence; and the trivial offences of stealing an egg, snapping at one man's heel and barking at another's horse, and the being suspected of having, years before, worried a sheep, will not put a dog out of the pale of the law and justify any person in killing him.

3. The action of trespass *vi et armis* is the proper remedy where a dog is killed by a direct administration of poison: as where the poison is thrown down to the dog and mixed up with food. But where the defendant puts the poisoned food where he knows the dog will pass along and get it, case is the proper remedy.

4. The distinction between injuries which are the proper subjects of an action of trespass, and those which are to be redressed by an action on the case between injuries immediate and injuries consequential, is sometimes very subtle and attenuated. Acts which are of themselves invasions upon the person and property (in possession) of another are of the first class, or immediate injuries. Acts which, by reason only of subsequent occurrences, occasion an injury to the person or property of another, which injury was either foreseen or ought to have been guarded against, are the subjects of an action by the party grieved, because of this consequent injury, and come under the second class.

5. There are some instances where, although the injury be immediate, it may be alleged as a *consequence* of negligence or inattention, and the action on the case may be maintained. But where the injury is entirely an indirect consequence of a previous act it cannot be complained of as a trespass *vi et armis*.

See *Parrot v. Hartsfield*, 110 *ante*.

THIS was an action of *trespass vi et armis* for killing the plaintiff's dog, tried at Stokes, on the last circuit, before his Honor, *Judge Pearson*.

It was in evidence on the trial that a few days before the dog died the defendant applied to one Doctor Keigh for poison to kill a dog, (283) and procured from him a quantity of *nux vomica*, with directions to administer it in corn meal; that Mrs. Terry, at whose house the dog was in the habit of staying, went on a visit to the house at which the defendant boarded and the dog followed her; that soon after she got there the defendant came in, went up stairs and came down with a cup in his hand, apparently having corn meal in it; that about one hour afterwards Mrs. Terry, upon returning home, found the dog in convulsions and he soon died, exhibiting all the appearances of having been poisoned; that the defendant, a day or two afterwards, being informed by Dr. Keigh that the plaintiff had inquired of him whether he had sold poison to any one to kill dogs, stating that his dog had been poisoned, said that he would not have cared if the Doctor had told the plaintiff all about it; and said also that he had folded one dose of the poison in a paper and wrote upon it "dog poison," and put it in the crack of a fence. It was also in evidence that the defendant, on one occasion, when the dog barked and jumped at him, at Mrs. Terry's house, where he was in the habit of visiting, flew into passion and swore that if the dog ever bit him he would kill him, and finally said "he would kill him anyhow." It was proved further that the dog was the property of the plaintiff and was valuable as a guard and yard dog on account of his watchfulness and propensity to bark.

For the defendant it was proved that this dog on one occasion entered the lot of one Aldy, in Waughtown, and took therefrom one hen egg in Aldy's presence, who hotly pursued him; that afterwards when Aldy was

passing by Mrs. Terry's the dog barked at him and made a grab at his heel, but fled upon Aldy's turning upon him; that upon another occasion he jumped at the horse of Dr. Keigh. That on another occasion a dog, which the witness believed to be this dog, was found upon a sheep about a mile from Waughtown; that Snider, the owner of the sheep, being informed of it went to the plaintiff and told him of it, whereupon the plaintiff called up his dog and he had no signs of having been engaged in killing sheep. Plaintiff then said that he supposed it must be a younger dog which he owned that was seen upon the sheep, as the young dog was of the same color with the old dog, and was (284) at the time missing; and plaintiff said further that although the old dog when young was guilty of running sheep, yet he had not done so for several years.

The defendant's counsel insisted, first, "that the action should have been case and not trespass *vi et armis;* secondly, that as the dog was guilty of sucking eggs, killing sheep, and barking and jumping at the good people of Waughtown, any person was justified in killing him." The plaintiff's counsel contended "that the action was well brought, and that although Aldy or Snider might well have justified killing the dog if taken in the act of sucking the egg of the one or killing the sheep of the other, yet the defendant was not the avenger of every hen's nest and sheep fold in Stokes county."

His Honor charged the jury "that if they were satisfied from the evidence that the defendant had killed the plaintiff's dog by throwing poison to him or putting it down where he knew the dog would pass along and get it, the plaintiff was entitled to recover so far as the form of the action was concerned, but if defendant had put the poison in the crack of a fence and the dog had casually passed by and got it, the defendant was entitled to a verdict, as the action should then have been case."

As to the second point his Honor charged "that although the dog had stolen the egg and caught the sheep and had the other bad habits stated by the witnesses the defendant was not justified in killing him; that the bad habits of the dog, however, should be taken into consideration in arriving at the amount of damage if they found for the plaintiff, and they might also take into consideration the circumstances of the trespass as the use of poison."

The defendant's counsel then moved the court to charge that as the dog was not proved to be of any certain value, if the jury should think from the evidence that the dog was of no value, they should find for the defendant. His Honor refused so to charge, but told the jury that when a man committed a trespass by killing the dog of another and was not justified in so doing, the law implied that some damage was sustained by

this violation of his rights, however small, and the jury should so find. The plaintiff had a verdict and judgment, and the defendant appealed.

(285) *J. T. Morehead and Boyden for the defendant.*
No counsel appeared for the plaintiff in this Court.

GASTON, J. We are of opinion that, with a single exception, all the objections taken to the charge of the judge must be overruled. It was not necessary for the maintenance of the action that the plaintiff's dog should be shown to have pecuniary value. Dogs belong to that class of domiciled animals which the law recognizes as objects of property, and whatever it recognizes as property it will protect from invasion by a civil action on the part of the owners. It is not denied that a dog may be of such ferocious disposition or predatory habits as to render him a nuisance to the community, and such a dog, if permitted to go at large, may be destroyed by any person. But it would be monstrous to require exemption from all fault as a condition of existence. That the plaintiff's dog on one occasion stole an egg, and afterwards snapped at the heel of the man who had hotly pursued him *flagrant delicto*—that on another occasion he barked at the Doctor's horse, and that he was shrewdly suspected in early life to have worried a sheep—make up a very catalogue of offenses not very numerous nor of a very heinous character. If such deflections as these from strict propriety be sufficient to give a dog a bad name and kill him, the entire race of these faithful and useful animals might be rightfully extirpated.

In that part of the charge which relates to the form of the action, we do not entirely concur with his Honor. We hold with him that if the poison had been directly administered (and the throwing it down to the dog mixed up with food *is* a direct administration of the poison), either by the defendant or by any other person under his direction, the action of trespass was the proper remedy. But we do not assent to the position that "if it were put by the defendant in a place where he knew the dog would pass and get at it," and the dog afterwards passed by and swallowed the poison, the action of trespass might also be maintained. The distinction between injuries which are the proper subject of an action of trespass and those which are to be redressed by an action on the
(286) case, between injuries immediate, and injuries consequential, is sometimes very subtle and attenuated. But the law makes the distinction, and the ministers of the law must follow it out. Acts which are of themselves invasions upon the person or property (in possession) of another, are of the first class or immediate injuries. Acts which by reason only of subsequent occurrences, occasion an injury to the person or property of another, which injury was either foreseen or ought to have been guarded against, are the subject of an action by the party

grieved, because of this consequent injury, and come under the second class. One of the most apt as well as ordinary illustrations of the legal distinction is thus stated. If A throw a log in the highway and it hits B, he may maintain trespass; but if B come along afterwards and fall over it, and thereby receive an injury, the remedy is case. Nor in the instance last put will it make any difference whether at the time the log was thrown it was or was not known that B was shortly thereafter to pass along and in all probability would stumble over it. There are, indeed, some instances where, although the injury be immediate, it may be alleged as a *consequence* of negligence or inattention, and the action on the case be maintained. But we know of none where the injury is entirely an indirect consequence of a previous act, in which it may be complained of as a trespass with force and arms.

For this error we feel ourselves obliged to reverse the judgment rendered below and order a *venire de novo*.

PER CURIAM. Judgment reversed.

Cited: S. v. Lathan, 35 N. C., 34; *S. v. Boon,* 49 N. C., 468; *Morse v. Nixon,* 51 N. C., 294; *Mowery v. Salisbury,* 82 N. C., 117; *S. v. Neal,* 120 N. C., 619.

(287)

WILLIAM Y. HOOPER, ADMR. OF SUSANNA HOOPER,
v. WOODLIEF HOOPER.

Deed—Construction—Life Estate.

Where a deed of gift conveys the immediate, absolute and entire interest in a slave, an endorsement made thereon by the donee at the same time when the deed was executed, stipulating that the slave "may be at the disposal of the donor during his life," will not operate as a reservation of a life estate by the donor, but will be regarded, *at law*, only as an executory covenant on the part of the donee that the donor during his life shall have the enjoyment of the slave, for the breach of which covenant the donee will be answerable in damages; though, *in equity*, the donor would probably be regarded as taking an interest for life.

THIS was an action of detinue for certain slaves. Plea: the *general issue*. Upon the trial at Caswell, on the last circuit, before his Honor, *Judge Pearson*, it was in evidence that the mother of the slaves in question had been the property of the plaintiff's intestate, and the only question in the cause depended upon the construction and legal operation of a deed of gift, executed by the plaintiff's intestate to the defendant's testator, who was her son; and an endorsement on the said deed of gift executed by the donee therein on the same day, and attested by the same

witnesses who attested the deed of gift. The deed of gift conveyed the absolute interest in the mother of the said slaves to the defendant's testator, and his endorsement was in the following words: "The within named negroes, Claricy and Milley, I hereby certify may be at the disposal of my mother, Susanna Hooper, for and during her natural life. Given under my hand and seal the day and date within written.

"Test: GRIFFIN GUNN." "HENRY HOOPER. (Seal.)

The plaintiff's counsel insisted that the proper construction and legal effect of the deed of gift and endorsement was to convey the slaves to the son with a reservation of a life estate to the mother, the donor, and that this reservation of a life estate gave her the entire interest. On (288) the contrary it was contended by the defendant's counsel that the deed of gift passed the slaves to the son, and the writing on the back of it did not amount to a reconveyance of a life estate by which the operation of the deed would be entirely defeated; but was merely a covenant or declaration of an use, or power of disposition, without passing any legal interest or estate. His Honor, in charging the jury, sustained the view taken by the defendant's counsel, and a verdict being rendered in favor of the defendant the plaintiff appealed.

J. T. Morehead for the plaintiff.
W. A. Graham for the defendant.

GASTON, J. We entirely approve of the opinion given by his Honor upon the legal construction of the deed from Susanna to Henry Hooper. Admit, as the plaintiff's counsel insist, that the endorsement, being cotemporaneous with the deed, should be regarded as a part thereof, it by no means follows that the meaning of what is declared by the endorsement would be thereby changed. This endorsement speaks the language of the donee, and is a declaration or stipulation on his part in relation to the precedent subject matter. The legal limitation of the gift is the language of the donor, who had the sole right to prescribe the extent and modifications of her donation. This limitation is immediate and absolute—and therefore passes directly the entire property from the donor to the donee. The subsequent declaration or stipulation on the part of the donee is an engagement that during the life of the donor she shall have the disposal, that is, the enjoyment, of the thing which has been transferred to him. *At law* it can be regarded but as an executory covenant, for the breach whereof he would be answerable in damages. *In equity,* the donor would probably be regarded as taking an interest for life—but however this might be, it could not affect the legal operation of the instrument. The judgment below is affirmed.

PER CURIAM. Judgment affirmed.

(289)

THE STATE v. ALFRED GOINGS, ALIAS ALFRED TERRY.

Indictment—Rape.

1. An indictment upon our statute (1 Rev. Stat., ch. 34, sec. 5), for abusing and carnally knowing a female child under the age of ten years, which charges the rape to be "in and upon one M. C., an infant under ten years of age." etc., "and her, the said M. C., feloniously did unlawfully and carnally know and abuse," etc., is sufficient without describing the infant as a *"female child"*; nor is the addition of "spinster" to the name of the infant requisite in such an indictment.

2. In indictments for offences against the persons or property of individuals, no addition to the names of those individuals is requisite.

THE prisoner was put upon his trial at Cumberland, on the last circuit, before his Honor, *Judge Nash,* upon an indictment which charged that he, "on the twenty-sixth day of May, in the year of our Lord one thousand eight hundred and thirty-eight, with force and arms, in the county of Cumberland aforesaid, in and upon one Mary M. Cook, an infant under the age of ten years, to wit: of the age of seven years, in the peace of God and the State, then and there being, feloniously did make an assault, and her the said Mary M. Cook, then and there feloniously did unlawfully and carnally know and abuse, against the form of the statute in such case made and provided, and against the peace and dignity of the State." The prisoner was found guilty, and his counsel moved in arrest of judgment, because the prisoner was charged in the bill of indictment "with carnally knowing and abusing one Mary M. Cook, an infant, under the age of ten years, whereas the offense should have been charged to have been committed on Mary M. Cook, spinster, an infant, etc., or upon Mary M. Cook, a woman child," etc.

His Honor sustained the motion in arrest of the judgment, and the solicitor for the State appealed.

The Attorney-General for the State.

DANIEL, J., having stated the case, proceeded as follows: Our (290) statute (see 1 Rev. Stat., ch. 34, sec. 5) is as follows: "Any person who shall ravish and carnally know any female of the age of ten years or more, by force or against her will, or who shall unlawfully and carnally know and abuse any female child under the age of ten years, shall be adjudged guilty of felony, and shall suffer death without benefit of clergy." That part of our statute which relates to the abuse of a *female child* is merely taken from the fourth section of the statute of 18 Eliz., ch. 7. That section of the English statute declares, "That if any person

shall unlawfully and carnally know and abuse any *woman child* under the age of ten years," etc. The form of an indictment, good under the English statute, we think, must be good under our act, which is so near a copy of the English statute. We have examined in several books of practice in Crown cases the precedents of indictments for rape on infant females under the age of ten years. In the form in Stubbs Cr. C., 612, and also that in Archb. C. P., 373, she is stated as *"an infant under the age of ten years."* The words "woman child" are not inserted in any part of the forms given by these authors. The form in 3 Chitty's Crim. Law, 816, does contain the very words of the statute, *"in and upon E. P., spinster, a woman child,* under the age of ten years," etc. Mr. Chitty, in a note says, "Sometimes the words *woman child* are omitted, but it seems better to follow the words of the statute." These remarks of his are given to the profession from abundant caution; he does not pretend that there ever has been any adjudication demanding the insertion of these words in the indictment. When we read the sentence in the indictment and arrive at the personal pronoun *her,* it seems to us it is sufficiently certain that the person mentioned as abused is no other than a female. This pronoun *"her"* agrees grammatically with its antecedent, Mary M. Cook, in gender, number, and person. Secondly, in indictment for offenses against the person or property of individuals in England, no addition to the names of those individuals is requisite: 2 Hale, 182, and it has been said, if stated it need not be proved. *Rex v. Graham,* 2 Leach, 547; *Rex. v. Oglive,* 2 Car. and P., 230; Archb. Crim., p. 31. The objection that the addition of *"spinster"* to the name of Mary M. Cook was omitted in the indictment has no weight. We have looked
(291) through the whole record and there does not appear to us anything why judgment should not have been rendered for the State against the prisoner. The judgment rendered by the Superior Court of Law for the county of Cumberland in this case is by this Court reversed. This opinion will be certified to the said Superior Court of Cumberland County, that judgment of death may be there given for the State against the prisoner, according to law.

PER CURIAM. Judgment reversed.

Cited: S. v. Farmer, 26 N. C., 225.

THE SURVIVING PARTNERS OF DUNNS, MCILWAINE & CO. v. WILLIAM D. JONES, ADMR. OF JOHN L. WARD.

Two Defendants—Appeal.

1. In an action of assumpsit in the county court against two, if they plead separately "*non assumpsit*," but the jury find a verdict and assess damages jointly against both, one cannot appeal without the other, and if the appeal at the instance of one alone be carried up and placed on the trial docket of the Superior Court, and the plaintiff obtain an order at the first term to take a deposition and the cause be then continued to the next term, it will at that term be dismissed upon the motion of the plaintiff.

2. The case of *Hicks v. Gilliam*, 15 N. C., 217, approved.

THIS was an action of assumpsit, brought in the county court of Franklin, against one Joseph J. Ward and the defendant William D. Jones, as the administrator of John L. Ward. Joseph J. Ward, by his attorney, pleaded "general issue, payment, and set-off," and the defendant Jones, by his attorney pleaded "general issue." A jury, being impanelled to try the issues joined, found that the "defendant Jones' intestate did assume," and further, "that the defendant Ward did assume, and that there was no payment or set-off," and they assessed the plaintiff's damages to $380.79, upon which the court rendered "judgment accordingly." From this judgment the defendant Jones prayed an appeal, which was granted; the defendant Ward, being in court and refusing to join in the appeal. At the next ensuing term of the (292) Superior Court the case was brought into court and docketed. At the same term the plaintiffs obtained an order for taking a deposition, and the cause was then continued to the following term, to wit: the fall term of 1838, when his Honor, *Judge Saunders,* upon motion of the plaintiff's counsel, dismissed the appeal, upon the ground that it was an appeal by one of the parties only to the judgment in the county court. From this order dismissing the appeal the defendant Jones appealed to the Supreme Court.

This case was submitted without argument by

W. H. Haywood for the defendant, and by
Badger and Battle for the plaintiffs.

DANIEL, J. In the county court, where this action commenced, the defendants plead separately "*non assumpsit*." The jury, as they ought to have done, assessed the damages jointly, and the judgment under our statute accordingly was joint—that the plaintiff recover his damages and costs, to be levied of the goods and chattels, lands and tenements of Jos. J. Ward, and of the goods and chattels which were lately belonging to

John L. Ward, deceased, now in the hands of William D. Jones, his administrator, to be administered. The administrator of John L. Ward prayed an appeal, and the other defendant objected to the appeal. We think this case is governed by the case of *Hicks v. Gilliam,* 4th Dev. Rep., 217, and that the judgment of the Superior Court, dismissing the appeal, was correct. The county court has a power to grant new trials on each and every ground that the Superior Court has. If the verdict had been against the law or the evidence, that court could have had the case submitted to another jury, at the instance of any of the parties complaining. An appeal entirely vacates the judgment and cannot be allowed at the instance of one person against the will of another who is jointly bound by the judgment. If a point of law relative to the cause be raised on the trial, and either party is dissatisfied with the decision of the court, it may be the subject of a bill of exceptions. Then one of several plaintiffs or defendants may, in the name of all, bring a (293) writ of error, and transmit the whole record into the Superior Court. The granting a writ of error only suspends the execution; the judgment stands firm until it is reversed in the Superior Court. But even after the record is transmitted into the Superior Court by writ of error, one plaintiff in error cannot, without summons and severance, assign errors without the authority of his co-plaintiffs. If he does, the defendant in error may move to quash the proceedings. The decision of the Superior Court in this case being correct the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Stiner v. Cawthorn, post; Stephens v. Batchelor, 23 N. C., 61; *Kelly v. Justices,* 24 N. C., 433; *Otey v. Rogers,* 26 N. C., 537; *Donnell v. Shields,* 30 N. C., 372; *Smith v. Cunningham, id.,* 461; *Jackson v. Hampton,* 32 N. C., 594; *Kelly v. Muse,* 33 N. C., 184.

JOHN POPELSTON v. JOSHUA SKINNER.

Levy—Goods Left with Defendant.

1. When a sheriff levies upon goods and leaves them with the debtor, the possession of the debtor may, to many purposes, be that of the sheriff, but it cannot be so in the sense of being adverse to the debtor himself, and of turning any right he had in the goods into a chose in action.

2. The right of a defendant in execution to goods seized and taken possession of by the sheriff, is not absolutely divested by such seizure and possession, but an interest is left in the debtor which he may sell and legally convey to another person.

3. The general proposition that the property in goods taken in execution is in the sheriff must be understood with qualifications. The law gives him the property to enable him to raise the money he is commanded to make; and the property is given as far as it is necessary for that purpose, but no farther. As far as it is invested in the sheriff, it is divested out of the defendant, but of course no farther. This interest in the sheriff, which is called a special property, enables him to perform certain acts in regard to it; but it results from the very terms "special property" that, subject to the raising the debt, the general property is in the former owner.

THIS was an action of trover brought to recover the value of a (294) negro woman named Peggy and her child. Plea the *general issue.*

Upon the trial at Chowan, on the last circuit, before his Honor, *Judge Bailey,* the plaintiff made out a *prima facie* case by showing that the slaves in question were in his possession, and that they were taken therefrom by the order of the defendant. For the defendant it was then proved that the slaves had formerly been the property of Jonathan H. Haughton; that on 7 July, 1837, Haughton duly conveyed them by a deed in truth to Robert R. Heath, who as trustee, conveyed them on the 12th day of September following, to the plaintiff; that at February term of 1837, of Chowan County Court, one Josiah Coffield obtained a judgment against the said Haughton for $1,000, upon which an execution of *fi. fa.* issued tested of that term, and returnable to the ensuing term of May of said court, under which the sheriff levied on the slaves in question, and returned the levy endorsed on the execution. From the said May term an execution of *venditioni exponas* issued, reciting the aforesaid levy, which was returned to the ensuing term in August and was satisfied on the second day of that term without a sale of the slaves. At the same August term a judgment was obtained against the said Haughton, at the instance of one James Coffield, for $1,100, upon which a *fi. fa.* issued tested of the first day of that term and returnable to the November term following, and upon which the sheriff returned "nothing to be found." From that term, to wit: November term, 1837, an alias *fi. fa.* issued upon the judgment last named, tested of that term, under which the sheriff levied upon the slaves in controversy, and sold them at public sale, when the defendant became the purchaser at the sum of $500. It was in evidence that when the sheriff levied upon the said slaves under the first mentioned execution, to wit: that at the instance of Josiah Coffield, he left them in the possession of Haughton, where they remained until they were produced at the sale made by the trustee Heath, the sheriff having never had actual possession under that execution.

His Honor charged the jury that upon this statement of facts, (295) if believed, the plaintiff was entitled to recover. A verdict was returned for the plaintiff and the defendant appealed. No counsel appeared for the defendant in this court.

Heath for the plaintiff.

RUFFIN, C. J. The objections taken to the plaintiff's recovery are that at the time of Haughton's conveyance his title had been divested by the levy of the execution, or had been turned into a mere right, and therefore inalienable by an adverse possession in the sheriff.

It might be adduced as an answer that in point of fact there was not an adverse possession. It actually remained with Haughton up to the execution of the deed by him, and indeed, until the sale and delivery to the plaintiff. To many purposes the possession of Haughton may be that of the sheriff; yet it could not be so in the sense of being adverse to Haughton himself, and of turning any right he had in the slave into a chose in action. That cannot happen except when the right is in one person and the possession is actually and exclusively in some other. If Haughton had any right in the slave it was in this case a right in possession, subject nevertheless to the lien of the execution.

But the court does not sustain the judgment by confining the opinion to that point. We think the objection is throughout fallacious. The principles on which it is founded seem to us to be misapprehended and misapplied. If the possession had not been left with Haughton, but had been taken and kept by the sheriff personally, yet, in our judgment the right of the defendant in execution would not have been absolutely divested, but an interest would have been left in him capable of being sold and legally conveyed.

It is true that it is said when a sheriff seizes goods the property is changed. A seizure to the value of the debt *prima facie* satisfies it and discharges the debtor; and therefore the defendant loses the property and it vests in the sheriff. But if the sheriff seizes less than the value, the debt on the one hand is not paid, and if he seizes more than the
(296) value the property, on the other hand, does not belong absolutely to the sheriff. The general proposition, then, that the property in goods taken in execution is in the sheriff must be understood with qualifications. The law gives him the property to enable him to raise the money he is commanded to make; and the property is given as far as it is necessary for that purpose, but no farther. As far as it is vested in the sheriff it is divested out of the defendant, but of course no farther. This interest in the sheriff is called the special property; that is to say, such a right and possession as is deemed necessary to the special purpose of satisfying the execution debt; which enables the sheriff to make a sale of it, to defend his possession and to bring an action against one who disturbs his possession before the execution has been satisfied. But it results from the very terms "special property," that, subject to the raising of the debt, the general property is in the former owner. Every case

of bailment gives rise to a similar division of property, if the expression may be allowed. In reference to the particular case under consideration this general ownership and its nature as a present value interest will be plainly established by recurring to a few legal positions, which are undeniable. Upon payment of the debt to the sheriff the general unqualified property is *ipso facto* in the defendant; and the sheriff loses his property without having made a sale, and without any farther or other act by him and even against his will. Again, if the sheriff make a sale for a larger sum than is due on the execution, the excess belongs to the debtor and may be recovered in an action for money had and received. The reason is because it is the proceeds of the sale of the defendant's property. The interest of the sheriff is therefore limited by the purpose for which it was created, which is the creditor's satisfaction. Beyond that the sheriff holds for the original owner, whose interest is, therefore, obviously a valuable present property, the subject of sale and conveyance, but liable in the hands of the assignee, as it was in those of the assignor, to be defeated by a sale of the chattels, if the debt be not otherwise discharged.

The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Alexander v. Springs, 27 N. C., 479; *Murchison v. White,* 30 N. C., 54.

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(297)

PETER ISLAY v. WILLIAM W. STEWART.

Purchase at Execution Sale—Delivery—Undivided Interest in Chattels. Justice's Executions.

1. The purchaser at an execution sale buys the *interest* of the defendant in execution, and cannot object, when the price is demanded, that the goods *belonged* to himself, or to a third person.

2. Upon a sale of goods made by a trustee, mutually appointed by the parties contending for the goods or their proceeds, if it were part of the agreement that the trustee should at all events collect the money and hold it subject to the decisions of certain arbitrators, then, in a suit by the trustee for the price of the goods before any award made, it would be repugnant to the agreement to permit one of the parties who purchased the goods to withhold the purchase money upon an *allegation* of a preferable claim, or to suffer the validity of such claim to be adjudged when its opponents had not an opportunity to contest it.

3. The legal interest of a defendant in undivided *chattels* may be seized and sold under execution.

4. Justices' executions are by law made returnable *in* three months from their date (see 1 Rev. Stat., ch. 62, sec. 16), but it is not necessary that they should be returned on the last day of the three months. They may be returned sooner, and *aliases* taken out and acted upon.

5. Where the controversy in a cause turns upon the meaning of the parties to a verbal agreement in relation to a matter upon which there is room for dispute, it is proper for the judge to leave it to the jury as a question of fact to ascertain what was the agreement of the parties in relation to such matter.

6. When the purchaser of goods takes them away, it amounts to a delivery.

THIS was an action of assumpsit, brought to recover the price of a quantity of corn sold and delivered, to which the defendant pleaded the *general issue.* Upon the trial at Guilford, on the last circuit, before his Honor, *Judge Pearson,* it appeared in evidence that the plaintiff as constable, had, under certain executions against the goods of one Carmack, levied on his share in a quantity of corn, of which one undivided third part belonged to the defendant, and the other two undivided third parts were supposed to be the property of Carmack. At the day of sale the defendant appeared, claimed the share levied on as his under a convey-
(298) ance from the said Carmack, and forbade the sale thereof. The plaintiff refused to proceed with the sale without an indemnity, and Smith, the principal execution creditor, instructed the plaintiff to prepare the bond of indemnity. The plaintiff retired to prepare the bond, and in his absence it was agreed between Smith and the defendant that the sale should proceed, and they, the said Smith and the defendant, would refer to arbitration the decision of the question, which of them should be entitled to the proceeds. It did not distinctly appear whether the plaintiff agreed to sell under this arrangement, or refused to sell except as constable, and under the executions; nor was there any express declaration of the parties to the agreement, whether, in the event of either of them becoming the purchaser, payment of the price was to be made to the plaintiff, and the application of the money depend on the award of the arbitrators, or the payment itself to be delayed until the arbitrators should settle the disputed right. The plaintiff, however, after this agreement sold the share which was levied on as Carmack's, and the defendant became the purchaser. No award had been made, and it was insisted by the plaintiff, first, that the sale was made by him as constable, and not under the arrangement; and secondly, if made under the arrangement he was entitled and bound to collect the price and hold the money for the benefit of him or them to whom it might be awarded thereafter. The defendant offered evidence to show that he had a

good title by Carmack's conveyance to the corn sold, which testimony was rejected by the court as irrelevant. He then insisted that the plaintiff had not a right to sell as constable, because the executions under which he levied had been renewed before the expiration of three months after they first issued, and secondly, because an undivided share in corn was not liable to execution. He further objected to the claim set up under a sale pursuant to the arrangement between Smith and the defendant; that by that arrangement the defendant was not bound to pay the price before the right to the money was ascertained in the manner agreed on. The court left it to the jury as a question of fact, in what character the plaintiff sold, instructing them that if the sale were made by him merely as an officer, and by virtue of his levy the objections to the validity of the sale because of the renewal of the (299) executions and of the joint possession of the corn, did not avail the defendant, and that if the sale were made by him under the arrangement, the right of the plaintiff to recover would depend upon what the jury should infer from the evidence to have been the understanding or agreement respecting the payment of the money. If it were a part of that agreement that whether the creditors or defendant bought, the money was to be received by the plaintiff, and by him held subject to the award of arbitrators, the plaintiff was entitled to recover. But if it were a part of that agreement, that if the creditors or defendant bought, the price was not to be exacted until an award made, then the plaintiff was not entitled to recover. Another objection was made by the defendant, that the plaintiff had not shown any delivery of the corn to the defendant, upon which the court instructed the jury if the defendant, after the purchase, carried away the corn (as was expressly testified by witnesses) this amounted to a delivery. The plaintiff had a verdict and judgment and the defendant appealed.

J. T. Morehead for the defendant.
Mendenhall for the plaintiff.

GASTON, J., after stating the case as above, proceeded: We do not perceive any error in the rejection of the testimony offered, or in the instructions given. Considering the sale as an ordinary execution sale, there was no warranty of title, express or implied. The purchaser at such a sale buys the *interest* of the defendant in execution, and cannot object when the price is demanded, that the goods bought belonged to himself or to a third person. Regarding the sale as it probably was, the sale of a trustee mutually appointed by the contending claimants of the property, the validity of their respective claims was to depend on the decision of a special tribunal, before whom *those parties* were to litigate

these claims. If it were part of the agreement that the trustee or commissioners should at all events collect the money—and unless this were part of the agreement the plaintiff could not recover, it would be
(300) repugnant to the agreement to permit the purchase money to be withheld upon an *allegation* of a preferable claim, or to suffer the validity of such claim to be adjudged, when its opponents had not an opportunity to contest it. We know of no principle of law which forbids a seizure and sale of a defendant's legal interest in undivided chattels. In contemplation of law it is perfectly distinct from that of his co-tenant. Each hath a several interest, though the occupation be joint. Justices' executors are by law made returnable *in* three months from their date, and after the expiration of that time they become effete. But it is not necessary that they should be returned on the last day of the three months. They resemble in this respect the *warrants* of justices which are "returnable *on or before* thirty days from the date thereof."

The main controversy in the case probably turned upon the meaning of the parties to the agreement in relation to a matter upon which there was room for dispute, whether the arbitration was to precede or follow after the payment of the purchase money. There could be no doubt but that if any other than the parties to the agreement bought at the sale the price was to be immediately paid—and there was no explicit understanding that there should be an exception in case either of the parties bought. The judge was warranted, we think, in leaving this part of the case to the jury as one of fact, to be determined upon the evidence. If the fact were, as the jury found it to be, then under the agreement the plaintiff became the *lawful owner* of the goods *pro hac vice;* as such was entitled to the price thereof, and must hereafter account for the money received upon the sale, to those who shall show their preferable right to it. Whether the defendant have or have not such right the judgment in this case does not determine.

On the question of delivery we see no ground for doubt.

PER CURIAM. Judgment affirmed.

Cited: Lyerly v. Wheeler, 33 N. C., 290; *Blevins v. Baker, id.,* 293; *Starnes v. Erwin,* 32 N. C., 229; *Adams v. Reeves,* 68 N. C., 140; *Pendleton v. Jones,* 82 N. C., 251; *S. v. Alphin,* 84 N. C., 748; *Shaw v. Burney,* 86 N. C., 334; *Leach v. Jones, id.,* 405; *Doubleday v. Ice,* 122 N. C., 677.

(301)

THOMAS RING v. POLLY KING, EXECUTRIX OF JOHN KING.

Boundary—Possession—Appeal.

1. In questions of boundary the distance called for in a certain line in the deed must govern, unless the party can show that a corner was made beyond such distance. In order to fix the *terminus* of such line, he will not be allowed to reverse a subsequent line, unless by so doing there exists something to render the means of identifying it more certain than the calls of the deed; but if it appear that the subsequent line was actually run and marked, the prior line may be extended to it in order to ascertain the true corner.

2. The possession by the owner of a part of a tract of land is the possession of the whole tract only so long as no other person is in the actual adverse possession of any part. As soon as another takes possession of any part, either with or without title, the former possessor loses the possession of that part, and cannot maintain trespass for any act done on such part while he is thus out of possession of it.

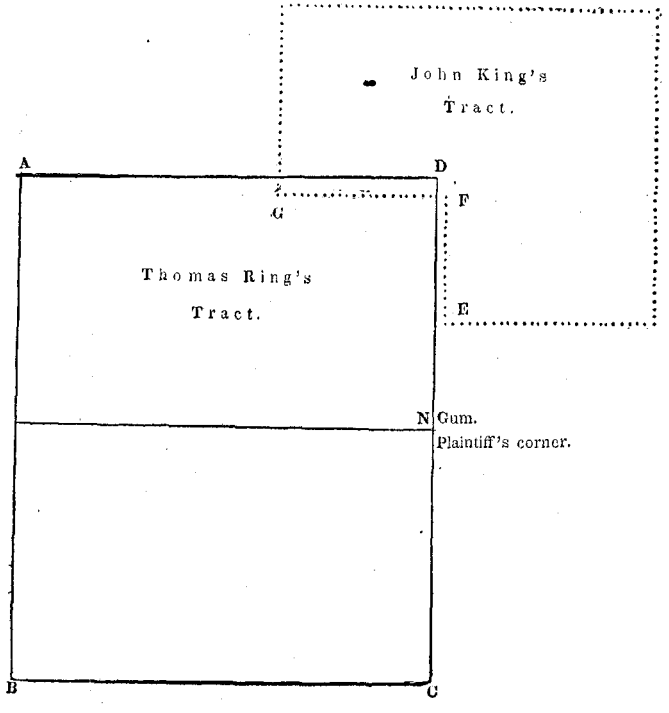
3. The case of *Graham v. Huston*, 15 N. C., 232, approved.

4. On appeals to the Supreme Court, questions of law—except such as appear on the *record* strictly so called—are not allowed to be raised in that court which were not before the court from which the appeal was taken. The *case* made by the judge below is regarded, as nearly as possible, in the light of a bill of exceptions for specified errors. The presumption is that whatever is not complained of was rightfully done; but this presumption cannot hold against what appears. When by no reasonable intendment facts can be supposed to have been shown upon which the charge of the judge was given, and without which the charge misdirected the jury upon a question of law presented by the pleadings and evidence upon a matter material to the issues which they had to try, an error is presented upon a point which, though not made in the court below, the Supreme Court cannot overlook.

THIS was an action of *trespass quare clausum fregit*, tried at Stokes, on the fall circuit of 1837, before his Honor, *Judge Saunders*.

The case as stated by his Honor was as follows: Two questions were made in this cause; the first as to boundary and the other upon the statute of limitations. The plaintiff offered in evidence a grant to John Waggoner dated in 1784, the calls of which were admitted to be A, B, C, as represented on the annexed diagram. From C the distance called for would terminate at F, and a line from that point to the beginning would not include the *locus in quo;* but the plaintiff contended (302) that he had the right to go to D, as the true terminus, and from thence to A, which would cover the place of the trespass. He further offered in evidence a deed to himself from Thomas Ring, Sr., dated in November, 1793, for 200 acres of land, and proved by one Charles Bouner that he, the witness, had surveyed the land many years ago, that

he began at A and run to D, where he made a corner; that he did not then run the cross line, but years after he did run the line and made a corner on the gum at N; that the remainder of the lines he did not run. The plaintiff then, to establish D as Thomas Ring, Sr.'s, old corner, introduced several witnesses who proved two pines, a popular and chestnut to have been old marked trees on the line from A to D; that one of the pines was blacked and the marks corresponded in years with the grant. The surveyor testified that these trees, as pointed out, would be in a line from A to D. The defendant offered in evidence a grant to one John Snow, dated in November, 1797, the boundaries of which were established to be according to the dotted lines on the diagram. He also offered a deed to himself from Snow, dated in June, 1833. The defendant then proved that Snow's son had settled on this tract of land, and cleared down to the dotted line between G and F; that at the time he cleared, something was said about the line, and he said he did not know where it was; that the son, as his father's tenant, had cultivated the land five or six years before the sale to defendant, and continued the



possession of the *locus in quo* up to the time of the sale. After the sale to the defendant and immediately upon the going out of Snow, the defendant entered and continued the possession (there being no interval between the possession of Snow and the defendant), and was about to remove the fence so as to run it above the black line as claimed by the plaintiff. The plaintiff forbid the defendant's removing the rails, notwithstanding which the defendant did remove them, and this was the trespass complained of, which was committed about a month before the suit was brought. Marks were found on the dotted line, between G and F, corresponding in age with the grant to Snow, but no marked corners were found at either of those points.

The court charged the jury "that the plaintiff, in running from (303) the third corner which was admitted to be C, would be confined to distance unless he could satisfy them the corner had been made beyond it. That the plaintiff could not be allowed to reverse a subsequent line in order to fix the *terminus* of a prior line, unless by doing so there existed something to render the means of identifying more certain than the calls of the deed; that if the jury should be satisfied as to the trees spoken of on the black line from A to D, and were convinced that such a line was actually run as the line at the time of the original survey, they might then extend the line from C towards D, and thus decide whether the true corner was at D or F. As to the question of the statute of limitations, the court charged that "although more than three (304) years had elapsed from the time of the trespass being first committed by Snow, the former tenant, yet if he moved off, and the defendant entered after the date of his deed and removed the rails, as testified to by the witnesses, as the plaintiff had been living on the 200-acre tract he would be considered as holding to his true boundary, and might sustain his action." The plaintiff had a verdict and judgment and the defendant appealed.

Boyden for the defendant.
J. T. Morehead for the plaintiff.

GASTON, J. The case made up by the judge, who tried this cause, states that two questions arose upon the trial: One as to the boundaries of the deed under which the plaintiff claimed the land where the alleged trespass was committed, and the other whether the action was barred by the statute of limitations. Upon the first question there has been no dispute here. The defendant's counsel admits, and very properly, that the judge's instruction upon that point was correct. On the second question, if it can be regarded as one confined to the operation of the statute of limitations, this court would hold with the court below that the de-

fendant was not protected by that statute. But the difficulty is, whether the case does not show that another question was *necessarily* presented, though not in express terms stated for the decision of that court, and whether the decision thereon was not erroneous. After setting forth the instructions upon the question of boundary the case states that the land whereon the trespass was alleged to have been committed is also within the boundaries of the grant to Snow; that Snow held the possession thereof for five or six years before he conveyed to the defendant; that after the conveyance the defendant entered in upon Snow's tenant, and that the defendant remained in possession continually thereafter until the institution of the action. It states also that after the defendant thus entered he was about to remove a fence which had been put thereon by Snow's tenant, when he was forbidden by the plaintiff; and this removal was the trespass complained of. Upon these facts a con-
(305) troversy arose, as the case states, upon the statute of limitations, when his Honor charged the jury that although more than three years had elapsed from the time of the trespass committed by Snow, yet if he moved off and the defendant thereupon entered and removed the rails, inasmuch as the plaintiff had been living within the limits of his tract, "he would be considered as *holding to his true boundary,* and *therefore* might sustain his action." Upon this statement and upon this instruction we are compelled to see that the question of law really presented for consideration was whether the plaintiff could be regarded as having such a possession of the *locus in quo* at the time of the removal of the rails by the defendant, that this act amounted to a trespass. If he had, the action could be sustained, because the trespass was within three years before the institution of the suit. If he had not, the plaintiff could not recover, not indeed because of the statute of limitations, for the defendant was not sued for the act of a former possessor, but because the removal of the rails complained of was not a trespass.

Upon this question of law the instruction was erroneous. Admit that the *locus in quo* was within the true boundary of the plaintiff's tract, and that the plaintiff was in possession within the limits of his tract, yet before the alleged trespass was committed and continually thereafter, the defendant had the actual adverse possession of this particular part. Now the position that where a man is residing on a tract his possession extends to the boundaries of that tract, must be understood with the exception of such parts thereof as are in the actual adverse possession of another. The possession of a part is a possession of the whole only so long as no other is in the actual possession of any part. As soon as another takes possession of any part, either with or without title, the former possessor loses the possession of that part. *Graham v. Houston,* 4 Dev., 232. Without a possession actual or constructive in the plaintiff

trespass could not be committed upon him, for trespass is an injury to the possession.

It must not be understood from our noticing this objection that we allow questions of law to be raised here, except such as appear on *the record,* strictly so called, which were not before the court from which the appeal was taken. Our rule is to regard, as nearly as (306) we can, the *case* made by the judge in the light of a bill of exceptions for specified errors. The presumption is that whatever is not complained of was rightfully done. But we cannot presume against what appears. If by any reasonable intendment we could suppose facts shown, which, notwithstanding those admitted constituted the defendant's act a trespass—inasmuch as the opinion of the judge upon that point was not directly called for, we might hold it our duty to make the intendment. But if we cannot—and we do not see how we can—then the jury was misdirected upon a question of law presented by the pleadings and the evidence upon a matter material to the issues which they had to try. The consequence of the mistake—though perhaps it would not have occurred had that question been more distinctly propounded—has been a verdict and judgment against law. This is an error which, when shown to us, we are bound to correct.

The judgment of the Superior Court is to be reversed and a new trial awarded.

PER CURIAM. Judgment reversed.

Cited: Briggs v. Evans, 27 N. C., 21; *State v. Langford,* 44 N. C., 444; *Bank v. Graham,* 82 N. C., 491; *Burton v. R. R.,* 84 N. C., 199; *Thornton v. Brady,* 100 N. C., 40; *Walton v. McKesson,* 101 N. C., 436; *Roberts v. Preston,* 106 N. C., 420.

(307)

GEORGE FARLEY v. THOMAS L. LEA.

Judgment—Execution—Case Agreed.

1. Judgments of a court of record, on whatever day of the term they may be rendered, in law relate to and are considered judgments of the first day of the term; and this rule applies although the judgments were confessed upon writs which were noted by the clerk to have been issued, and the service of which were acknowledged, on a day subsequent to the first day of the term; and executions issued upon such last-mentioned judgments will have priority over a deed in trust proved and registered on the second day of the same term.

2. The sheriff is protected by a writ of *fieri facias,* and is not bound to show any judgment. It is sufficient for his defense that he has acted in obedience to a mandate proceeding from a court of competent authority; and

if he have a writ of execution bearing *teste* the first day of the term, he may by virtue thereof take away goods of the defendant in the hands of a person who had *bona fide* purchased them since the *teste* of the writ.

3. Where certain facts are agreed upon for the purpose of presenting a particular question to the court, the case is not open to an objection raising another question upon a particular fact not appearing in the statement.

4. A judgment by confession is valid without any previous process.

5. Where a testator died in term time before a judgment was signed: *It was held*, that it might be signed after, and execution taken out against his goods in the hands of his executor *tested* the first day of the term, for they relate to and are considered as a judgment and execution of the first day of the term, at which day the testator was alive.

THIS was an action of trover, brought by the plaintiff as trustee, against the defendant as sheriff of Caswell County, for selling certain property, and was submitted to his Honor *Judge Pearson,* at Caswell, on the last circuit, upon a case agreed. If his Honor should think that the plaintiff was entitled to recover, judgment was to be entered for him for $132, if not then the judgment was to be for the defendant.

It was admitted that the plaintiff held a deed of trust executed to him by one Crockett, conveying the property in trust to sell and pay the debts therein mentioned. The deed was executed on 9 May, 1833, and was proved and registered at 3 o'clock p. m. of the same day, being the Tuesday of Caswell Superior Court. It was further admitted (308) that the defendant, the sheriff of Caswell County, sold the property mentioned in the trust for $132, at the instance of one Finley and one Lea, two of Crockett's creditors, under execution *tested* the Monday of said term of said court, being 8 May, 1833; that these executions were issued upon judgments confessed by Crocket on the Friday of the same term of said court, being 12 May, 1833, and that the writ upon which Finley's judgment was confessed issued on 12 May, 1833, and the writ on which Lea's judgment was confessed was issued on 11 May, 1833, but both writs were *tested,* as of the preceding term, service of them was acknowledged, the writs were returned into court and the judgments were confessed on Friday of the term, viz.: 12 May, 1833, as above stated.

The defendant's counsel insisted that the executions related back and bound the property from the *teste,* viz: Monday, 8 May, 1833. The plaintiff's counsel contended that the executions could not relate back farther than the day of the term when the writs issued and were returned and the judgments confessed.

His Honor being of opinion that the plaintiff was entitled to recover, judgment was accordingly entered for him, and the defendant appealed.

W. A. Graham for the defendant.
Winston for the plaintiff.

GASTON, J. No position can be more firmly established than that the judgments of a court of record, on whatever day of the term they may in fact be rendered, in law relate to, and are considered as judgments of the first day of the term. This is admitted by the plaintiff's counsel to be the general doctrine, but its application to the judgment in the case before us is denied, because the writ on which the defendant therein acknowledged service is noted by the clerk to have been issued on a day subsequent to the first day of the term, and therefore it is inferred that the judgment could not have been *in fact* rendered on the first day of the term. It may well be questioned whether this be a necessary inference, for a judgment by confession is valid without any previ- (309) ous process. But admit the inference to be irresistible, the fact so inferred is wholly immaterial. In the language of the court in the case of *Johnson v. Smith,* 2 Bur., 967, "the reason why nobody shall be permitted to aver that a judgment was signed after the first day of the term or that a *fieri facias* was taken out in the vacation, is because the fact is not relevant; the *legal* consequences do not depend on the truth of *the fact* on what day the judgment was completed or the writ actually taken out; but upon the *rule of law* that they shall be deemed complete and bind to all intents and purposes by relation." That a judgment rendered in fact on a late day of the term is as operative as though it were rendered on the first day thereof seems incontestable. Where a testator died in term time, before a judgment was signed, it was held that it might be signed after, and execution taken out against his goods in the hands of his executor tested the first day of the term, for they relate to, and are considered as a judgment and execution of the first day of the term, at which day the testator was alive. *Bragner v. Langmead,* 7 Term, 20. See, also, *Fann v. Atkinson,* Willis 427; *Waghorne v. Langmead,* 1 Bost. and Pul., 571. So where a testator gave a warrant of attorney to confess a judgment and died within a year afterwards, so that a judgment might be entered up without leave of the court it was held that a judgment entered up after his death related to the first day of the term of which it was entered, when he was living, and that an execution tested of that day might be levied on his goods in the hands of his executor. *Odes v. Woodward,* 2 Ld. Ray, 766, 849; 1 Salk., 87. See, also, *Robinson v. Tonge,* 3 P. Wms., 397. This legal relation of the judgment to the first day of the judicial term is as perfect as was at common law the relation of an act of Parliament to the first day of the legislative session. No matter on what day of the session the statute was enacted, unless a certain time were therein appointed when the same

should first take effect, it had relation to the first day of the Parliament, and from that day was *accounted in law a perfect act. Partridge v. Strange and Croker,* 1 Plow., 79; *Attorney General v. Panter,* 6 (310) Bro. Par. Ca., 533; *Latless v. Holmes,* 4 Term, 660. The inconveniences found to result from the law of relation as applied to statutes, have been remedied both in England and in this country by positive legislation. The law of relation applicable to judgments has been, in part, changed in that country by the statute of 29 Chas. II; but in this State it remains as it was at common law.

But the controversy in this case does not depend upon the relation of the judgment. The defendant is protected by the writ of *fieri facias,* and he is not bound to show any judgment. *Cotes v. Mitchell,* 3 Lev., 20. It is sufficient for his defense that he has acted in obedience to a mandate proceeding from a court of competent authority. The *fieri facias* was tested of the first day of the term, and it is not to be questioned but that, at common law, the goods of a defendant are bound from the teste of a *fieri facias,* and may by virtue thereof be taken in execution by the sheriff in the hands of a person who had *bona fide* purchased them since the *teste* of the writ. In England the statute of 29 Chas. II. has provided that, against purchasers, no writ of execution shall bind the goods but from the time such writ was delivered to the sheriff. We, however, have no such statute here, and therefore with us the writ binds against all persons from the *teste,* as it yet does in England, where purchasers are not concerned.

The counsel for the plaintiff has objected that it does not appear that the *fieri facias* was returned by the sheriff. Whatever weight the objection might have, if it appeared that the writ had not been returned, the Court is of opinion that this case is not open to the objection. It is manifest that the sole question presented for decision upon the facts agreed is, whether the *fieri facias* or the conveyance to the trustee be entitled to priority. The proceedings of the sheriff upon the writ—if in law such writ was entitled to the priority—must be understood to have been rightfully and regularly done.

This Court being of opinion that the execution did bind from its *teste,* and that *teste* being prior to the registration of the deed, it follows that the judgment below must be reversed and judgment upon the case agreed be rendered for the defendant.

PER CURIAM. Judgment reversed.

Cited: Foust v. Trice, 53 N. C., 494; *Rutherford v. Raburn,* 32 N. C., 146; *Clifton v. Wynne,* 81 N. C., 162; *Webber v. Webber,* 83 N. C., 283; *Symons v. Northern,* 49 N. C., 242; *Lea v. Smith,* 24 N. C., 227; *Peoples v. Norwood,* 94 N. C., 172; *Harding v. Spivey,* 30 N. C., 65; *Davison v. Land Co.,* 120 N. C., 259.

(311)

JAMES E. METTS v. MORTIMER BRIGHT AND WATSON WILCOX.

Registration of Deed—Fraction of a Day.

1. It is a maxim that in law there is no fraction of a day; yet that doctrine no longer prevails when it becomes essential for the purposes of justice to ascertain the exact hour or minute when particular acts were done. Therefore, where a deed in trust was proved and delivered at a certain hour of the day to the register, who immediately commenced the registration thereof, but without endorsing on the deed the time when it was delivered to him, and two hours afterwards, on the same day, a justice's execution was levied upon the property conveyed in the trust: *It was held*, that the hour at which the deed was delivered to the register for registration might be proved by parol evidence, and that it had priority over the levy under the execution.

2. The act of 1829 (1 Rev. Stat., ch. 37, sec. 26) directs the register to endorse on each deed of trust the day when it is delivered to him for registration, and that such endorsement shall be entered on the register's books and form a part of the registration; but an omission by the officer to perform that duty, although he is liable to an action and an indictment for such neglect, will not render the registration invalid; but it is questionable whether, in such case, the registration can refer back to an antecedent day by means of parol evidence of the time when the deed in trust was delivered to the register for registration.

3. The registration of a deed in trust is deemed to be complete from the time when the register commences it.

THIS was an action of *trespass vi et armis,* submitted to his Honor, *Judge Saunders,* at Lenoir, on the last spring circuit, upon the following case agreed:

One John Stephens, being indebted to the firm of J. & J. C. (312) Washington, for the purpose of securing the payment of the debt, conveyed certain property by a deed in trust to James E. Metts, the plaintiff, as trustee. The property was left in the possession of Stephens. The deed in trust was dated 11 October, 1837, and was proved before the clerk of the county court and deposited in the register's office for registration at 7 o'clock p. m. of the same day. No memorandum was made on the deed by the register of the time of its deposit in his office. He immediately, however, commenced the registration of the deed and continued until it was completed, and endorsed upon it "enrolled in the register's office the 11th of October, 1837."

At 9 o'clock p. m. of the same day the firm of Wilcox & White, of which the defendant Wilcox was a partner, obtained a judgment before a justice of the peace against the said John Stephens, and an execution was immediately issued, and by the direction of the defendant Wilcox was levied by the defendant Bright on the property conveyed in the deed

of trust. For this levy and seizure this action was brought by the trustee. If the court should be of opinion that the officer was justified by the execution in making the levy and seizure, then judgment was to be rendered for the defendants, otherwise for the plaintiff for a certain sum and costs.

His Honor held upon these facts that "according to the case of *McKinnon v. McLean* (*ante*, vol. 2, p. 79), it would seem that the deed has priority. The fact of delivery to the register may be proved by parol when the register has omitted to note the time; and as the object is to give notice to creditors and purchasers, the deed being in the register's office, they have the means thereby of perusing the original or transcript, and there inform themselves of its contents. The law does not regard the fraction of a day unless time be material, but it will take notice of a *prius* and *posterius* when it is necessary for the ends of justice."

Judgment was rendered for the plaintiff and the defendant appealed.

J. H. Bryan for the defendant.
No counsel appeared for the plaintiff in this Court.

(313) DANIEL, J. Justices' executions bind personal property only from the levy. 1 Rev. Stat., ch. 45, sec. 16. Mortgages and deeds in trust are good against creditors and purchasers only from the date of registration. 1 Rev. Stat., ch. 37, sec. 24. In this case the registration of the deed from Stephens, under which the plaintiff claims, and the constable's levy under the justice's execution against the said Stephens, under which the defendant claims, were made on the same day, to wit: on 11 October, 1837. The deed in trust had been proved, and was delivered to the register at 7 o'clock p. m. on that day, and he immediately commenced registering it, and continued until the same was completed. The endorsation on it simply is "enrolled in the register's office 11 October, 1837." The defendant's judgments were obtained at 9 o'clock p. m. the same day—executions were immediately issued and the constable levied, on the same day, on the property contained in the plaintiff's deed in trust. The judge said that the law does not regard the fractions of a day unless time be material, but that it will take notice of a *prior* and a *posterior* when it is necessary for the ends of justice. This opinion was correct. It is a maxim that in law there is no fraction of a day. Co. Lit, 135-136; 9 East's Rep., 154; 11 East's Rep., 496; 4 Term. Rep., 660. Yet that doctrine no longer prevails when it becomes essential for the purposes of justice to ascertain the exact hour or minute. 9 East's Rep., 154; 3 Coke Rep., 36; 3 Bur. Rep., 1434; 2 Bur. and Ald., 586; 3 Chitty's Prac., 113. The Legislature directs (1 Rev. Stat., ch. 37, sec. 26) that the register shall endorse on each deed of trust or mortgage the day

on which it is delivered to him for registration, and such endorsement shall be entered on the register's books and form a part of the registration; and he shall immediately thereafter register such deeds in the order of time they are delivered to him. The direction contained in this section of the act was intended to preserve the best evidence of the fact of priority in delivery and registration of deeds of trust and mortgages. The register is subject to an action and an indictment if he omit this duty. Certainly it is not essential to the validity of a registration that the day of delivery to the register should be endorsed on the deed and registered with it in the book of the office. If this duty (314) is not performed by the register it may be questionable whether the registration can refer back to an antecedent day by means of parol evidence of that fact. But there is no claim on the part of the plaintiff here to carry back the registration beyond the day whereon it was registered and certified to have been registered. Our Legislature has not been as particular as the British parliament have been in framing some of their registry acts. It has not directed the register to note the hour of the day when deeds shall have been delivered into his office. In *McKennon v. McLean* (*ante* 2 vol., p. 79), this court held that "registration in itself is but one thing, necessarily indeed made up of successive operations, consuming more than an instant of time; and as the registration cannot be said not to exist at any instant after it was begun, the intermediate lapse of time is not regarded, and the whole relates to the first moment, so as to make the act operative therefrom. From the beginning the whole is one continuing act, and therefore in legal contemplation it is done from the commencement." The registry of the plaintiff's deed in trust was commenced, if not finished, before the defendant's levy. We are, therefore, of the opinion that the law was properly expounded by the Superior Court, and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Parker v. Scott, 64 N. C., 120; *Cunninggim v. Peterson,* 109 N. C., 37; *Davis v. Whitaker,* 114 N. C., 280; *Glanton v. Jacobs,* 117 N. C., 429.

(315)

JOHN GRIFFIS v. WILLIS SELLARS.

Malicious Prosecution—Probable Cause.

In an action for a malicious prosecution a verdict and judgment of conviction in a court of competent jurisdiction, although the party convicted was afterwards acquitted upon an appeal to a superior tribunal, is conclusive evidence of probably cause, and precludes the plaintiff in the action for the malicious prosecution from showing the contrary.

GRIFFIS *v.* SELLARS.

THIS was an action of trespass on the case for a malicious prosecution. Plea—not guilty.

It appeared upon the trial at Orange, on the last circuit, before his Honor, *Judge Pearson,* that the defendant had instituted a prosecution in the county court against the plaintiff, and his brother and mother, for mismarking the defendant's hogs, and that the plaintiff and his brother had been convicted in the county court, but upon an appeal had been acquitted of the charge in the Superior Court. The plaintiff then offered to prove that the conviction in the county court was founded upon the testimony of the defendant and one other witness only; that the defendant and the other witness who was in his employment and under his influence had given false testimony on the trial; that before the charge was preferred they had express knowledge of the plaintiff's innocence and that the defendant was actuated in the institution and prosecution of the indictment by the most express malice. To this evidence the defendant objected, and insisted that the verdict of guilty in the county court, although it was appealed from and the defendant acquitted in the Superior Court, was conclusive proof of probable cause and could not be contradicted by any species of evidence. His Honor being of this opinion refused to admit the evidence, and the plaintiff submitted to a judgment of nonsuit and appealed.

W. A. Graham and W. H. Haywood for the plaintiff.
No counsel appeared for the defendant in this Court.

(316) RUFFIN, C. J. This case differs from that which was before the court a year ago between the plaintiff's brother and the same defendant (*ante* 2, vol. 492) only in showing more explicitly the innocence of the plaintiff and the malignant motive of the defendant. But the same principle governs both, notwithstanding that difference in the detail of the circumstances. The principle is that probable cause is judicially ascertained by the verdict of the jury and judgment of the court thereon, although upon an appeal a contrary verdict and judgment be given in a higher court. Our opinion being that probable cause is judicially established by those means, it follows that no evidence is competent to disprove it.

It is insisted that the present case is a strong example of the hardship of the rule, and calls for some relaxation of it at the least, since the conviction was grossly unjust, within the knowledge of the prosecutor, and obtained by perjury. It is doubtless a grievous thing that a person should be concluded as to any of his rights by a judgment founded in error, and especially if procured by perjury or subornation of perjury.

But that is the consequence of every judgment, although it may have been thus procured; and the conclusiveness of a judicial sentence is not more oppressive in its application to a case of this sort than to any other, in which the party to be affected may be able satisfactorily to explain or contradict the former proofs against him. Every party is supposed to bring to the trial all such proof as he may have, that is material to the support of the issue on his part; and every court in cases within its jurisdiction must be deemed competent duly to weigh the facts and circumstances thus in evidence, and the credit of the witnesses deposing to them. Hence another court before which the matter is brought collaterally, must receive that sentence as proving its own verity, and cannot look beyond it to the evidence on which it was founded. If the present plaintiff were at liberty to aver that the witnesses who testified against him in the county court were perjured, or that the court was mistaken in the conclusion drawn from their testimony, and to support those averments by evidence; for the same reason, the present defendant ought to be permitted, in his turn, in an action to be brought by him, to sustain by fuller proof the evidence first given by him on the prosecution, and to show that the evidence now offered by the plaintiff is itself (317) false and perjured. The result would be the interminable prosecution of the same litigation between the parties, alternately changing sides. If upon the appeal the prosecutor had been again successful in obtaining a conviction, the plaintiff could not support this action upon the proof here offered or any other, because his guilt would be conclusively established by the judgment, however corrupt were the means of procuring it. So in the present state of the case (another ingredient of the action, namely, the want of probable cause which is as essential to the plaintiff's action as is his innocence, is completely negatived, because the proof that satisfied the jury and the court then trying the plaintiff that he was guilty, must, upon the ground already adverted to, be deemed by another court to establish that there was then probable cause. The judgment in the county court justifies the institution of the prosecution in that court.)

PER CURIAM. Judgment affirmed.

Cited: Bell v. Pearcy, 33 N. C., 234.

HANNAH AND SUSANNA CARR, BY THEIR GUARDIAN, v. SARAH CARR.

Dower—Widow's Rights Therein.

A widow has not the right to make turpentine upon land assigned to her in dower which in the lifetime of her husband had not been used for that purpose. But she may rightfully use, in the ordinary mode of making turpentine, trees that have been boxed or tended for turpentine in his lifetime; and she may box new trees as those already boxed become unfit for use, so as not to enlarge the crop beyond the extent which it had when the dower was assigned.

THIS was an action of trespass on the case, in the nature of an action of waste brought by the plaintiffs against the defendant for waste alleged to have been committed by her upon the land assigned to (318) her as dower. Upon the trial at Greene, on the fall circuit of 1837, before his Honor, *Judge Dick,* it was admitted that the cleared land assigned to the defendant for dower, was sufficient for her support. The alleged waste consists in boxing and tending turpentine trees growing on the woodland portion of the dower. The court charged the jury that this was waste, and that the plaintiffs were entitled to recover. A verdict was accordingly rendered for the plaintiffs and the defendant appealed.

J. H. Bryan for the defendant.
Devereux for the plaintiffs.

GASTON, J. It has been the aim of the courts of this State, in the decision of controversies between the heir and the widow on the subject of waste to accommodate the principles of the common law to the condition of our country. So far as respects the clearing of new ground for cultivation, and the getting of staves and shingles on wild lands, this object has perhaps been accomplished with sufficient precision. As yet, however, there have been few or no adjudications in relation to the legitimate use by the tenant in dower of lands of another description, which furnish no inconsiderable part of the products of industry in the eastern section of the State. Turpentine trees are there "tended" as a regular crop, yielding an annual profit, but ultimately destructive of the trees themselves. It is our duty, by analogy to the adjudged cases, to ascertain the rights of the tenant in the use of these trees upon land assigned to her in dower. Upon the most mature consideration we are of opinion, first, that the widow has not the right to make turpentine upon land

which in the life-time of her husband had not been used for that purpose. Secondly, that she may rightfully use, in the ordinary mode of making turpentine, trees that have been boxed or tended for turpentine in his life-time. Thirdly, that she may box new trees as those already boxed become unfit for use, so as not to enlarge the crop beyond the extent which it had when the dower was assigned.

As the instruction given on the trial is understood to forbid the widow to box or tend trees for turpentine under any circumstances the judgment is reversed and a new trial awarded. (319)

PER CURIAM. Judgment reversed.

Cited: Bynum v. Carter, 26 N. C., 313; *King v. Miller,* 99 N. C., 596.

JOHN COX v. HENRY HOFFMAN.

Liability of Husband for Acts of Wife—Agency.

1. A *feme covert* may become an agent for her husband, and such an appointment as agent may be inferred from his acts and conduct respecting her. When the agency is to be inferred from his conduct, that conduct furnishes the only evidence of its extent as well as of its existence, and in solving all questions on this subject between the principal and third persons, the general rule is that the extent of the agent's authority is to be measured by the extent of his usual employment.
2. The husband is responsible for any injury done to the property of another person by the negligence, carelessness, or unskillfulness of his wife in her performance of his business, the wife, in this respect, being considered as his servant.

TROVER for a mule, tried at Chowan on the last circuit before his Honor, *Judge Bailey.*

On behalf of the plaintiff it was proved that the mule was borrowed from the plaintiff's overseer by the wife of the defendant; that the mule was the property of the plaintiff and was so injured while in the service of the defendant as to be rendered of no value, and shortly afterwards died. It was also in proof for the plaintiff that the defendant's wife had borrowed from a former overseer of the plaintiff, horses belonging to the plaintiff, and that the defendant had repeatedly expressed his thanks to the overseer for his kindness in making such loans. It also appeared that the defendant's wife had been in the habit of borrowing from another neighbor with the approbation of her husband; but that after the

borrowing of the plaintiff's mule when the defendant who was absent from home at the time, was informed of the injury done, he told (320) his wife that "he was sorry, and that she had done wrong."

His Honor instructed the jury that if they believed the mule went into the possession of the defendant's wife, and that she acquired that possession by the directions of her husband, and that she had his approbation for that particular borrowing, either express or implied, and that the mule was thereby lost to the plaintiff, the plaintiff was entitled to recover. The jury returned a verdict for the plaintiff and the defendant appealed.

Heath for the defendant.
Iredell for the plaintiff.

DANIEL, J. There can be no exception to the charge of the judge. A *feme covert* may become an agent even for her husband. Co. Litt., 52a; *Prestwick v. Marshall;* 7 Bingh., 575; 1 Esp. Rep., 142; 2 Esp. Rep., 511. Such appointment as agent may be inferred from the acts and conduct of the supposed principal respecting her. When the agency is to be inferred from the conduct of the principal, that conduct furnishes the only evidence of its extent, as well as of its existence; and in solving all questions on this subject the general rule is that the extent of the agent's authority is (as between his principal and third persons) to be measured by the extent of the usual employment of that person. *Pickering v. Busk,* 15 East, 38; *Whithead v. Tucket,* 15 East, 400; *Townsend v. Ingles;* Holt 278; 3 Esp., 60; 4 Camp., 88; 2 Stark. Rep., 368; Smith's Mer. Law, 57. Secondly, the defendant was liable for the injury done to the property of the plaintiff by the negligence, carelessness or unskillfulness of his servants in their performance of his business. The wife in the eye of the law is his servant; and the husband would be equally liable to third persons for her negligent and careless acts in doing his business, as he would be for the acts of any other of his servants. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Huntley v. Mathias, 90 N. C., 105.

(321)

ABRAHAM CARTER v. EDMUND SAMS.

Arbitration and Award.

1. If a cause be, by a rule of court, referred to certain arbitrators or a majority of them, an award made by a majority of the referees named will not be vitiated by other persons not named in the rule of reference joining in and signing the award.

2. The court will always intend everything in favor of an award and will give such construction to it that it may be supported if possible. Therefore, where arbitrators to whom a cause was referred returned an award stating that "we agree that E. S. (the defendant) pay all cost, and assess the plaintiff's damage to one hundred dollars," it will be intended that the defendant is awarded to pay the one hundred dollars, as well as the cost, to the plaintiff.

3. An award is sufficiently certain that is certain to a common intent; and the court will not intend an award to be uncertain, but the uncertainty must appear on the face of the award, or by averment. Hence, an award made under a rule of reference in a cause stating that the arbitrators "agree that E. S. pay all cost and assess the plaintiff's damage to one hundred dollars," is sufficiently certain, as it means that the defendant is awarded to pay to the plaintiff one hundred dollars and also his cost expended in the cause referred.

THIS was an action of trespass on the case for malicious prosecution. Plea—the *general issue*. At the spring term, 1838, of Buncombe Superior Court, by an agreement of the parties, the following order of reference was made, to wit: "Ordered by court, that this case be referred to Levi Baily, David Edwards, Lewis Bryant, Leonard West, and the two William Pecks, and their award or a majority of them to be a rule of court." At the succeeding term of the court an award was returned in the following words, namely: "A. Carter v. Edmund Sams. We, the undersigned, as referees, met according to appointment, and after examination do say, after two that were chosen, refused and Sams and Carter agreed and chose two others, and agree that Edmund Sams pay all cost and assess plaintiff's damage to one hundred dollars; done by us this 2 June, 1838," and it was signed by four of the referees named above, and by two others. The defendant filed the following exceptions to the award: "1. That the award was not according to the submission—it was made only by part of the referees acting with (322) other persons. 2. That the award did not set out what was to be done by the parties. It did not award that the defendant should pay to the plaintiff any amount except costs; and the defendant objected to judgment going against him for the one hundred dollars. 3. That the

award or paper called an award was unmeaning and uncertain." His Honor, *Judge Dick,* overruled the exceptions and granted a judgment according to the award, from which the defendant appealed.

No counsel appeared for either party in this Court.

DANIEL, J. This was an action of trespass on the case, plea *general issue.* Under a rule of court the differences in the cause were referred to six arbitrators and their award, or the award of a majority was to be the judgment of the court. In the vacation the plaintiff and the defendant agreed to substitute two other arbitrators in the place of two of those named in the rule of reference. The award was made and signed by four of the original arbitrators, and also by the two appointed by the parties in the vacation. The plaintiff, under the rule of court, moved for judgment. The defendant filed several exceptions to the award. First, because it was made by part of the arbitrators acting with other persons. This exception was overruled by the court, and we think it was correctly overruled. In *Saulsby v. Hodgson,* 3 Bur. Rep., 1474, the arbitrators were to choose an umpire, in case they themselves could not agree in a limited time. They did not agree within the limited time, but chose an umpire. The umpire accordingly made an award and they *joined* in it. The court were clear that this was the umpirage of the umpire alone. He was at liberty to take what advice or opinion or assessors he pleased. In *Beck v. Sargant,* 4 Taunt. Rep., 233, the court held the same doctrine. *Mansfield, C. J.,* said it was no more than if mere strangers had joined in the award, which could not vitiate. *Heath, J.* It has been decided in very old cases that the circumstances of another joining with the arbitrator in making an award does not vitiate. The same (323) opinion is given in *Bates v. Cooke,* 17 E. C. L. Rep., 231. Second exception: the arbitrators do not award that the defendant pay the plaintiff any amount except the cost. Answer: the arbitrators, after heading the award by the title of the suit, proceed and say that "we agree that Edmond Sams pay all costs and assess plaintiff's damages to one hundred dollars. Done by us, this 2 June, 1838." When the arbitrators assessed the plaintiff's damage to one hundred dollars they certainly intended that the defendant should pay it. The court will always intend everything to support awards, and give a construction to an award, that it may be supported, if possible; Watson on Awards, 102. Third exception: the award is unmeaning and uncertain. Answer: the certainty now regarded in awards is certainty to a common intent, and the court will not intend an award to be uncertain; but the uncertainty must expressly appear on the face of the award, or by averment. Watson

on Awards, 120. To a common intent, we think this award, on its face, is certain, and there is no averment in the pleadings pointing to an uncertainty. It means that the defendant is awarded to pay to the plaintiff one hundred dollars and also his cost expended in the cause referred. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Ballard v. Mitchell, 53 N. C., 157; *Thompson v. Deans,* 59 N. C., 26; *Stevens v. Brown,* 82 N. C., 462; *Osborne v. Calvert,* 83 N. C., 370.

RULES

The Judges of the Supreme Court find it necessary, as well for the accommodation of those who have occasion to attend the court, as for the efficient discharge of their own duties, to establish and publish the following rules:

All applicants for admission to the Bar must present themselves for examination during the first seven days of the term.

All cases which shall be docketed before the eighth day of the term shall stand for trial in the course of that term. Appeals permitted to be docketed after the first seven days of the term shall be tried or continued at that term at the option of the appellee. In all other causes brought up afterwards either party will be entitled to a continuance.

The court will not call causes for trial before the eighth day of the term, but will enter upon the trial of any cause in the meantime which the parties and their counsel may be desirous to try.

On the eighth day of the term the court will call over the calendar of all the causes, and then, but not afterwards, by the general consent of the Bar, a precedence may be given to causes in which gentlemen attending from a distance are concerned, over causes on any of the dockets. But unless this change be made, and subject to this change only, the court will proceed regularly with the dockets, first with the State, next with the Equity, and finally the Law docket.

When causes are called for trial by the court they must be then either argued, submitted, or continued, except under special peculiar circumstances, to be shown to the court, and except that Equity causes under a rule of reference may be kept open a reasonable time for the coming in of reports and the filing and arguing of exceptions.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE TERM, 1839

(4 DEV. AND BATTLE.)

THE STATE v. ARMSTED TERRY, JOEL VANNOY, ET AL.

Indictment—Gambling—Spirituous Liquors.

1. The playing at cards for money or property in a counting-room attached to and under the same roof with a store-room in which spirituous liquors are retailed falls within the prohibition of the Act of 1831, ch. 26 (1 Rev. Stat., ch. 34, sec. 69), forbidding the playing "at any game of cards in any house where spirituous liquors are retailed, or any outhouse or store attached thereto, or any part of the premises occupied with such house."

2. In an indictment under the above mentioned act it is sufficient to show that the spirituous liquors were in fact retailed in the house in which the playing took place; and it is no defense for the defendants that the retailer has not pursued the directions of the act of Assembly in obtaining a license to retail.

THE defendants were tried at Wilkes, on the spring circuit of 1838, before his Honor, *Judge Bailey,* upon an indictment for gaming in a house wherein spirituous liquors were retailed, contrary to the act of 1831, ch. 26 (see 1 Rev. Stat., ch. 34, sec. 69), when the jury returned a special verdict in the words following, to wit: "That the defendants, Joel Vannoy, Armsted Terry, and Thomas F. Lowery did play at cards, for a horse, in a room belonging to the said Joel Vannoy, which said room and a storeroom in said house, the said Vannoy had theretofore rented from Benj. W. Cass, in which said storeroom the said Vannoy, at the time of the playing the cards aforesaid, retailed spirituous (326) liquors without a license authorizing him so to do. And they further find that the county court of Wilkes, before the playing aforesaid, had made an order and within twelve months, that a license should issue to the said Vannoy to retail in said storehouse; and further, that it did not appear from the record aforesaid, that the said order granting a license was made by seven justices then in court; and they find further, that the room in which the cards were played was a counting room."

Upon this verdict, a motion was made to arrest the judgment, which was sustained by the court, and the solicitor for the State appealed.

DANIEL, J. The defendants are indicted for offending against the following act of Assembly: "Every person who shall play at any game of cards in any public house or tavern, or house where spirituous liquors are retailed, or any outhouse or store attached thereto, or any part of the premises occupied with such house, and bet money or property, shall be deemed guilty of a misdemeanor." 1 Rev. Stat., ch. 34, sec. 69. The jury, in a special verdict, find that Vannoy, one of the defendants, was owner of a storeroom and countingroom in one house. He retailed spirits in the storeroom, and the defendants gamed at cards, and for property, in the counting room. The store and counting room, in our opinion, constituted parts of but one establishment. The counting room was a part of the premises occupied with the store by the retailer, and the playing of cards in that room brought the defendants within the act of the Assembly.

The second question arising out of the verdict is, whether the owner was a retailer of spirituous liquors within the meaning of the said act of Assembly. We are of opinion that the circumstance of Vannoy's not having complied with all the requisites of the law in obtaining his license to retail, is no excuse for the defendants. The jury have found the fact that he did retail spirits in his storeroom. That fact satisfies the gaming act above quoted, and the charge in the indictment that spirits were retailed in the house. The judgment rendered in
(327) the Superior Court must be reversed. This opinion will be certified, that judgment may be rendered for the State.

PER CURIAM. Judgment reversed.

Cited: State v. Hawkins, 91 N. C., 628.

THE STATE v. WILLIAM REEVES.

Justice's Precept—Valid ca. sa.

A precept from a single justice of the peace, endorsed on a magistrate's judgment, and directed to the sheriff, commanding him "to take the body" of the defendant "and him safely keep until he is discharged as the law directs," though an informal, is yet a valid *ca. sa.*, and will justify the sheriff in making an arrest under it.

THIS was an indictment for an assault upon an officer while in the execution of process, tried at Bladen, on the last circuit, before his Honor, *Judge Pearson.*

It was in evidence that the sheriff had a *capias ad satisfaciendum* against the defendant, and informed him of it; whereupon he refused to be taken and attempted to strike the sheriff with a hammer. The process under which the officer acted was written upon the back of a paper which contained a magistrate's warrant and judgment in the regular form. On the same paper was also endorsed a *fieri facias,* to which the return of "no goods" was regularly made, and then followed the process in question, in the following words:

"To the Sheriff of Bladen County: You are hereby commanded to take the body of William Reeves, and him safely keep, until he is discharged as the law directs.

"July 11, 1838. JOHN MELVIN, J. P."

The defendant's counsel insisted that this was not a *ca. sa.* and (328) did not protect the officer in making the arrest. The court charged that the precept, although not in the usual form of a *ca. sa.* was sufficient to protect the officer in making the arrest. The defendant was found guilty, and, after an ineffectual motion for a new trial, appealed.

Strange for the defendant.
The Attorney-General for the State.

GASTON, J. The writ upon which the sheriff undertook to arrest the defendant is so very defective that with every disposition to view with indulgence the process of magistrates in the exercise of their civil jurisdiction, we should have great difficulty in sustaining it as an execution were it not for the principles established in former adjudications. But after it has been long *settled* that a mandate from a magistrate, endorsed upon a judgment "execute and sell the defendant's property according to law," is valid *fieri facias* to make the amount of that judgment out of the goods and chattels of the defendant, and for want of such to levy upon his lands, we do not see how we can hold that the mandate in this case is not a valid *capias ad satisfaciendum.* It is endorsed on the judgment, is addressed to the proper officer, orders the seizure of the defendant's person according to law, and if it be not a *ca. sa.* neither is nor resembles anything else. Perhaps it might have been better had a less latitudinous interpretation been originally put upon these acts of magisterial power; but we cannot now do so without throwing the law into confusion.

This opinion is to be certified to the court below with directions to proceed to judgment against the defendant accordingly; and there must be judgment against him here for costs.

PER CURIAM. Judgment to be affirmed.

(329)

JOHN McMORINE v. GEORGE STOREY, EXECUTOR.

Executor de son tort—Evidence.

1. One who administers upon the estate of a fraudulent assignee, and takes possession of the goods assigned, may, upon the death of the fraudulent assignor, be sued as executor *de son tort* by the creditors of the latter, and this although administration may have been granted upon his estate.
2. The case of *Turner v. Child*, 1 Dev. Rep., 25, explained and distinguished from this; because in that the agent, who was sought to be charged as an executor *de son tort* of his deceased principal, had been rightfully put into the possession of the property, not only as to his principal, but as to all the world.
3. Evidence of what a deceased witness swore to in another and different suit is inadmissible.
4. The law never assigns anything to an administrator but what may be rightfully assigned. Hence, goods conveyed to an assignee for the purpose of defrauding creditors are not assigned to the administrators of the assignee as against the creditors of the assignor.

AFTER the new trial granted in this case at June Term, 1838 (see 3 Dev. and Bat. Rep., 87), it was again tried at Pasquotank, on the last circuit, before his Honor, *Judge Saunders,* when the facts appeared as follows:

David Davis and Joseph Davis, who were brothers, lived together; and David made a transfer by judgment and execution sales, of all his slaves, to his brother Joseph, alleged by the plaintiff to be fraudulent; and afterwards David died indebted to the plaintiff, and one Williams qualified as his administrator. The administrator of David brought suit against Joseph to recover the slaves, and failed because the transfer, although void as to creditors, was good as between parties to it and their representatives. After this suit Joseph died, and the defendant became his administrator, and, as such, took possession of the slaves, and claimed them as the assets of his intestate Joseph. The plaintiff, as a creditor of David, brought this action against the defendant, Storey, seeking to charge him as executor *de son tort* of David Davis, and he pleaded *ne unques executor.*

The plaintiff, in making out proof of the fraudulent transfer and sale of the slaves between the two brothers, offered a witness to
(330) prove what a witness then dead had sworn in the suit between the administrator of David Davis and Joseph Davis. This evidence was objected to, but received by the court.

His Honor charged the jury that if the transfer of the slaves by David Davis to his brother Joseph was made to defraud his, David's,

creditors, then the plaintiff could, under this state of facts, recover of the defendant as executor *de son tort* of David Davis. There was a verdict for the plaintiff, and upon a motion for a new trial his Honor observed that the evidence of what the deceased witness had sworn to in the suit between the administrator of David Davis and Joseph Davis had been received subject to the opinion of the court as to its admissibility, and that he thought it inadmissible, but as the parties wished the whole case to be carried to the Supreme Court, he would overrule the motion, which he did, and gave judgment for the plaintiff, from which the defendant appealed.

A. Moore for the defendant.
Kinney and J. H. Bryan for the plaintiff.

DANIEL, J., after stating the facts of the case as above, proceeded as follows: The counsel for the defendant admits that if Joseph Davis was alive, and if the present plaintiff (a creditor of David) had sued him, he could have recovered, as Joseph was an executor *de son tort* of David. *Osborne v. Moss,* 7 John. Rep., 161. But that as Joseph died in possession of the slaves Storey intermeddled with them under a color of right as administrator of Joseph. He cited the case of *Turner v. Child,* 1 Dev. Rep., 25, and Williams on Exrs., 140. We think the counsel's references are not in point for him. In the first, Samuel Child was left agent by Francis Child, to sell property at a credit of six months, and collect the proceeds of the sale. He sold, and before the credit was out, his principal died, and he, having possession of the evidences of the debts, proceeded to collect. Two of the judges of this Court, against the opinions of the Chief Justice and the judge who tried the cause in the Superior Court, were of the opinion that this did not make him an executor *de son tort.* Samuel Child had been rightfully put (331) into possession of the property, not only as to his principal, but as to all the world. But Storey *quoad* the claim of the present plaintiff, had no right to intermeddle with the slaves by force of the letters of administration on the estate of Joseph granted to him. The letters granted by the court authorized him to administer the goods and chattels that lately belonged to Joseph. As to the creditors of David, these slaves were the assets of David. Storey, not having the possession, nor any legal authority as to the plaintiff, to take possession by force of his character of administrator of Joseph, is, in law, a wrong-doer or intermeddler with those assets of David which the law had appropriated to the satisfaction of the plaintiff's debt. In Williams on Executors, it is said, if the person claims a lien on the goods, though he may not be able to make out his title completely, he is not an executor *de son tort.* In

the case referred to by Williams, of *Femings v. Jarratt,* 1 Esp. N. P. cases, 335, the person had the possession of the goods at the time of the death of the owner. He retained and intermeddled under a colorable claim of a lien consistent with a general property in the deceased. In the case before us, Storey had not the possession. He illegally took possession of the slaves as the assets of Joseph, when, in law, they were the assets of David Davis for the benefit of his creditors.

The defendant's counsel again contends that a *bona fide* assignee of an executor *de son tort* is never liable to be sued by the creditors of the deceased debtor. For this he cited Godol. Orph. Leg., pt. 2, c. 8, s. 6, and contended that Storey, being administrator of Joseph, was, in law, the assignee of the slaves from him, the said Joseph, the first executor *de son tort.* Without stopping to enquire whether the law be as is stated we nevertheless think if the law be so, it has no applicability to this case. The law never assigns anything to an administrator but what may be rightfully assigned. The law declared that these assets in the hands of Joseph were applicable to the payment of the creditors of David. The death of Joseph could not have the effect of making them his assets, to the detriment of the creditors of David. The grant of administration did not assign these assets to Storey. As to the
(332) creditors of David he, Storey, took the slaves without any legal assignment. He is consequently, in our opinion, liable to the plaintiff as executor *de son tort* of David. The administrator cannot ever be doubly charged, viz.: to the creditors of both the brothers, if he is careful in his pleadings.

Secondly. The court admitted the evidence of what a deceased witness had sworn to in another and different suit. This was erroneous (Stark on Ev., 43), and for this reason there must be a new trial.

PER CURIAM. Judgment reversed.

Cited: Burton v. Farinholt, 86 N. C., 267; *Bryan v. Malloy,* 90 N. C., 510.

THE STATE v. WILEY FORT AND SAMUEL GAUSE.

Indictment—Forcible Trespass.

1. An indictment for any forcible trespass upon a dwelling house—short of violent taking or withholding of the possession of it—must charge that the proprietor was in the house, or actually present at the time.

2. In an indictment for a forcible entry into a dwelling house it is not necessary to charge or to show that a proprietor was in the house, or present at the time of the violent dispossession.

STATE *v.* FORT.

THE defendants were indicted at Bladen, on the last circuit, before his Honor, *Judge Pearson,* in the following words:

"The jurors for the State, upon their oath, present that Wiley Fort and Samuel Gause, late of Bladen, on, etc., with force and arms and with strong hand, in said county, the window of the dwelling house of one Griffith J. Streety there situate, did break open against the peace and dignity of the State."

A motion was made to quash the indictment, because it did not allege that the proprietor was in the house, or actually present at the time, so as to show that the act had a tendency to a breach of the peace.

The Solicitor contended that breaking a dwelling house with (333) strong hand was indictable at common law, whether the owner was present or not, because the law held dwelling houses to be sacred, and extended a peculiar protection to them. His Honor sustained the motion and quashed the indictment, and the Solicitor for the State appealed.

GASTON, J. We are of opinion that the Superior Court did not err in quashing the indictment.

The law certainly has a great respect for the immunities of a man's dwelling, but the law has not deemed it necessary for their protection to hold every direct injury to it an offense against the public. Many of these injuries are properly redressed as private wrongs by actions at the instance of the person injured. The violent taking or withholding of the *possession* of a man's house is indeed regarded as a public offense; and in an indictment for a forcible entry or detainer, the term *manu forti,* or with strong hand, being one used in statutes descriptive of the offense, is technically appropriate to designate the violence which is thus visited. In an indictment for a forcible entry it is not necessary to charge or to show that the proprietor was in the house, or present, at the time of the violent dispossession. But we find no authority for the position that a mere trespass upon the dwelling house, short of a violent taking or withholding of the possession thereof, is *per se* an offense against the community. If committed under such circumstances as necessarily involve a breach of the public peace, or have an immediate tendency to provoke it, then the act may rise from a private to a public wrong. But when prosecuted as a public wrong the indictment must show it to be such, and therefore must charge the circumstances which give to it this character. The epithet "with strong hand" cannot supply the want of the essential constituents of the offense. As connected with a mere trespass, it has no technical meaning, and amounts to no more than is expressed by the words force and arms. It does not imply the presence of the proprietor or of any of

his family—nor that the act created, or had a tendency to create, terror or indignation—and therefore does not charge an actual breach,
(334) or such conduct as is tantamount to an actual breach, of the public peace. The judgment is affirmed.

PER CURIAM. Judgment affirmed.

Cited: State v. Whitfield, 30 N. C., 316; *State v. Walker,* 32 N. C., 235; *State v. Caldwell,* 47 N. C., 470; *State v. Shepard,* 82 N. C., 616.

WILLIAM BARRETT ET AL., JUSTICES, TO THE USE OF MARY A. PERSON ET AL, V. ARCHIBALD MUNROE ET AL.

Guardian Bond—Breach—Demand.

1. The condition contained in a guardian bond that the guardian shall improve the estate of his wards "until they shall arrive at full age, *or be sooner thereto required,* and *then* render a true and faithful account of his said guardianship, etc., and deliver up, pay to and possess" his said wards of their estate, is not broken by a guardian who is removed from his office, until an account and settlement be demanded of him and he refuse to comply with such requisition, or there be such conduct on his part, tantamount to a refusal, as to render a requisition unnecessary or impracticable.

2. Whether, upon the wards coming to full age, a suit might be sustained upon such a guardian bond before a demand made for an account and settlement, *Quere?*

3. There are some instances in which, upon a simple demand of money due from the defendant to the plaintiff, although the contract *in form* is to pay the same on demand, an action may nevertheless be brought without the special averment of a demand and sustained without proof of a demand. These are cases in which it was seen, or thought to be seen, that the money was due before any demand, and therefore the demand was not regarded as one of the terms of the contract.

4. But a previous demand is necessary where the engagement sought to be enforced is an original specific undertaking by parties bound by no previous obligation and owing no duty to the plaintiffs other and further than the duty which this engagement creates.

THIS was an action of debt upon a guardian bond, tried at Moore, on the last circuit, before his Honor *Judge Pearson.* The statement of the pleadings in the transcript is so imperfect as not to show the
(335) issues submitted to the jury, but they may be ascertained from the case made out by his Honor. It appears from the transcript that the plaintiffs declared on a bond for the payment to them of the

sum of thirty thousand dollars. The defendants craved oyer of the bond and also of its condition. Upon oyer had, the latter was thus set forth: "The condition of the above obligation is such that whereas the above bounden Archibald Munroe is constituted and appointed guardian to Mary Ann Person, Samuel Jones Person, Murdock Person, and William Person. Now, if the said Archibald Munroe shall faithfully execute his guardianship by securing and improving the estate of the said Mary, Samuel, Murdock, and William, that shall come into his possession, for the benefit of said children, until they shall arrive at full age *or be sooner thereto required,* and *then* render a true and faithful account of his said guardianship on oath before the justices of the county court of Moore County, and deliver up, pay to, and possess the said Mary, Samuel, Murdock, and William of all such estate or estates as they ought to be possessed of, or to such other person as shall be lawfully impowered or authorized to receive the same, then the above obligation to be void, otherwise in full force and virtue." The transcript shows that after oyer thus had, the defendants pleaded generally performance of the condition, but does not show what replication was made to this plea. The case, however, states that the plaintiffs assigned, as breaches of the condition, that Archibald Munroe having been removed from his guardianship, and John B. Kelly having been appointed guardian in his stead, the said Munroe had failed to render an account of his guardianship—and further, that he had failed to deliver up and pay to the said Kelly the estate of the said wards. As no breaches were assigned in the declaration, it must be understood that they were assigned in the replication (where according to the better opinion they ought to be assigned, 1 Chit. Plead, 618) and that issues were joined upon the denial by the defendants of the breaches so assigned.

Upon the trial it appeared that the November Term, 1837, of (336) the county court of Moore, Munroe was removed from the guardianship, and John B. Kelly appointed guardian in his stead, who immediately thereafter sued out the writ in this case; and it was admitted that there had been no demand on Munroe for an account, or for delivery of the estate to the new guardian previously to the institution of the suit. His Honor, being of opinion that such a demand was necessary, the plaintiffs were nonsuited and appealed.

Winston for the plaintiffs.
Mendenhall for the defendant.

GASTON, J., after stating the case as above, proceeded: We decidedly concur in the opinion expressed by the judge below. Whatever construction may be put upon that part of the condition which stipulates that Munroe shall render an account to the court, and deliver up the estate of

his wards when they shall arrive at age, upon which we neither express nor intimate an opinion, it seems to us clear that the part of the condition which binds him to render such account and deliver up such estate *sooner*—that is to say, before the wards shall arrive at age—is distinctly qualified by the provision, if he "be sooner thereunto required." It is a reasonable qualification. The guardian knows when his office is to expire, and possibly it may be deemed his duty upon its expiration to be ready to render an account of his stewardship and to settle with his late ward. But he may be taken by surprise altogether—if death, removal, or other casualty should put an abrupt termination to his office—and he is instantly deemed in default for not having rendered an account or delivered up the property. He knows that the person who had been his ward is entitled on coming of age to receive the property which had been committed to his custody, but he may be wholly ignorant of the authority set up by any other person to receive it at an earlier day. But whether the qualification be reasonable or not, the defendants are sued upon their bond, and the bond cannot be held forfeited until the terms of the condition be violated. There is no analogy, we, think, between the present case and those cited in argument by the counsel for the plaintiffs. It is true that there are instances in which upon a simple demand of money due from the defendant to the plaintiff, although the con-
(337) tract *in form* is to pay the same on demand, an action may nevertheless be brought without the special averment of a demand, and sustained without proof of demand. These are cases in which it was seen, or thought to be seen, that the money was *due* before any demand, and therefore the request or demand was not regarded as one of the terms of the contract. The contract was viewed as a mere promise to pay an acknowledged precedent debt—and the action brought to recover that precedent debt. In regard to these cases, however, it may be observed that had a request been held a necessary pre-requisite to suit, many vexatious actions might perhaps have been prevented. 1 Chit. Plead., 362. But the engagement here sought to be enforced is an original specific undertaking by parties bound by no previous obligation and owing no duty to the plaintiffs other and further than the duty which this engagement creates; and on no principle of law or reason can they be held liable upon this engagement beyond the extent to which they have thereby bound themselves. They have assented to incur the forfeiture set forth in the bond, if Munroe shall refuse to comply with a certain requisition; and the forfeiture is not incurred, and cannot therefore be rightfully demanded, before a refusal to comply with such requisition, or there be such conduct on his part, tantamount to a refusal, as to render a requisition unnecessary or impracticable. The judgment is affirmed with costs.

PER CURIAM. Judgment affirmed.

ALSLEY OVERTON, DEVISEE OF BENJAMIN OVERTON, v. MOSES OVERTON ET AL.

Probate of Will—Executor Competent Witness.

1. A devise of lands in this State since the first day of January, 1838, is good under the first section of the "act concerning last wills and testaments" (ch. 122 of the Revised Statutes), notwithstanding the repeal of all the British statutes by the second section of the "act concerning the Revised Statutes," ch. 1 of the Revised Statutes.
2. A subscribing witness to a will, who is named executor therein, may nevertheless be called to support it.

THIS was an issue of *devisavit vel non* joined between the (338) devisee and heirs at law of Benjamin Overton, deceased, tried at Camden, on the last fall circuit, before his Honor, *Judge Bailey*. The points raised upon the trial are so distinctly noticed in the opinion of the Supreme Court that it is unnecessary to insert them here by way of statement. There was a verdict in favor of the will below, and the defendants appealed.

No counsel appeared for the defendants in this Court.
Kinney for the plaintiff.

GASTON, J. On an issue of *devisavit vel non* joined between the devise and the heirs at law the executor, who was one of the subscribing witnesses, was introduced by the devisee and his testimony objected to by the heir at law as inadmissible, because of alleged interest. We do not see any foundation for this objection.

It was then objected by the heirs at law that at the time when the alleged devise was made, viz.: 31 March, 1838, there was no law in this State authorizing a devise of lands. The Legislature, by an act passed on 22 January, 1837 (see 1 Rev. Stat., ch. 1, secs. 1 and 2) enacted that the several acts passed at that session, known as "the Revised Statutes," among which is an act (ch. 122) "concerning last wills and testaments," should take effect and go into operation on the 1st day of January thereafter, and that from and after that day, all acts of the General Assembly theretofore enacted, the subjects whereof were revised in the said "Revised Statutes," and all the statutes of England theretofore in use in this State should be repealed, and of no force and effect. To this general enactment there were certain exceptions not material to the question before us.

The objection we are considering is founded upon the position that as devises of lands did not exist at common law, and, as all the statutes

and acts authorizing devises of land, passed before 22 January, 1837, were repealed and of no force from and after 1 January, 1838; and as the act concerning last wills which went into operation on 1 Janu-
(339) ary, 1838, was then the only law on the subject of devises, *that* law did not authorize such a devise. Without undertaking to lay down the rule which it may be proper to observe, where the Revised Statutes *imply* the existence of legal principles and rules introduced by statutes thus repealed, we have no difficulty in disposing of this objection. The act concerning last wills and testaments, after prescribing the formalities to be observed in wills of lands (section 1) declares that *"then,* and in that case," that is to say, when these forms are observed, "such will shall be good and sufficient in law to give and convey a good and sufficient estate in lands, tenements and hereditaments."

No error is shown in the judgment below and it must be affirmed with costs.

PER CURIAM. Judgment affirmed.

TIMOTHY ANDERS v. JAMES MEREDITH.

Suits Between Tenants in Common—Appeal.

1. One tenant in common may have an action on the *case* against his cotenant for any act done on the land amounting to waste or destruction, but he cannot in any event have an action of trespass *quare clausum fregit* against him, nor against any other person entering under his authority.
2. An order of the Superior Court, either allowing or rejecting a motion for an amendment, where the Court has the power to amend, is a matter of discretion, and cannot be appealed from.

THIS was an action of *trespass quare clausum fregit,* tried at Bladen on the last circuit, before his Honor, *Judge Pearson,* upon the pleas of *the general issue* and *liberum tenementum.* The proof in the cause was that Meredith, one of the defendants, was either entitled to a fee in severalty in the *locus in quo;* or he was entitled as tenant in common with the plaintiff and others. That he, and the other defendants under his direction, entered upon the land, and in the absence of the plaintiff broke open the door of a house and entered and took therefrom a loom and some other articles of personal property.

(340) After the evidence had closed and the arguments of counsel commenced, the plaintiff's counsel moved to amend the declaration by adding a count for the trespass to the personal property in taking

the loom and other articles. This motion was objected to by the opposite counsel and rejected by the court.

It was insisted for the defendants that Meredith had made out a title in severalty; but that if he had failed in that, and was but a tenant in common with the plaintiff, he and the other defendants acting under his authority, had a right to enter, and that the plaintiff could not maintain this action. The plaintiff insisted that being a tenant in common and in possession he could maintain this action against a co-tenant who entered in the manner proven.

His Honor charged the jury that whether Meredith had the title to the land in severalty or only in common with the plaintiff, the latter could not recover in this action. There was a verdict and judgment for the defendants, and the plaintiff appealed.

Strange for the plaintiff.

No counsel appeared for the defendant in this Court.

DANIEL, J., after stating the case, proceeded: We are of the opinion that the charge of the judge was correct. The possession of one tenant in common is the possession of the other; each has a right to enter upon the land and enjoy it jointly with the others. If one tenant in common destroys houses, trees, or does any act amounting to waste or destruction in woods or other such property, the other tenant may have an action on the *case* against him. But he never can, in any event, have an action of trespass *quare clausum fregit* against his co-tenant. Co. Lit., 200; 1 Thomas Co. Lit., 785; 1 Chitty's Gen. Prac., 271. The other defendants were not trespassers, as they entered and acted by the direction of Meredith.

The rejection by the court of the plaintiff's motion to amend the declaration was a matter in the discretion of the judge, and it is not a ground of appeal to this Court. It may be proper to remark that as no objections were taken at the trial to the *sufficiency* of the (341) pleas, we understand the *note* of the plea of *liberum tenementum* (afterwards to be drawn out in full) to mean that the *locus in quo* was the freehold of Meredith, and that Causey entered with him and under his authority. We think the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Bond v. Hilton, 44 N. C., 309; *S. v. Swepson,* 84 N. C., 828.

DEN ON DEM. OF JOHN DOBSON ET AL. V. WILLIAM A. ERWIN, DEVISEE OF WILLIAM W. ERWIN.

Fraudulent Representation—Adverse Possession.

1. *It seems* that where the defendant in an execution and his family makes a fraudulent misrepresentation of the quality and value of the land levied upon and about to be sold, with a view to defeat the creditors of the defendant and to secure it for his benefit, and one ignorant of the fraudulent arrangement purchases at an inferior price, his title will be good against the creditors; as will also, at least at law, be the title of one of the parties to the fraudulent arrangement purchasing from him. But if, in such case, the sale were void, as for want of a seal to the writ issuing from another county, and the first purchaser sold without ever having taken possession, the possession of his vendee, a party to the fraudulent combination, will be as to the creditors of the defendant a possession for him, and will not be adverse to the creditors so as to defeat them by length of possession under color of title.

2. The possession of a fraudulent vendee cannot, in respect of a creditor of the fraudulent vendor, be deemed adverse to such vendor or his creditor, because the statute makes the whole contract void, and against the creditor the possession of the vendee is deemed to have been in trust for the vendor, and therefore it is the possession of the vendor. But when a sale is once made by the creditor, then the possession of the fraudulent donee becomes adverse, for the law does not suppose any secret confidence between the donee and the purchaser.

(342) AFTER the new trial granted in this case at June Term, 1836 (see 1 Dev. and Bat. Rep., 569), it was removed to Rutherford, where it was again tried on the last circuit, before his Honor, *Judge Toomer*. It appeared upon the trial that Joseph Dobson, the elder, owned the premises in dispute, and that they were exposed to sale under executions against him, and purchased by his daughter, Nancy Young, with money belonging to the father and by his directions, for the purpose of defrauding his other creditors. This sale took place in 1808, and the sheriff conveyed to Mrs. Young. In 1810 one Knight, another creditor of the father, obtained judgments and executions against him and filed his bill in the Court of Equity against the father and daughter, seeking a discovery of the fraud between them, and that it might be declared and the land made liable to and sold for his satsifaction; and in that suit there was a decree for Knight and a sheriff's sale made under an execution issued thereon in 1824, at which the person bought, under whom the defendant claimed. Pending that suit, namely in 1812, another creditor of the father obtained judgment in Buncombe and issued a *fieri facias*, without a seal, to Burke County, where the premises lay, under which they were set up for sale and bid off at $16.25 by one Stevely, who took a deed from the sheriff and then conveyed to one

Burnett, and he, in July, 1815, conveyed to John Dobson and Alexander Dobson, two sons of the said Joseph Dobson, the elder, and the lessors of the plaintiff, who then lived on the land, and continued to do so until 1827 or 1828, when the defendant entered. During that whole period Joseph Dobson, the elder, and his daughter, Nancy Young, as well as the lessors of the plaintiff, resided on the land; but Burnett, who was examined as a witness for the lessors of the plaintiff, stated that after he made the deed to the lessors of the plaintiff, in 1815, Mrs. Young did not set up any title to the land as against her brothers. This action was brought in 1831.

The defendant alleged that the land in dispute was a notorious and valuable tract, situate on the Catawba River, and worth $3,000; and that for the purpose of defeating Knight's suit and other creditors of Joseph Dobson, the elder, a scheme was contrived by the father and his sons and daughters and his son-in-law Burnett to have this tract set up and sold under the execution in 1812, without its being known by the sheriff or bidders that this particular tract was the one exposed (343) to sale, but, on the contrary, that it should be represented to be a different and poor piece that was sold; and that at such sale the lessors of the plaintiff's witness, Burnett, should become the purchaser for the benefit of Joseph, the father, and his family; and the defendant gave evidence to that effect; and thereupon the defendant contended that his title was good, notwithstanding the deeds to Stevely, Burnett, and the lessors of the plaintiff, and the possessions by the lessors of the plaintiff, the father, and other members of the family, as stated by the witness Burnett.

It was admitted on both sides that the sale by the sheriff, at which Stevely purchased was void for the want of a seal to the writ.

His Honor held that the deed to Stevely and the others were a sufficient color of title if there had been the requisite possession under them. But, leaving to the jury, upon the evidence, the question of the alleged fraudulent combination between Joseph Dobson and the other members of the family, his Honor further instructed them in substance that if they found such collusion and fraud, the possession, as proved, would not constitute a good title in the lessors of the plaintiff. The defendant had a verdict and judgment, and the lessors of the plaintiff appealed.

Badger for the lessors of the plaintiff.
D. F. Caldwell and Alexander for the defendant.

RUFFIN, C. J. The title of the defendant is deduced under a creditor of Joseph Dobson, the elder, and therefore he is at liberty to impeach that set up by the lessors of the plaintiff. (His Honor here stated the

facts of the case as above, and then proceeded as follows:) It is not necessary to say how the parties would have been affected by their dishonest purposes if the execution had been valid. We suppose, however, that Stevely, being innocent of the fraud and a fair bidder at a judicial sale, would have got a good title, and that the title derived from him by the lessors of the plaintiff would also have been good, at least in a court of law. But it being clear that Stevely gained nothing by the sale and conveyance to him, the inquiry is, whether, under the cir-
(344) cumstances of this case the possession was out of Joseph Dobson, the father, or whether it was in the lessors of the plaintiff, and of a character to defeat the defendant We think not.

In the first place, it might be sufficient in this particular case, perhaps, to say that the lessors of the plaintiff had not the exclusive possession, because the debtor himself was also in the actual possession. We do not, however, put the case on that point, inasmuch as that would perhaps have made it necessary to submit an inquiry to the jury as to the terms on which the father remained on the land, as understood between him and his sons. But, in the next place, we think that even if the father had not been on the land at all, the possession of the sons, under the fraudulent agreement and circumstances found by the jury, could not be legally adverse to the father and his creditors, so as to make a complete title in the sons under the statute of limitations. *Pickett v. Pickett,* 3 Dev., 6. The possession of a fraudulent vendee cannot in respect of a creditor of the fraudulent vendor, be deemed adverse to such vendor or his creditor, because the statute makes the whole contract void and as against the creditor, the possession of the vendee is deemed to have been in trust for the vendor, and therefore it is the possession of the vendor. When a sale is once made by the creditor, then the possession of the fraudulent donee becomes adverse, for the law does not suppose any secret confidence between the donee and the purchaser. It must be admitted that a possession by Stevely would have been for himself, and therefore adverse to all the world. But he never had the possession for a moment, and the title was taken from him, not in fact for the persons to whom the deed was made, but upon a fraudulent and secret trust for the father, to the intent that he and his family should enjoy the land, and his just creditors be hindered of their debts. Whatever color the deed might afford to such a possession, we see that in fact it was not a possession of the lessors of the plaintiff for themselves, and therefore, it was not in law adverse. Consequently the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Cowles v. Coffey, 88 N. C., 342.
Dist.: Taylor v. Dawson, 56 N. C., 92.

(345)

JOHN BLACKWELDER v. JOHN FISHER.

Subscribing Witness—When Incompetent.

If the subscribing witness to an instrument becomes interested and a party to a cause, even though he does so voluntarily, he cannot be examined as a witness. In such case the adverse party, if he wish to prove the instrument, may prove the handwriting of the subscribing witness; and if that cannot be done, proof of the handwriting of the person who executed the instrument is admissible. If proof of neither can be obtained by disinterested witnesses, the party must resort to his bill of discovery in equity.

THIS was an action of trover for a horse. Plea—not guilty. Upon the trial at Rowan, on the last circuit, before his Honor, *Judge Nash,* the plaintiff set up title to the horse on the grounds: First, that his father was owner of the dam, and agreed with him that if he would pay the price of putting the mare to the horse he should have the foal, and that he had done so. Secondly, that after the mare had foaled his father made a parol gift of the colt to him. The defendant, admitting the conversion of the property denied the plaintiff's title, stating that the father of the plaintiff was in insolvent circumstances at the time of the gift and had subsequently made an assignment of all his property, by deed, to the defendant and others, to satisfy his debts, and that the horse in question was included in the deed of assignment. The plaintiff was the subscribing witness to the deed, and on the trial the defendant called on him as a witness. The evidence was objected to, but admitted by the court. The defendant had a verdict and judgment, and the plaintiff appealed.

Boyden for the plaintiff.
D. F. Caldwell and Barringer for the defendant.

DANIEL, J., after stating the case as above, proceeded as follows: It is a general rule of law that a party to a suit cannot be a witness in it. This rule is not founded merely on the consideration of his interest. The rule is partly, at least, founded on a principle of policy for the prevention of perjury, 2 Stark. Ev., 580. If the attesting (346) witness to an instrument has become interested and a party to a cause, even though he disqualify himself voluntarily, still, if his adversary wishes to prove the instrument, the handwriting of the subscribing witness may be proved; and if that cannot be done, proof of the handwriting of the person who executed the instrument is admissible. If proof of neither can be obtained by disinterested witnesses the party

must resort to his bill of discovery in equity. The answer then is evidence as an admission, 1 Stark. Ev., 5 (American edition), 325, 326, and the cases there referred to. There must be a new trial.

PER CURIAM. Judgment reversed.

Cited: Howell v. Ray, 92 N. C., 512.

RICHARD T. DISMUKES v. JOHN WRIGHT.

Construction of Deed—Evidence.

1. Where a debtor conveyed property in trust to secure the payment of certain debts, and among others "a note for $500, payable to J. W., and by him transferred to R. D.," the trustee, and proceeded to direct that "the balance of the money, if any, after paying the debts in this deed, the said R. D. is to pay" to the grantor, and the trustee sold the property and received the proceeds sufficient to pay the debts mentioned in the deed in trust: *It was held,* that in a suit by R. D. against J. W., as endorser upon upon a note for $430, made by the debtor, the jury were not at liberty to infer, without any extrinsic evidence, that there was but one note to which these persons were parties, and that that was misdirected in the deed by mistake; *and it was held further,* that no evidence could be received *at law* to show the mistake.

2. In the construction of deeds the first rule is, that the intention of the parties is, if possible, to be supported; and the second rule is, that this intention is to be ascertained by the deed itself, that is, from all the parts of it taken together.

3. Omissions in a deed cannot be supplied from arbitrary conjecture, though founded upon the highest degree of probability.

(347) AFTER the new trial granted in this cause, at June Term, 1838 (see 3 Dev. and Bat. Rep., 78), it came on to be tried again at Davie, on the last circuit, before his Honor, *Judge Nash,* when the facts appeared as follows: One John Belt made his single bill to the defendant for $430, who endorsed it to the plaintiff, and this action was brought to recover the amount from the endorser. Plea—payment. After the plaintiff became the holder, Belt, the maker, executed to him a deed transferring a large amount of property, to be by him sold, and the proceeds applied in paying Belt's creditors, according to their priorities, as mentioned in the deed. The plaintiff sold the property and collected the money. The first debt directed in the deed in trust to be paid was "a note for five hundred dollars, payable to John Wright, and

by him transferred to Richard Dismukes." After naming a number of other debts, and the persons to whom they were due, the deed closes thus: "and the balance of the money, if any, after paying the debts mentioned in this deed, the said Richard Dismukes is to pay to the said John Belt." There was no extrinsic evidence offered to show that the $500 note, mentioned in the deed, was, in truth, the note now sued on, and that there had been a mistake in describing it; but the defendant averred that there was but one note, viz., the one now sued on, and that it was intended by the parties to be covered by the deed, and that it was described in said deed as being for the sum of $500 by mistake. The court instructed the jury that there was no evidence to establish this allegation. There was a verdict and judgment for the plaintiff and the defendant appealed.

Boyden for the defendant.
D. F. Caldwell for the plaintiff.

DANIEL, J., after stating the case as above, proceeded: It has been contended here, with much earnestness, that the judge erred in this instruction, for, that the jury might legitimately have inferred that there was but one note, from the concluding clause of the deed, the situation of the parties, and the failure of the plaintiff to show that there were two notes, and that the jury might have inferred that the one now sued on was the note intended by the parties to be included in the deed.
We think that there was no error in the instruction, for certainly (348) the deed, *per se*, shows no mistake, and no extrinsic evidence could have been received *at law* to show a mistake. The deed transfers property to the plaintiff in trust, to pay a note particularly described as being for $500. There is no ambiguity or uncertainty in the description. Can the defendant at law be permitted to substitute another note of $430, and thus contradict the deed? In the construction of the deeds the first rule is that the intention of the parties is, if possible, to be supported, and the second rule is that this intention is to be ascertained by the deed itself; that is, from all parts of it taken together. In general no expression can be contradicted or explained by extrinsic evidence; and the intention collected *from the four corners* of the deed, is to govern the construction of every passage in it. Touch., 87; Burton on Real Property, 164, 165. The clause in the deed directing the trustee (who was holder of this bill) to pay the balance of the money, if any, to Belt, the maker, and the man primarily liable on it, shows only that this note was not thereby secured. But omissions cannot be supplied from arbitrary conjecture, though founded upon the highest degree of probability. *Chapman v. Brown*, 3 Bur. Rep., 1627; 3 Atk., 136; *Andrew v. Ward*,

1 Russ. Rep., 260, 279. The deed did not evidence, in any way in which we legally can take it, that the plaintiff had received property and money in trust to pay this bill of $430 and interest. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Scull v. Pruden, 92 N. C., 173; *Lowdermilk v. Bostick,* 98 N. C., 303.

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(349)

JOHN POTEAT v. THOMAS BADGET.

Offer of Compromise—Effect.

Where one party offers to pay or give the other a certain sum by way of compromise, and the offer is rejected, it is in no way obligatory. Nor is it an admission of the fact that the defendant owed the sum offered. When a proposition of that kind is rejected, the rights of the parties remain precisely as they were before it was made.

THIS was an action of assumpsit, in which the plaintiff declared in two counts, one on a *quantum valebat* for the use and occupation by the defendant of the plaintiff's tenant, the other on a promise of the defendant to pay the plaintiff fifty dollars for such use and occupation. Upon the trial at Caswell, on the last circuit, before his Honor, *Settle, J.,* the plaintiff was forced to abandon his first count because of its being shown that the occupation was under a special agreement, the terms whereof had been by him broken, and then resorted to his second count. The only evidence offered to sustain this count was that a dispute having arisen between the parties in relation to their rights growing out of this agreement and occupation, the plaintiff proposed to refer the matter in dispute to arbitration; that the defendant rejected this proposition but offered to pay or give the plaintiff fifty dollars; that the plaintiff returned no answer to this offer but on leaving the defendant declared his dissatisfaction therewith and afterwards instituted this action, in which he sought to recover a much larger sum. His Honor declared his opinion that this evidence did not sustain the count in question, to which opinion the plaintiff excepted. The defendant obtained a verdict and had judgment, and thereupon the plaintiff appealed.

No counsel appeared for the plaintiff in this Court.
W. A. Graham for the defendant.

GASTON, J., after stating the case as above, proceeded as follows: We approve of the opinion expressed by his Honor. The offer of the defendant, unless accepted by the plaintiff, was in no way obligatory. Neither was it an admission of the fact that the defendant owed (350) the sum of fifty dollars. In all fairness it must be understood with reference to the subject-matter before the parties, which was an attempt to adjust a disputed claim. It was a proposition whether that claim were well or ill-founded, to pay a specific sum as the price of peace. As the plaintiff did not accede to the proposition the rights of the parties remained precisely as they were before the proposition was made. The judgment is affirmed.

PER CURIAM. Judgment affirmed.

Cited: Hughes v. Boone, 102 N. C., 162.

JOHN McELWEE v. JACOB COLLINS.

Endorsement—Usury.

1. Where an endorsee takes a bill or note with the endosement or guaranty of the endorser, and advances therefor less than the real value of the bill or note, the transaction is, in effect, a loan between the endorsee and endorser, and is usurious as between those parties.

2. There is a distinction between taking a bill or note and advancing money on it with an endorsement or guaranty, and one without. The last is a *purchase*, and may be for less than the real value; the other is a loan, and within the operation of the statute against usury.

3. The cases of *Ruffin v. Armstrong*, 9 N. C., 411, and *Collier v. Neville*, 14 N. C., 30, approved.

THIS was an action of debt, brought by the endorsee of a single bill against his immediate endorser. Plea—usury. Upon the trial at Lincoln, on the last circuit, before his Honor, *Judge Nash,* the only evidence offered to support the plea was a declaration made by the plaintiff that he had purchased the bill for less than it was worth. The court instructed the jury that the bill was the subject of sale and might be purchased by anyone at a less price than its real value; that the question for them to decide was whether this was a *bona fide sale,* and if it were, the plaintiff was entitled to recover; but that if it were, in (351) reality, a loan, and the form of a sale given to the transaction to evade the statute, then the plaintiff could not recover. The plaintiff had a verdict and judgment and the defendant appealed.

Hoke for the defendant.
Alexander for the plaintiff.

DANIEL, J., after stating the case, proceeded: The opinion of the judge would have been correct, if the purchaser of the bill had taken it without any endorsement or guaranty of the seller. And in the State of New York it has been decided that an endorsee of business paper may recover of his immediate endorser the money he paid for the bill, although it was less than the sum mentioned in the face of it, and that the endorser could not resist such an action by the plea of usury. These decisions were, however, against the opinions of those learned jurists, Chancellors Kent and Walworth. In addition to the authorities from that State, cited by the plaintiff in support of this position, may be cited the case of *Ham v. Hendricks,* 7 Wend. Rep., 569. It is true that to constitute usury there must be either a direct loan and a taking of more than legal interest, or there must be some device for the purpose of concealing or evading the appearance of a loan, when in truth it was one; but the ordinary transaction of discounting a bill or note with an endorsement or guaranty from the transferor, is a lending within the statute. The party discounting does, in fact, lend money on interest, to be repaid either by the person receiving or by some other party to the bill, at a certain prefixed period. Byles on Bills, 72, 73. There is a distinction between taking a bill and advancing money on it, with an endorsement or guaranty, and one without. The last is a *purchase,* and may be for less than the real value; the other is a loan, and within the operation of the Statute of Usury. *Massa v. Dauling,* Strange, 1243. The case before us is completely within the rule laid down by this court in the case of *Ruffin v. Armstrong,* 2 Hawks., 411. Altman and others had executed a bond to Armstrong; it was a business paper, negoti-
(352) able. Armstrong endorsed it without value to an accommodating endorsee and he endorsed it to Ruffin at a discount of thirty-three and one-third per cent. In the action by Ruffin against Armstrong on his endorsement it was held by the court that the transaction was usurious. Chancellor Walworth, delivering his opinion in the case of *Ham v. Hendricks* (after having reviewed all the cases on this subject, both in England and this country), remarks, "it appears that in most of our States which have adopted the English Usury Laws, as well as in the Supreme Court of the United States, and in England, it is held that a sale of a note for less than its nominal amount, on the advance of money or other thing in the nature of a discount of the note, is usurious between the parties to such a transaction, if the seller endorses the note or otherwise guarantees the repayment of the purchase money." Even in New York the endorsee is not permitted to recover of the endorsed the full

amount of the bill, for, if he could, the statute would be easily evaded; but he is permitted to recover only the money and interest he advanced when the bill was endorsed to him. This is not the rule in any other part of the world that we know of. It is not the rule in *Ruffin v. Armstrong,* and in *Collier v. Neville,* 3 Dev. Rep., 30, it was held to be clear that the discounting of a bill or bond and taking the general endorsement of the holder does *ex vi termini* constitute a loan, and if the rate of discount exceed that fixed by the statute it is an usurious loan." The endorsee, in a case like this, has no more right, as it seems to us, to claim the money advanced for the endorsement than he would if he had declared on a promissory note, infected with usury, if the defendant had plead the Statute of Usury in bar. The policy of the law is to enable the defendant to make void both assurances *in toto.* We therefore are of opinion that there must be a new trial.

PER CURIAM. Judgment reversed.

Cited: Hines v. Butler, 38 N. C., 308; *Bynum v. Rogers,* 49 N. C., 400; *Ballinger v. Edwards,* 39 N. C., 452.

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(353)

JAMES LOWE v. ISAAC WEATHERLEY.

Release—Consideration—Estoppel.

1. A receipt and acquittance under seal, contained in a bill of sale for slaves, has the effect of a release and estops the vendor from explaining or contradicting by parol the payment of the purchase money. The giving time or forbearing to sue for a precedent debt, where the party has a remedy in some court either at law or in equity, is a good consideration to support a promise to pay the debt. And where the defendant said to the plaintiff's agent, "Tell the old man" (meaning the plaintiff) "not to be uneasy, but to wait until next Thursday week, and I will then come to his house and compromise or settle the matter, for I do not wish him to be injured," it is evidence tending to show such a promise sufficient to be left to the jury.

2. Whether upon the payment of the price of slaves partly in counterfeit bank notes the vendor may not recover the amount of the notes upon an express or even an implied promise to make them good, notwithstanding a receipt and acquittance under seal for the purchase money contained in the bill of sale, *Quere?* And of an action founded on such promise a justice has jurisdiction. It is a promise to pay money, if what has been received as a bank note be not what it purports; and not a guaranty of the solvency or punctuality of the makers of the note.

3. A receipt not under seal is not conclusive evidence of payment, and may be explained by parol.

4. A payment in counterfeit bank notes is a nullity, and the party receiving them as the price of articles sold may, if there by no receipt and acquittance under seal, recover upon the original consideration, although both parties were ignorant at the time that the notes were counterfeit.

THIS was an action of assumpsit, commenced by warrant and carried by successive appeals to the Superior Court, in which it was tried at Guilford, on the last fall circuit, before his Honor, *Judge Pearson.*

The defense relied upon was under the plea of a *release,* and upon the trial the facts appeared to be as follows: The plaintiff sold to the defendant a parcel of slaves for the sum of $850. The defendant paid the price in bank notes and took a bill of sale under seal, containing the ordinary acquittance or release for the purchase money. At the time the release was given the defendant said "the money is all good; if it is not,

(354) I will make it good." It turned out that a fifty dollar bill so paid by the defendant was counterfeit. The plaintiff procured affidavits, both of the identity of the bill and also that it was a counterfeit, and sent them to the defendant by an agent and demanded good money. The defendant took the bill and affidavits to a friend and consulted him as to the proofs and said that he wished to be satisfied that he let the plaintiff have the bill. He then said to the agent, "tell the old man" (meaning the plaintiff) "not to be uneasy, but to wait until next Thursday week and I will then come to his house and compromise or settle the matter, for I do not wish him to be injured." The plaintiff, in consequence of this message, forbore to take any proceedings, either at law or in equity, to recover his demand, until the time had expired. He then, on failure of the defendant to come to his house and settle, commenced this action by warrant. His Honor charged the jury that if they were satisfied the bill was a counterfeit and were also satisfied that the meaning of the defendant in what he said to the agent at the time he demanded payment was that if the plaintiff would forbear to sue until the day fixed on he would pay the fifty dollars, provided it was proven in fact that he let the plaintiff have the bill in question, and in consequence of this promise the plaintiff had forborne to sue, then they would find for the plaintiff. But if they were not satisfied that such was his meaning they would then find for the defendant. The jury returned a verdict for the plaintiff and the defendant moved for a new trial: First, because the judge erred in permitting any evidence to go to the jury tending to show a promise after the date of the release, he having objected to such evidence at the time it was offered. Secondly, because there was no evidence to be left to the jury of any promise or

legal consideration to support a promise, subsequent to the release. The court overruled the motion and gave judgment for the plaintiff and the defendant appealed.

Mendenhall for the defendant.
No counsel appeared for the plaintiff in this Court.

DANIEL, J., after stating the case as above, proceeded as fol- (355) lows: If the receipt which the plaintiff gave for the purchase money of the slaves had been without seal it might have been explained by parol, as a receipt is not conclusive evidence of payment, 2 Term Rep., 366; 5 B. and Ald., 611; 3 B. and C., 421; 3 B. and Adol., 313. In that case the plaintiff might have recovered upon the original consideration, as a balance of the price of the slaves; the counterfeit bill being a nullity could not be considered a payment, although both of the parties were ignorant at the time that the bill was a counterfeit. *Hargrave v. Dusenberry,* 2 Hawks, 326; *Markle v. Hatfield,* 2 John. Rep., 445. But as the plaintiff affixed his seal to the acquaittance that circumstance gave it the effect of a release, which the defendant has plead in bar of all demands arising upon the original transaction, and it estops the plaintiff to contradict or explain it by parol evidence. *Brocket v. Foscue,* 1 Hawks, 64; Gilbert's Law of Ev., 142; *Rountree v. Jacobs,* 2 Taun., 154; *Sampson v. Cork,* 5 B. and A., 506. But the plaintiff has relied on a promise made by the defendant subsequent to the date of the release. The defendant contends, however, that if such a promise was made it was without consideration, and that no action lay upon it, and that therefore the court erred in submitting it to the jury. The plaintiff says that as the bill was bad he had a remedy either at law upon the promise made by defendant to make the bill good, *Baker v. Deavey,* 8 Eng. Com. Law Rep., 193, or he had a remedy in equity to set aside the release as having been given under a mistake so far as relates to this demand, and that he had, at the special instance and request of the defendant, forborne to take judicial proceedings to obtain his rights until the time expired, and that that forbearance is a good consideration. It seems to us that such a consideration is sufficient to uphold a promise, and that the plaintiff, notwithstanding the release, had a remedy in some court. An action will lie upon a promise to pay a sum of money in consideration of giving time, or forbearing to sue for a precedent debt, or other cause of action. Com. Dig. B., 1 (action of assumpsit); 2 Com. on Cont., 420. Secondly: The defendant contends that if the consideration of forbearance be, in this case, deemed sufficient in law to uphold a promise, still there was no evidence of any promise made by him to have been left by the judge to the jury, and that the judge (356)

should have nonsuited the plaintiff. The answer given by the defendant to the plaintiff's agent, when he demanded payment, was, in our opinion, such evidence as the judge was bound to leave to the jury for them to determine whether a promise had or had not been made. Strike out the word "compromise" in the agent's testimony and the balance of his evidence is very strong to show that the defendant did promise to pay the money. That word remaining leaves it doubtful, and the jury were the proper persons to determine the fact.

To prevent misapprehension we desire to be understood as expressing no opinion whether the plaintiff might not have recovered, independently of the special contract for forbearance, upon the promise to be inferred from the transaction, and actually made when the release was executed, to make the notes good should they turn out to be counterfeit; and we are clearly of opinion that of an action founded on such a promise, a justice had jurisdiction. It is a promise to pay money, if what has been received as a bank note be not what it purports, and not a guaranty of the solvency or punctuality of the makers of the note. The judgment is affirmed.

PER CURIAM. Judgment affirmed.

Cited: Mendenhall v. Parish, 63 N. C., 106; *Herndon v. Critcher, id.,* 486; *Lawson v. Pringle,* 98 N. C., 452; *Shaw v. Williams,* 100 N. C., 280.

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(357)

ISHAM YOUNG v. WILLIAM JEFFREYS AND SAMUEL HARRIS.

Construction of Contract.

1. Where a subscription was raised for building a house of worship for a religious society, and upon the letting of the building at auction by certain commissioners appointed for the purpose, the defendants, who were not shown to have any other concern with the transaction, declared that *if* or *when* the work was done according to certain written specifications, and accepted by the commissioners, they would pay the sum at which the building should be bid off, and the plaintiff became the contractor and executed the work, but it was rejected by the commissioners upon the ground that it was not executed according to the specifications in four particulars, in two of which, however, it was shown that an alteration had been made with the assent of the defendants: *It was held,* that the alteration in the building, with the assent of the defendants, modified the contract to the extent of that assent, but left it subsisting as to the other particulars; and that as to them the acceptance of the work by the commissioners was an essential term of the defendant's engagement, without

which the plaintiff could not recover; and, *it was held further*, that the plaintiff could not recover upon the common count for work and labor done.

2. Whether the plaintiff might not obtain compensation in some forum, in case the acceptance by the commissioners was rendered impossible by accident, or may not be entitled to redress in some form if that acceptance has been withheld *maliciously* or by *fraudulent combination, Quere?*

3. The *effect* of a contract is a question of law. Where a contract is wholly in writing and the intention of the framers is by law to be collected from the document itself, there the entire construction of the contract—that is, the ascertainment of the intention of the parties, as well as the effect of that intention—is a pure question of law, and the whole office of the jury is to pass on the alleged written agreement. Where the contract is by parol, the terms of the agreement are, of course, a matter of fact; and if those terms be obscure or equivocal, or are susceptible of explanation from extrinsic evidence, it is for the jury to find, also, the meaning of the terms employed; but the effect of a parol agreement, when its terms are given and their meaning fixed, is as much a question of law as the construction of a written instrument.

4. In works of art it is a prudent and common stipulation, for the prevention of controversies, that the construction of the work shall be determined by some persons in whose judgment the parties have confidence; and the judgment of this forum cannot be disregarded or revised by a court and jury.

THIS was an action of assumpsit in which the plaintiff declared in a special count, and also in the common count for work and labor done.

Upon the trial at Franklin, on the last fall circuit, before his Honor, *Judge Saunders,* it appeared that several persons belong- (358) ing to the Methodist Society had subscribed sums of money for building a meeting house; that the building of the house was let out publicly to the lowest bidder by commissioners; that at the bidding a specification of the building required—of its dimensions, form, materials, and workmanship—was read aloud, and that the defendants, who were not shown to have any other concern with the transaction, thereupon declared and promised that "if the work was done according to the specifications, and accepted by the commissioners" (according to the language of some of the witnesses), or "*when* the work was done and accepted by the commissioners" (according to the language of other of the witnesses) they would pay the sum at which the building should be bid off. The plaintiff became the lowest bidder at that auction, and having, as he alleged, finished the building, tended it to the commissioners, who rejected it as not having been completed according to the specifications. The commissioners objected, first, that the building wanted two girders, which, by the specifications, were required to be erected throughout its entire length, and that instead thereof there were three girders

across its breadth; secondly, that the windows, instead of having all of them sixteen lights, as required in the specifications, had, those in front, eighteen lights, and those in the rear fifteen only; thirdly, that the weatherboarding, instead of showing not more than six inches, showed in some places six and a half inches, and in others six and three-quarter inches; and fourthly, that the shingling of the roof had been done unfaithfully. The plaintiff offered evidence to show, with regard to the two first objections, that the changes in the specifications therein embraced, had been made with the approbation and consent of the defendants—and to show that the other two objections were frivolous and unfounded. It was insisted by the defendants that, admitting the facts to be established for which this evidence was offered the plaintiff's case was not thereby sustained, because the approbation of the work by the commissioners was a condition of the engagement of the defendants; and they submitted a motion for a nonsuit. By the assent of the par-
(359) ties this motion was reserved and the case submitted to the jury, whose verdict was to be subject to the opinion of the court on the matter reserved. His Honor instructed the jury that if the plaintiff established to their satisfaction that he had completed the building in all respects agreeably to the specifications, except so far as they had been changed by the direction or consent of the defendants, and that the other objections taken by the commissioners were frivolous, and unfounded, he was entitled to recover. The plaintiff had a verdict, subject to the opinion of the court on the matter reserved, and the court upon that verdict rendered a judgment for the plaintiff, from which the defendants appealed.

Battle and W. H. Haywood for the defendants.
Badger for the plaintiff.

(360) GASTON, J., after stating the case as above, proceeded as follows: I am instructed to declare the opinion of this court that the judgment rendered below is erroneous; that on the matter reserved the law is for the defendants, and that under the agreement of the parties the verdict is to be set aside and there is to be a judgment of nonsuit.

The court assents to the propriety of that part of his Honor's opinion which holds that the jury might consider the special contract made between the plaintiff and these defendants at the time of bidding, modified in the particulars and to the extent which had been subsequently agreed upon between them and the plaintiff. If, therefore, the commissioners had rejected the building because of these changes, and these only—and had approved of it as conforming to the specifications in all other respects the defendants would have been liable to the plaintiff upon

their agreement. But the court holds that inasmuch as the commissioners rejected the building because in their judgment it did not conform to the other specifications, then, however unfounded and frivolous these objections of the commissioners might be deemed by the jury, the defendants were not liable to the plaintiff upon the agreement given in evidence, and which, according to the practice that obtains with the profession where a formal declaration has not been previously drawn out at length, must be understood as the agreement contained in the declaration. This opinion is founded upon the principle that the defendants are bound so far and so far only as they consented to be bound. Now, *all* the evidence of their agreement made the "acceptance" of these commissioners *one* of the conditions of their engagement. It is immaterial which set of words testified to by the witnesses was used—whether to pay *if* the commissioners accepted or *when* the commissioners accepted, for unless these words do not mean what they obviously import, the addition of them manifests that the commissioners were to *pass* upon the question whether the work was completed according to the specifications. And the opinion is deemed by us erroneous, because in effect it strikes out of the agreement one of its essential terms, and holds the (361) defendants bound to pay without or before such acceptance, when they have consented to pay only *if* or *when* the acceptance shall take place.

There is nothing unreasonable, much less illegal, in such a condition. Whether a work of art has been done with proper materials and in a workmanlike style, is an inquiry on which honest differences of opinion may prevail, even among persons skilled in the art, and on which men of ordinary pursuits are very unfit to pass. It is, therefore, in agreements for works of this kind, a prudent and common stipulation for the prevention of controversies that the construction of the work shall be determined by some persons in whose judgment the parties have confidence. If, however, the judgment of the forum appointed by the parties is to be disregarded or revised by a court and jury—the stipulation is unmeaning.

There can be no question but that the view entertained by this court would prevail if the agreement between these parties had been in writing, and contained a stipulation in the words used by any of the witnesses who testified as to the agreement. *Morgan v. Birnie,* 9 Bing. Rep., 672 (23 Eng. Com. Law Rep., 414); *Devile v. Arnold,* 10 Price 21 (4 Exch. Rep., 266). It is supposed, however, that inasmuch as the contract was by parol, the *construction* of the contract was a matter wholly for the consideration of the jury. If by construction be meant the ascertainment of the agreement of the parties, the proposition is admitted, but if thereby be meant the ascertainment of the *effect* of the agreement, then,

we apprehend, the proposition is erroneous. The *effect* of a contract is a question of law. Where a contract is wholly in writing, and the intention of the farmers is by law to be collected from the document itself, there the entire construction of the contract—that is, the ascertainment of the intention of the parties as well as the effect of that intention, is a pure question of law; and the whole office of the jury is to pass on the existence of the alleged written agreement. Where the contract is by parol the terms of the agreement are of course a matter of fact; and if those terms be obscure or equivocal, or are susceptible of explana-
(362) tion from extrinsic evidence, it is for the jury to find also the meaning of the terms employed; but the effect of a parol agreement, when its terms are given and their meaning fixed, is as much a question of law as the construction of a written instrument.

The propriety of the nonsuit depends on the effect of the terms of the agreement as offered in evidence. There is nothing in the terms employed ambiguous or equivocal; and if there were there is no suggestion that the ordinary meaning was not the meaning of the parties. The Judge therefore had a right to declare the legal effect of an agreement in those terms, and the verdict being, by the assent of the parties, taken subject to his judgment thereon, the matter thus referred to him was a pure question of law.

The plaintiff, under the circumstances of the case, was not, in our opinion, entitled to recover upon the common count for work and labor done. The liability of the defendants was founded *solely* upon their special agreement. The change by mutual assent in respect to *some* of the specifications of the work to be done under that agreement left the agreement in full force as to all its other parts.

Whether the plaintiff might not obtain compensation in some forum in case the acceptance by the commissioners was rendered impossible by accident—or may not be entitled to redress in some form, if that acceptance has been withheld *maliciously,* or by *fraudulent combination,* we are not called upon to determine. It is enough for us now to say that upon the agreement alleged the defendants are not liable, because by that agreement their liability was made to depend on the judgment of the commissioners that the work had been done according to the specifications.

PER CURIAM. Judgment reversed.

Cited: Rhodes v. Chesson, 44 N. C., 338; *S. v. Moore,* 46 N. C., 280; *Adams, v. Reeves,* 68 N. C., 140; *Pendleton v. Jones,* 82 N. C., 251; *S. v. Poteet,* 86 N. C., 614; *Buffkin v. Baird,* 73 N. C., 289; *S. v. Alphin,* 84 N. C., 748; *Spraigins v. White,* 108 N. C., 451.

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THE STATE v. MOSES A. CURTIS ET AL.

Indictment—Forcible Entry.

1. Where the proprietor of a school employed a person as a steward and servant in the establishment, and assigned for his lodging rooms a house situated within the curtilage, but not connected with the dwelling house of the proprietor by any common roof or covering, and for which lodging rooms the steward paid no rent: *It was held*, that the house occupied by the steward was not, in law, *his* dwelling house, but was the dwelling house of the proprietor of the school, and that no indictment would lie against the proprietor for an entry and expulsion of the steward from such house, provided there was no injury to his person or other breach of the peace.

2. The occupation of servants is not *suo jure*, but as servants and representing their master; and therefore it is the occupation of the proprietor himself. There may be cases in which the master lets to his servant a tenement or part of his premises on rent, in which the house and possession would be properly laid as those of the servant.

3. And even where there is no stipulation for rent, yet the premises occupied by the servant may be so far removed and distinct from those in the personal occupation of the master that they may be deemed and stated to be in the possession of the servant, in an indictment, for instance, for burglary. It would seem from some adjudications that in this last case it *may* be laid either way.

4. But these cases are to be regarded as exceptions founded on particular circumstances.

5. When an overseer, in this State, is placed on plantation he is not put into possession as against his employer; but the latter may, if he thinks proper, turn him off and evict him from the houses which he occupies.

6. The redress of the overseer is by action on the contract of the employer, and not by holding over that which was never in his possession for an instant, but as the servant and *agent* of his employer.

THE defendants were indicted at Wake, on the last circuit, before his Honor, *Judge Bailey,* in the words and figures following, to wit:

"The jurors for the State, upon their oath present that Moses A. Curtis, William B. Otis, and James G. Rowe, all, etc., on, etc., with force and arms in the county aforesaid, unlawfully, riotously and routously did assemble and gather together to disturb the peace of the State; and being so then and there assembled and gathered together with (364) force and arms, to wit: with sticks, axes, and other offensive weapons, in the county aforesaid, into a certain dwellinghouse there situate, and being, and then and there in the possession of one William H. Pope, unlawfully, riotously and routously did violently, forcibly, injuriously, and with strong hand enter; and the said Moses A. Curtis, Wil-

liam B. Otis, and James G. Rowe, then and there with force and arms, to wit: with sticks, axes, and other offensive weapons, unlawfully, riotously and routously did violently, forcibly, injuriously, and with strong hand the said William H. Pope from the possession of the said dwellinghouse expel, amove and put out; and the said William H. Pope so as aforesaid expelled, amoved and put out from the possession of the said dwellinghouse, then and there with force and arms, to wit: with sticks, axes, and other offensive weapons, unlawfully, riotously and routously did violently, forcibly, injuriously, and with strong hand keep out, and still keep out, to the great damage of the said William H. Pope, and against the peace and dignity of the State."

Upon the trial of this indictment the jury returned the following special verdict, to wit: "That on the first day of January, 1838, the defendant Curtis, was and continually since hath been the lessee for a term of years, lawfully in possession of a certain tract or parcel of land near the City of Raleigh, and there, during all the time aforesaid, kept a boarding school for boys. On this land were several large buildings, in one of which the said Curtis and his family resided as their dwelling house, and others were used for the accommodation of the scholars; and there was also a small outhouse (amongst others) containing two rooms, situated in the yard or curtilage inclosing the said dwellinghouse and pupils' houses, but the said outhouse was not connected with the said dwelling house by any common roof or covering, but the door of the said outhouse opened into the yard; that this outhouse had been originally built and used for recitation rooms for the pupils, but after the completion of the buildings for their accommodation, was used for lodging rooms by the servants attached to the establishment; that some time in the said month of January, the said Curtis being such lessee,
(365) and keeping said school as aforesaid, hired the said William H. Pope, in the indictment mentioned, as a servant and steward for the residue of the year at $..... per month as his wages—it being understood that he was likewise to be furnished with board and lodging suitable to his station in the family, though no express engagement was made therefor. For two years previous to the year 1838 the said Pope had held the same situation of servant in the same school then kept by other proprietors, and occupied one of the rooms in the said outhouse during that period as his lodging room. And the said Pope, by the permission and assent of the said Curtis (after his employment by Curtis as aforesaid) occupied the same room of the said outhouse as his lodging room, and so continued to occupy it until his removal therefrom as hereinafter stated, the other room in the said outhouse being unoccupied; that the said Pope did not rent, lease, or hire the said room of the defendant Curtis, nor make any engagement for the use or occupation of

the same, but merely used it in his character of steward and servant as aforesaid; that on 23 October, 1838, the said Curtis having discovered that the said Pope had sold certain small articles to some of the pupils, contrary to a rule of his school, discharged him from his situation as steward and servant, and ordered him to leave the premises; the said Pope, after he was so out of his said employment in the service of the defendant Curtis, continued to occupy the said room, alleging as a reason for not leaving it as required that he was building a house, and until that was completed he could not remove, as he had no place in which to deposit and secure his bed and other articles which were in the said room; that on the day mentioned in the indictment the defendant Curtis, accompanied by the other defendants, one of whom was an assistant teacher and the other a boarder of the said Curtis, went to the said room and required the said Pope immediately to remove therefrom, to which Pope replied he could not remove until the next succeeding Monday, when he promised that he would go out. Curtis told him he must go out before the night of that day, as he would not permit him on any account to remain on his premises another night. On this, Pope came out of the room, locked the door, and put the key in his (366) pocket. Curtis demanded the key, which Pope refused to give up, and thereupon the defendant Rowe told him, cost what it might, even if it were a thousand dollars, he must leave that very day, and ordered an axe and chisel to be brought, and the same being brought the defendant therewith forced the door open, took it from its hinges, forced out the window sashes, and removed both the door and windows from the said room; that the said Pope, so soon as the axe was brought and the defendants had commenced forcing the door, left the premises, and on his return an hour afterwards the door and windows being removed, and he by reason thereof unable to occupy the room, proceeded to remove and did remove his bed and other articles therefrom.

And whether, upon the whole matter, the defendants, or either of them, are or is guilty, the jury is ignorant, and pray the order of the court; and if the court shall be of opinion that they are, or either of them is, guilty, then the jury find him or them guilty of the matters in the said indictment charged; otherwise they find the defendants not guilty."

His Honor, being of opinion upon this verdict that the defendants were guilty in law, pronounced a judgment against them, from which they appealed.

Badger for the defendants.
The Attorney-General for the State.

RUFFIN, C. J. The indictment does not charge any injury to the person of the prosecutor. Nor is it framed under the statutes of forcible entry and detainer; and it is admitted that it could not have been so framed for the want of any estate in the prosecutor. It is then merely an indictment, at common law, for a forcible entry into a dwellinghouse in the possession of Pope and expelling him therefrom. The verdict finds an entry and expulsion in such a manner as to make the defendants guilty, in our opinion, provided the house was in law the dwellinghouse of the prosecutor. We think, however, that it was the dwelling house of Mr. Curtis, and in *his* possession, both according to legal intend-
(367) ment and the common understanding of the country; and therefore, that it was not in the possession of Pope.

The rule upon this subject is laid down in general and very plain terms by Mr. East, P. C., 500: "If a person occupy a dwellinghouse as the servant or part of the family of another, it is the *occupation* in law of such other person, and must be so laid in the indictment." The reason must be clear to every mind. The occupation of servants is not *suo jure,* but as servants, and representing their master, and therefore it is the occupation of the proprietor himself. There may be cases in which the master lets to his servant a tenement or part of his premises on rent, in which the house and possession would be properly laid as those of the servant, for although the relation of master and servant existed between those parties, yet that of landlord and tenant, *quoad* the premises let, also existed. And even where there is no stipulation for rent, yet the premises occupied by the servant may be so far removed and distinct from those in the personal occupation of the master, that they may be deemed and stated to be in the possession of the servant, in an indictment, for instance, for burglary. It would seem from some adjudications that in this last case it *may* be laid either way. But in treating the master's house, occupied by the servant, as the servant's house in any case, there is manifestly a departure from the general rule quoted, and therefore those cases are to be regarded as exceptions, founded on particular circumstances. There is, however, no fact or circumstance to bring this case within the reason of any exception hitherto admitted, but everything to make it fall under the operation of the general principle. The house in question is within the curtilage and is parcel of the premises belonging to and actually occupied by Mr. Curtis. It had not been let to Pope at a rent. Nay, the jury find that there was no engagement of any sort for Pope's use and occupation of this house in particular, and that he "merely used the lodging room in his character of servant." It is obvious, therefore, that Pope was put to lodge in the room at the mere will of his master, and that this was for the more convenient performance of the service to be rendered by him as a domestic, and for

that reason only. These was no severance of this from the other (368) parts of the premises, and we think clearly, that Pope had no possession *of his own,* but that his possession *as* servant was just as much the possession of his master as if they had occupied separate rooms under the same roof. *Rex v. The Inhabitants of Cheshire,* 1 Barn. and Ald., 473; *Stockles' and Edwards' case,* 2 Leach C. C., 1015, and R. and R. C. C., 185. In the latter case Lord Ellenborough remarks that a servant who lived with his family in particular rooms of his master's house by his leave, could not maintain trespass against his employers if they entered the rooms without his consent; and he asks, "does a gentleman, who assigns to his coachman the rooms over his stables thereby make him a tenant?" In the same case, *Mansfield, C. J.,* uses this language: "Many servants, as, for instance, porters at park gates, have rooms assigned to them to live in, and surely if a master choose to turn away his servant it does not follow that he cannot evict him until the end of the year." A very common instance of this relation in this State exists in the case of employer and overseer. Certainly it has never been understood among us when a planter places an overseer on his plantation to superintend his operations and hands there, that he puts him into possession as against himself, so that he cannot turn him off during the year, but that the overseer may remain against the will of the master in possession, perhaps, of the only house fit for the occupation of a second overseer or of the owner himself. On the contrary, it is clear law and universally received, that the houses on the plantation are as much in the possession of the owner as the plantation itself, or the hands, provisions, or horses on it, and it would work an intolerable inconvenience to employers and detriment to agriculture to hold otherwise. The redress of the overseer is by action on the contract of the employer, and not by holding over that which was never in his possession for an instant, but as the servant and *agent* of his employer. So, in the present case, Mr. Curtis never parted from or lost his possession, and consequently the house was never in possession of Pope. When Mr. Curtis dismissed the man from his service he had a right also to exclude him from his premises; provided, as in this case, he did so without injury to (369) his person or other breach of the peace.

For these reasons the judgment, in the opinion of this Court, is erroneous, and the usual certificate must be sent down in order that judgment may be entered on the special verdict for the defendants.

PER CURIAM. Judgment reversed.

Cited: State v. Pridgen, 30 N. C., 87; *State v. Boyden,* 35 N. C., 508; *Watson v. McEachin,* 47 N. C., 211; *State v. Jake,* 60 N. C., 473; *State v. Smith,* 100 N. C., 468.

JOHN HOUGH v. JAMES HORNE ET AL., ADMRS. OF HUGH E. HORNE.

Boundary—Known Corners.

1. Where a grant calls for a certain course from one corner to another, without saying by a line of marked trees, and the corners are both established, the direct line from one corner to the other is the boundary, although there may be a line of marked trees between the corners, but varying in some places from the direct line; but if, in the description, a line of marked trees be called for in addition to the course the line of marked trees is then to be followed, though variant from the course.

2. When a certain course is called for in a grant along a public road from one corner to another, and the corners are identified, the public road is the boundary, though varying from the course; and if there be two tracks of the road for part of the distance, it is a question for the jury to ascertain which track was the public road at the time of the grant.

THIS was an action of *trespass quare clausum fregit,* tried at Anson, on the last circuit, before his Honor, *Judge Pearson.* The plaintiff alleged trespasses at two different places. As to the first the evidence necessary to be stated was a grant to Hezekiah Hough, dated in 1790, and a regular deduction of title from the said Hough to the plaintiff.

The second call in the grant was from a pine corner N. 10° W.
(370) 150 chains to a pine corner. Both these corner trees were identified and admitted. The defendants' intestate claimed a tract of land adjoining the plaintiff's on the east, for which he produced a grant to one Kirby, dated in 1792, and deduced a regular chain of title to himself. The third call in the grant to Kirby was from a black jack in Hough's line, then with his line S. 10° E. a certain number of chains to a pine, Hough's corner, etc. The plaintiff proved by one Hezekiah Hough, Jr., who was present when the survey was made upon which the grant to Hezekiah Hough, Sr., issued, that the surveyor marked line trees from the one pine corner to the other pine corner, and that the trees so marked were still standing. It was also proved that some of these line trees were blocked and corresponded in age with the grant. It was also in proof that the course called for in the grant would lead directly from the one pine corner to the other, leaving the line of marked trees a little to the East; that for 150 or 200 yards the direct line pursuing the course corresponded very nearly with the marked trees, after which the direct line left the marked line of trees, leaving the trees standing at different and varying distances from it; that the marked line thus formed a zigzag course for the greater part of the distance, until it approached the other corner, when it got back so as again to correspond with the direct line indicated by the course called for, and thus led to the corner. The

trespass, which consisted in cutting trees, etc., was between these two lines. The plaintiff insisted that he had a right up to the line of marked trees, while the defendant contended that he had a right to go up to the direct line indicated by a straight course from corner to corner.

As to the second trespass, the plaintiff offered in evidence a grant to himself, dated in 1800, which lapped over and covered a part of the defendant's tract of land on the north. To present the question arising on this part of the case it is only necessary to give one call of the grant to Kirby, dated in 1792, under which the defendant claimed, to wit: the course from a black jack corner, on the side of the public road; then with the public road N. 80° W. 100 chains to a black jack corner the side of said road in Hezekiah Hough's line, then with his (371) line, etc. These two black jack corners were identified. The defendant proved that there was, at the date of his grant, and had been for some years before, a public road leading from one black jack corner to the other, that this road was kept up many years afterwards, and that although it had for some years past been discontinued, and a nearer road opened, yet the traces of the old road were still left and could be easily followed; that in one place in going down a hill the road divided and formed two tracks for some distance, when the two came together again. It was doubtful from the evidence which of these tracks was the public road in 1792. A direct line from corner to corner left the road, including both branches of it a small distance to the north. The line indicated by the course mentioned in the grant, starting at the first corner, would also leave the road to the north but would not strike the second corner, missing it by some thirty or forty yards. The trespass, which consisted in cutting trees and the like, was between the direct line from corner to corner and the road, and also between the two branches of the road. The plaintiff insisted that the defendant's title reached only to the direct line from corner to corner, while, on the other hand, the defendant insisted that he had a right to go with the road.

Upon the first question his Honor charged "that where both corners were known and identified, and the grant did not call for a line of marked trees, the grant run in a straight line from corner to corner—the course mentioned in the grant, and the marked line trees being regarded only as means to find the corner; that this case was entirely different from the cases relied on by the plaintiff's counsel, for in those cases, one corner being known, the object was to find the other which was unknown, and the line of marked trees being the most certain means of ascertaining the unknown corner, controlled the course when they happened to differ; but that when both corners were known the grant pursued a straight line from corner to corner, and did not turn about from

tree to tree, as they happened to be marked; that line trees, particularly 'side line trees,' as surveyors call them, were intended to indicate
(372) near where the line was; in the same way that a pointer indicates near where the corner stands. That where a grant called for a corner and then along a line of marked trees to another corner, the grant would then pursue the line of marked trees, because they were then not simply a means to find the corner, but an essential part of the boundary."

Upon the second question, the jury were charged "that as the defendant's title called from the first corner with the public road to the other corner, his grant pursued the road, and not a direct line from corner to corner, as the road was an essential part of the boundary. And that if the jury were satisfied that the road spoken of by the witnesses was the public road called for in the defendant's grant, he would be entitled to their verdict, so far as the trespass between the direct line and the road was concerned. That as to the trespass between the two branches of the road, if the jury were satisfied from the evidence that the northern branch was the public road in 1792, and was the road called for in the defendant's grant, they would find for him; but if they were not satisfied that the north branch was the public road at that time, then the defendant would be liable for the trespass between the two branches of the road." A verdict was returned for the defendant, upon which he had judgment, and the plaintiff appealed.

No counsel appeared for the plaintiff in this Court.
Mendenhall for the defendant.

DANIEL, J. The law arising on both points in this cause was, we think, correctly stated by the judge in his charge to the jury. The opinion of the Superior Court and the reasons for it, as contained in the case, are adopted by this Court as its opinion, and the judgment is affirmed.

PER CURIAM. Judgment affirmed.

Cited: Wynne v. Alexander, 29 N. C., 238; *Dula v. McGhee,* 34 N. C., 333; *Brown v. House,* 118 N. C., 879; *Higdon v. Rice,* 119 N. C., 626.

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BENJAMIN RUNYON v. THOMAS H. LEARY.

Contract—Mistake of Fact.

1. Where a vendor and purchaser contracted for a life estate in certain slaves, at a fair price for such interest, under the supposition that the vendor was entitled to no greater estate in the slaves, and the vendor executed a bill of sale conveying "all his right, title and interest in and to the slaves" to the purchaser, and it turned out that the vendor was entitled to an absolute interest in them, which was ten times the value of the life estate: *It was held*, in a suit at law in the lifetime of the vendor by the creditors of the vendor, impeaching the conveyance for fraud, that the mistake might be shown by parol testimony and that the conveyance was not fraudulent and void as to such creditors.

2. Matter *dehors* a deed may be resorted to for the purpose of repelling, as well as founding, an imputation of fraud.

THIS was an action of detinue for several slaves in the possession of the defendant. Plea—*non detinet*—upon which issue was joined and the case tried at Pitt, on the last circuit, before his Honor, *Judge Bailey.*

The case was as follows: Sally Leary was the owner of the slaves in question, and, being about to intermarry with Thomas J. Charlton, by an indenture to which she, the intended husband, and the present defendant were parties, she conveyed the slaves by way of marriage settlement to the defendant, as a trustee, upon several trusts, amongst others, upon trust, after the marriage, for the intended husband during his life, and after his death for the wife, the children of the marriage, and other persons. The marriage took place in March, 1827, and the deed was proved in June following, but was not registered until 22 March, 1830. From the marriage up to 19 July, 1837, Mr. Charlton had the possession and profits of the slaves, with the consent of the defendant. On that day he contracted to sell to the defendant, Leary, all his interest in the slaves, at the price of $400. Both of those parties, under the advice of counsel, then believed Charlton's interest to be only an estate for his life, and the price agreed on was the full value of such an estate. Counsel then prepared and Charlton executed a bill of sale, conveying "all his rights, title and interest in and to the slaves," describing them (374) by name and as being the same negroes which were settled upon the marriage. Leary paid Charlton the said sum of $400, and it was applied towards the payment of Charlton's debts.

At the time of the sale the whole value of the slaves in absolute property for $4,000, and Charlton was then insolvent and sued by the Bank of the State of North Carolina and the Bank of Cape Fear, as surety for insolvent principals, to the amount of $25,000. In August, 1837,

judgments were rendered in those suits and executions issued, under which these negroes were sold and purchased by the plaintiff. Mr. Charlton is still living. His Honor instructed the jury that if Leary intended *bona fide* to buy a life estate in the negroes and Charlton intended to convey a life estate only, as the price was a full consideration for such an estate, the conveyance was good against Charlton's creditors, although the deed, in law, conveyed the absolute and entire interest. There was a verdict and judgment for the defendant and the plaintiff appealed.

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

RUFFIN, C. J., after stating the case as above, proceeded as follows: It seems to us that the correctness of the instructions cannot be questioned. The plaintiff contended that the settlement was void for want of due registration; so that, as to his creditors, the legal estate vested in the husband, *jure mariti*. Now, admitting that to be so, then Charlton contracted to sell to the defendant an estate for life, and this contract is found to be on a fair price, and *bona fide*, and thus far there is no fraud and Charlton's creditors would be bound, as well as himself. But, it is said that Leary took a bill of sale for the entire estate, and *that* conveyance must be deemed fraudulent. It is granted that there would be a presumption against it if we were not otherwise informed what the parties contracted for, and why they so contracted. Matter *dehors* the deed may be resorted to for the purpose of repelling, as well as founding, an imputation of fraud. When we learn the whole truth in (375) this case the presumption from the form of the bill of sale is rebutted. Had it been known that Charlton had the absolute estate, the deed would doubtless have been expressed in terms more restricted and suited to pass the life estate only. But the mistake as to the extent of his interest caused also the mistake in drawing the bill of sale, in which general terms are used instead of such as would accurately describe the interest the one party intended to part from and the other expected to get, by that instrument. It was clearly a mistake, and nothing more. It cannot be turned into a fraud and thus avoid the contract altogether. The title is good for the life of Charlton at the least, and that is a sufficient answer to this action. How the conveyance might be treated in another jurisdiction, or how it might be treated at law if set up after the death of Charlton are not questions proper to be now considered. Our duty is to say that in the present state of things the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

WILLIAM W. WELLBORN v. JAMES JAMES.

Indemnity—Condition Precedent.

Where a bond was given to secure the payment of a certain sum at a particular day, which sum was stated to be in part for a tract of land, and a condition was annexed that the obligee should keep the obligor "indemnified as to the heirs" of a certain person, *it was held*, that as the money was payable at a particular day, and the indemnity provided for indefinite as to time, the indemnity was not a condition precedent to the payment of the money.

THIS was an action of debt, upon a bond, in these words:

"Three years after date I promise to pay unto William W. Wellborn, his heirs or assigns, $1,000, in current bank notes of the State of North Carolina, for value received, as witness my hand and seal this 15 September, 1831: Provided, I maintain the right and possession of the tract of land for which this note is in part given; and in the event of my being subjected to costs of any suit or suits legally (376) brought for said lands, by adverse claimants, the amount of said costs is to be deducted from the above amount, and the balance not to be paid until said suit or suits, as the case may be, are decided; also the said Wellborn is to keep me indemnified as to the heirs of Montgomery.

[Signed] JAMES JAMES. (Seal)

Test: N. CANNON."

The defendant, among other pleas, pleaded *non est factum*, upon which the cause was tried at Wilkes, on the last circuit, before his Honor, *Judge Nash*. Upon the trial, after the plaintiff had proved the execution of the bond and submitted his case, the defendant moved the court for a nonsuit, upon the ground that the bond contained a condition precedent of which the plaintiff had not proved the performance, to wit: the last clause of the bond, "also said Wellborn is to keep me indemnified as to the heirs of Montgomery." The court refused the nonsuit, and there being no other evidence given on either side the jury returned a verdict for the plaintiff and the defendant, after an ineffectual motion for a new trial, appealed.

No counsel appeared for the defendant in this Court.
D. F. Caldwell for the plaintiff.

DANIEL, J. The action is brought to recover the sum of money mentioned in the body of the bond. This sum was payable at a particular day. The condition annexed, that the plaintiff should keep the defendant indemnified as to the heirs of Montgomery, is indefinite as to time;

it is not a condition precedent to the payment of the money. It was inserted for the benefit of the defendant, and if he had been evicted by the heirs of Montgomery, by a better title, he might have plead that fact specially in bar. As that event has not occurred there is nothing to prevent the plaintiff's recovering his debt, and interest on the same from the day it should have been paid. What remedy the defendant may have, if the heirs of Montgomery should hereafter disturb him, it is now unnecessary to decide. The judgment is affirmed.

PER CURIAM: Judgment affirmed.

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(377)

DEN ON DEM. OF PARMELIA CLEMENTS ET AL. *v.* HADRIANUS VAN NORDEN'S HEIRS ET. AL.

Amendment of Pleadings—Appeal.

The fixing the terms on which an amendment is allowed is a matter of discretion with the court which allows it, and is not the proper subject of appeal.

EJECTMENT. At September Term, 1838, of the Superior Court of Law for Pitt County, the attorney for the lessors of the plaintiff moved the court for leave to amend the declaration by adding a new count on a demise of some other person. The cause had been pending in the County Superior Courts from February Term, 1835, of the county court. The motion for the amendment was resisted on behalf of the defendants, unless upon the condition of the lessors of the plaintiff paying all the costs incurred in the cause up to the time of granting the order. His Honor, *Judge Saunders,* however, permitted the amendment on the payment of the costs of the term only. From this order the defendants were permitted by his Honor to appeal.

Iredell and J. H. Bryan for the defendants.
The Attorney-General for the plaintiffs' lessors.

DANIEL, J., after stating the case as above, proceeded: The act of Assembly empowers the court in which any action shall be pending to amend any process, pleading, or proceeding in such action, either in form or substance, for the furtherance of justice, on *such terms* as shall be just. 1 Rev. Stat., ch. 3, sec. 1. It was discretionary with the Superior Court to fix the terms on which the amendment was to be permitted. The exercise of this just discretion, as to terms, vested by the Legislature in

the court which allows of amendments is not the proper subject of appeal. The discretion as to just terms when an amendment is made, is left by the Legislature solely with the court that exercises the power of amendment. This Court has no criterion or standard to ascertain whether the discretion exercised by the judge below was just or not. We are, therefore, of the opinion that this appeal must be dismissed.

PER CURIAM. Appeal dismissed.

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(378)

ALLEN BEVERLY v. JAMES WILLIAMS ET AL.

Opinion of Witnesses—Handwriting and Identity.

A witness may state his belief as to the identity of persons, or the sameness of handwriting, though he will not swear positively as to those facts; and the degree of credit to be attached to his evidence is a question for the jury.

THIS was an action of *trespass vi et armis,* brought to recover damages from the defendants for killing a slave of the plaintiff named Elias.

Upon the trial at Hertford, on the last circuit, before his Honor, *Judge Saunders,* the evidence was that some of the defendants shot a runaway slave found in the swamps of Gates County, and that the other defendants were present and encouraged the act to be done. A question arose on the trial, whether the slave which had been killed by the defendants was in fact the slave of the plaintiff. A witness was examined as to that and stated that he knew the plaintiff's slave Elias, and that he had seen him not long before in the possession of the plaintiff; that he saw the corpse of the slave that was killed the day after the killing and he believed it was Elias, but could not be positive. He was asked why? if he knew the slave. He said the negro was so much swollen that he could not swear positively, but he believed then, and still believed, it was the plaintiff's negro. The witness further testified that he lived in the neighborhood and more than two years had elapsed since the killing, yet he had not since seen or heard of the negro Elias.

His Honor charged the jury that as to the slave killed being the plaintiff's slave, that was a question of identity; that if they could confide in the belief of the witness and were satisfied as to the killing, they would find a verdict for the plaintiff. The plaintiff had a verdict and judgment and the defendants appealed.

Iredell for the defendants.
Badger for the plaintiff.

(379) DANIEL, J., after stating the case, proceeded as follows: On questions of identity of persons and of handwriting it is every day's practice for witnesses to swear that they believe the person to be the same, or the handwriting to be that of a particular individual, although they will not swear positively, and the degree of credit to be attached to the evidence is a question for the jury. 1 Stark. Ev., 153. The charge of the judge was correct, and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Sikes v. Paine, 32 N. C., 282.

EDMUND CLAYTON v. ASA D. LIVERMAN.

Delivery—Evidence.

The delivery of a paper as a deed may be either actual at the time of the making, or by the donee's taking possession of it as a deed at the time of the making, or at any subsequent time, if done with the knowledge and consent of the makers. But where there were neither acts done nor words spoken at the time of the making from which a delivery of the paper as a deed to the donee, or to any person for him, could be inferred, and the possession of the paper by the donee long afterwards was satisfactorily accounted for, *it was held*, that there was *no* evidence of a delivery to be left to a jury.

THIS was an action of detinue for three slaves, tried before his Honor, *Judge Saunders,* at Tyrrell, on the last circuit.

The plaintiff claimed the slaves in question under the following instrument, which he contended was a deed of gift:

"STATE OF NORTH CAROLINA—Tyrrell County.

"Know all men by these presents, that I, Patsey Liverman, and Sarah Liverman, of the aforesaid county, do, for the good will and divers of good causes which we have not mentioned, have given and bequeathed unto Edmund Clayton the following articles, viz.: first, we give (380) and bequeath fifty acres of land, which we purchased of Uriah Spruill; also one negro woman named Phillis, one girl, Ginney, and one boy by the name of Robert, to have and to hold the aforesaid

property at our death, free and clear from any enthralment whatsoever. In testimony whereof we have hereunto set our hands and seals this 28 July, 1828.

her
PATSEY × LIVERMAN. (Seal)
mark

her
SARAH × LIVERMAN. (Seal)
mark

"Signed, sealed, and delivered in the presence of us.
NANCY MCCLEES.
CHARLES MCCLEES."

One of the subscribing witnesses was called and testified that he wrote the instrument at the request of the makers, and read it over to them; that they signed it and then handed it back to him to witness; that he did witness it, and then either handed it back to them or laid it on the table, he did not recollect which; and that the plaintiff was present at the time. The plaintiff, at that time, lived with the makers, who were his aunts, and was their manager and agent, which he continued to be until their deaths. He then took possession of all their property and effects. The paper in question was not proved and registered until after the death of the makers, which was more than eight years after the date of the instrument.

For the defendant it was insisted that the paper was testamentary and did not operate as a deed; and that there had been no delivery. His Honor charged the jury that they must be satisfied of the fact that the makers of the paper had delivered it. That the delivery might be either actual at the time of the making or by the plaintiff's taking possession of it, as a deed, at the time of the making, or at any subsequent time, if done with the knowledge and consent of the makers. That if the paper, after being witnessed, had been returned to the makers, and they had held until their deaths, it was not a delivery; but if it had been laid on the table and the plaintiff either then or at any subsequent time took possession of it with the assent of the makers, it was a delivery. That it was necessary that something should be said by the makers, signifying their intention to deliver, or they should do some act with (381) an intent that the paper should be delivered, otherwise the instrument could not, in law, be a deed. There was a verdict and judgment for the plaintiff and the defendant appealed.

A. Moore and Heath for the defendant.
Kinney for the plaintiff.

DANIEL, J., after stating the case as above, proceeded as follows: The rules of law as to the delivery of deeds were properly laid down by the judge. *Moore v. Collins,* 4 Dev., 384. But we think that there was no evidence in this cause for the application of those rules. There were neither acts done nor words spoken from which a delivery of the paper as a deed to the plaintiff, or to any person for him, could be inferred. The manner in which the plaintiff got possession of the paper is accounted for by the proof of his residence with his aunts, and his taking possession of all their property and effects on their death. It was not shown that he ever held possession or made any exhibition of the
(382) paper until after their death. But the jury were authorized by the instruction to presume such possession, and thence to infer a delivery without any evidence. Their verdict is not contrary to the weight of the evidence, but without *any* evidence as to the delivery of the paper as a deed. It is unnecessary for us to give any opinion as to the question, whether the paper is testamentary in its character, as there must be a new trial, because there was *no* evidence of delivery, even if the paper could be considered as having been draughted for a deed. There must be a new trial.

PER CURIAM.

Cited: William v. Singleton, 108 N. C., 195.

DEN ON DEM. OF SARAH HARRIS ET AL. V. JAMES J. MAXWELL.

Possession of Land—Statute of Presumptions.

1. The Act of 1791 (1 Rev. Stat., ch. 65, sec. 2), making certain possessions of land valid against the State, does not affect the common law principle of presuming a grant from great length of possession. And if a person and those under whom he claims have been in possession for thirty-five years of a tract of land, the lines and boundaries have been known and visible, and he and they under whom he holds claimed up to those lines and boundaries, a grant for the land up to those boundaries may be presumed to have issued, although the actual possession or enclosure of the occupants might not have extended to the lines—the possession, in that case, of a part being the possession of the whole.

2. The case of *Fitzrandolph v. Norman,* 4 N. C., 564, approved.

3. Maps and surveys, which are referred to in deeds of conveyance, whether annexed to the deeds mechanically or not, become incorporated as parts of them. But whether such map or survey could be read in evidence when not registered with the deed, *Quere?*

THIS was an action of ejectment, tried at Mecklenburg, on the last circuit, before his Honor, *Judge Nash.*

The lessors of the plaintiff, in making out their title to the land in controversy, introduced a deed executed by George Graham, sheriff of Mecklenburg County, to James Harris, in October, (383) 1795, in which were contained the following words as part of the description of the land conveyed: "The various courses being fully ascertained by said Harris' plat of *his deeded* lands and the surplus land found to contain 268 acres." They then offered in evidence a survey made by Samuel Black (a deceased surveyor) in April, 1795, as the one referred to in the sheriff's deed. The reception of this plat was objected to by the defendant's counsel, but was admitted by the court, submitting its identity as a matter of fact to the jury. The plaintiff's lessors then proved that the plat covered the land in dispute, and further that they and those under whom they claimed had been in the peaceable and undisturbed possession of the land within the boundaries as set forth in the plat referred to, for upwards of fifty-five years, and that sice 1795 the said James Harris and those claiming under him had used the land designated by the said plat as one tract, by actual cultivation on different parts, and by other acts of ownership, and that they had had a part of the lands within the disputed lines in actual cultivation for about thirteen years before the bringing of this action.

The defendant claimed under a grant to him of recent date for the land in dispute, and contended that the land covered by his grant was, at the time it issued, vacant, and subject to entry.

His Honor, after giving some instructions to the jury, which it is unnecessary to mention, charged them "that if they were satisfied that the plaintiffs and those under whom they claimed had been thirty-five years in possession, before the action was brought, of the land circumscribed by the plat, referred to in the sheriff's deed to James Harris, and that during that time the lines and boundaries of said land were known and visible, and the plaintiffs and those under whom they held claimed up to them, they were at liberty to presume a grant for the land to have issued up to those boundaries——although the actual possession or enclosure of the occupants might not have extended to the lines—the possession, in that case, of a part being the possession of the whole, and that, in that case, they would find for the plaintiffs." There was a verdict and judgment for the lessors of the plaintiff and the defendant appealed.

Hoke for the defendant. (384)

D. F. Caldwell for the lessors of the plaintiff.

DANIEL, J. Maps and surveys are often referred to by deeds of conveyance, and then, whether mechanically annexed or not, they become incorporated parts of the descriptions contained in those deeds. *Bridgman v. Jennings,* 1 Lord Raym., 734; 1 Phil. Ev., 203; 1 Strange's Rep., 95; Burton on Real Property, 142. But, without this Court now stopping to decide the question whether the survey or map could legally be given in evidence by the plaintiffs as a part of the sheriff's deed to Harris, executed in the year 1795, as it, the map, was not registered with the sheriff's deed, still, we think, there is a point in the case which is clearly in favor of the lessors of the plaintiff. The judge charged the jury "that if they were satisfied that the lessors of the plaintiff, and those under whom they claimed, had been thirty-five years in possession, before the action brought, of the land circumscribed by the plat referred to in the sheriff's deed to James Harris, and that during that time the lines and boundaries of said land were known and visible, and the lessors of the plaintiff, and those under whom they held, claimed up to them, they were at liberty to presume a grant for the land to have issued up to those boundaries, although the actual possession or enclosure of the occupants might not have extended to the lines—the possession, in that case, of a part, being the possession of the whole, and in that case they would find for the plaintiffs." The correctness of the charge of the judge on this point is supported by the case of *Fitzrandolph v. Norman,* N. C. Term Rep., 131. In that case the judges who decided it gave elaborate opinions and went so thoroughly into the subject that we now deem it unnecessary to say or do more than refer to the reasons there advanced, as sufficient in our opinion, to show that the act of 1791 (1 Rev. St., ch. 65, sec. 2) making certain possessions of land valid against the State, does not affect the common law principle of presuming a grant from the State, from great length of possession. In our opinion the above charge of the judge was correct, and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Wallace v. Maxwell, 29 N. C., 137.

(385)

THOMAS S. HOSKINS v. WILLIAM WILSON.

Guardian—Purchase of Ward's Property.

A guardian cannot purchase his ward's property of himself, because the law requires that there should be two persons at least to make a contract. But if another purchases at the guardian's sale for the guardian's benefit, but takes a conveyance to himself and afterwards conveys to the guardian, the purchase will not be void at law. And even in equity such sales are not *ipso jure* void; but the trustee purchases subject to the equity of having the sale set aside, if the *cestui que trust*, in a reasonable time, chooses to say he is not satisfied with it.

THIS was an action of detinue for two slaves and the following statement of facts agreed was submitted to his Honor, *Judge Saunders,* on the last circuit, at Chowan.

The slaves in controversy, in the year 1823, belonged to eight persons by the name of Wilson, as tenants in common. Four of the tenants were infants, and Willis Wilson, Sr., was their guardian. All the tenants in common petitioned the county court of Camden, under the act of Assembly, 1 Rev. Stat., ch. 85, sec. 19, for a sale of the slaves for the purpose of division. The court granted an order that the petitioners might sell the slaves at six months credit; and in pursuance thereof the sale was made, when one William Bartlett became the purchaser of them at the price of $227. The petitioners executed to Bartlett, in due form, a bill of sale for the slaves, and a short time thereafter he conveyed them to Willis Wilson, Sr., the guardian of the infant petitioners. Bartlett bought the slaves at the sale for the benefit of Willis Wilson, Sr., who paid the purchase money. Wilson held possession of them during his life, and all that time continued to be the guardian of the infant petitioners. By his will Wilson bequeathed the slaves to the plaintiff, whose guardian took them and hired them out. The defendant, who was one of the petitioners and joined in the execution of the bill of sale to Bartlett, became administrator to one of the infant petitioners who died, and guardian to one of them. He got possession of the slaves and on demand refused to deliver them to the plaintiff. On this statement of facts his Honor charged the jury that the plaintiff was entitled to recover. There was a verdict and judgment for the plaintiff, and the defendant appealed.

Kinney for the defendant. (386)

A. Moore and Iredell for the plaintiff.

DANIEL, J., after reciting the facts of the case, proceeded as follows: The defendant insists that the nominal purchase by Bartlett for the benefit of the guardian of the infant petitioners, was, in law, *void,* and that the plaintiff having only the title of the adult petitioners, was now only tenant in common with the infants, and could not maintain an action of detinue against him, their guardian and representative. If the sale to Bartlett was void in law the ground taken by the defendant would be correct. But we are of the opinion that in a court of law the sale under the circumstances stated was not void. *Jackson ex dem. of Coldin v. Walsh,* 14 John Rep., 406, is a case in which the Court decided that a deed similar in its character to the one now before us was not void at law. The case is as follows: C. Coldin made his will, which contained a power by which his executor was authorized to sell all or any part of his lands, for certain purposes. The executor, under the power, exposed a lot of land to sale to the highest bidder at public auction; Dubois became the purchaser for the consideration of £141, and the executor executed to him a deed for the land. On the same day Dubois reconveyed the premises to the executor. After this the heir at law of the testator brought an action of ejectment to recover the land thus sold. Walsh, the defendant, claimed under the deed made as aforesaid, to and from Dubois. The Court, in delivering its opinion, say: It is not denied on the part of the plaintiff but that a regular paper title was made out, under this will, down to the defendant. It appears, however, that the executor conveyed the premises in question to Dubois, who, on (387) the same day reconveyed them to the executor. It is contended that Dubois is a mere nominal purchaser, and the sale void, under the rule which prevails in the Court of Chancery, that a trustee or agent to sell shall not himself become the purchaser. It is unnecessary to go into an examination of the equity doctrine on this subject. No case is to be found where a Court of Law has pronounced such a deed absolutely void. The legal title undoubtedly passes, and the rules and principles which govern the Court of Chancery in such cases, show that it would be very unfit for a Court of Law to interfere and set aside such conveyances. Indeed, it is not the doctrine of a Court of Equity that such sales are, *ipso jure,* void, but that the trustee purchases subject to the equity of having the sale set aside, if the *cestui que trust,* in a reasonable time, chooses to say he is not satisfied with it. (All the law on this subject, governing Courts of Equity, may be found in the references made by Willis on Trustees, 163, 164.) There may be some *dicta* scattered in our N. C. Reports that such a conveyance might be avoided at law. But we are not aware of any express decision in our courts contrary to the one which the judge of the Superior Court made in this case. Wilson, the guardian, could not purchase of himself, because the

law requires that there should be two persons at least to make a contract. But we think that the sale to Bartlett and the reconveyance by him to the guardian of the infant tenants in common was not void, *per se,* at law. We ought not to hold it so unless compelled by authority, for the consequences of the doctrine would be injurious to purchasers without notice. And we think the judge did not err in telling the jury that the plaintiff at law was entitled to recover. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Ford v. Blount, 25 N. C., 518.

(388)

PHILIP CAUSEE v. TIMOTHY ANDERS.

Assault and Battery—Damages.

1. A tenant in common has no right to inflict a battery upon one who enters upon the land under the authority of the co-tenant; and in this respect there is no distinction between the co-tenant and one entering with him and under his authority.

2. In an action for an assault and battery the plaintiff usually and as a general rule has a right to expect a fair compensation in damages for the injury really sustained; but in addition to this the jury may be sometimes called upon to give exemplary damages by way of punishment, when it appears that the defendant was actuated by malice and a total disregard of the laws, and the plaintiff was in nowise to blame.

THIS was an action of *trespass vi et armis* for an assault and battery upon the body of the plaintiff.

Upon the trial at Bladen, on the last circuit, before his Honor, *Judge Pearson,* it appeared that the defendant was in possession of a tract of land to which one Meredith had title either in severalty or as a tenant in common with the defendant; that Meredith and the plaintiff under his authority, entered upon the land in the absence of the defendant, and broke open and entered a house there situate, and carried a loom, bed, and several other articles of personal property belonging to the defendant from the house into the yard, and then returned into the house with the view of staying there all night; that between midnight and daybreak the defendant, in company with one William Anders, came to the house and having by a stratagem prevailed upon Meredith to open the door jerked him out and knocked him down, then rushed into the house and knocked the plaintiff down, and as he was attempting to rise knocked

him down again. That at this instant William Anders, who was holding a gun for the defendant, came to the door and the defendant seeing him and supposing him to be Meredith, knocked him down, when Meredith and the plaintiff made their escape. All this knocking down was done with a large hickory stick loaded with lead at both ends, and it was proved that at the first blow which the plaintiff received three of his teeth were knocked out and his jaw bone fractured. He was a weakly old man and the defendant was a man of great strength, in the prime of life.

(389) For the plaintiff it was insisted that the land belonged to Meredith in severalty, but if it did not, and he was but a tenant in common with the defendant, yet as the plaintiff was there under the authority of Meredith the defendant had no right to treat him in the manner proven.

The defendant insisted that he was a tenant in common with Meredith, and as such had a right to inflict the battery upon the plaintiff—taking a distinction between the tenant in common and one who, like the plaintiff, was there by the authority of his co-tenant. His Honor charged the jury "that it was not necessary to decide whether Meredith had a right to the land in severalty or was but a tenant in common with the defendant, for if he was but a tenant in common he had a right to enter and to take with him the plaintiff, and the defendant was not justified in committing a battery upon him. That the distinction taken by the defendant's counsel was not supported by law."

His Honor added "that if the jury found for the plaintiff the amount of damage was a matter for their consideration; that usually and as a general rule in actions of this nature the plaintiff had a right to expect a fair compensation in damages for the injury really sustained; as for the loss of time when by the act of the defendant he was rendered unable to attend to business, and the expense of calling in a physician, or the actual loss in being deprived of a tooth; but in addition to this the jury were sometimes called on to increase the amount of damages by adding on something by way of punishment, when it appeared that the defendant was actuated by malice and a total disregard of the laws, and the plaintiff was in no wise to blame. That in this case if the defendant honestly believed he was entitled to the land and that the plaintiff, as a mere volunteer and hireling, had willfully trespassed upon his rights, and in the heat of passion the defendant had inflicted the injury, the case would not call for vindictive damages. But if the defendant had done all this violence actuated by a total disregard of the rights of others, and a reckless disposition to have his own way in despite of consequences, it would present a case in which the jury would be authorized to punish by exemplary damages." The plaintiff had a verdict for

$200 damages, and the defendant moved for a new trial for error (390) in the charge in not sustaining the distinction taken, and upon the question of damages. The motion was overruled and the judgment pronounced, from which the defendant appealed.

Strange for the defendant.
No counsel appeared for the plaintiff in this Court.

DANIEL, J. We have examined this case and are of the opinion that the charge of the judge, as to the law, and the reasons given by him on both points in the cause, are correct. The judgment will, therefore, be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Mills v. Carpenter, 32 N. C., 301; *Louder v. Hinson,* 49 N. C., 371; *Sowers v. Sowers,* 87 N. C., 307; *State v. Powell,* 97 N. C., 420; *Hansley v. R. R.,* 115 N. C., 612.

(391)

PECK, WELLFORD & CO. v. JOHN A. GILMER ET AL.

Covenant—Way-Bills—Evidence.

1. Although a covenant expressly made with A, but declared to be for the benefit of B, vests the legal interest in A, yet where the *covenantee* is not expressly declared the inference of law, because the inference of reason, is that the covenant is made with him or them for whose benefit it purports to have been given. Therefore, where certain persons guaranteed that W. would pay to the agent of a company of stage contractors "all amounts of money that might come to his, W.'s, hands," as agent also for the company: *It was held*, that an action brought against the covenantors upon the default of W., should be brought by the company, and not by their agent to whom the money was to be paid.

2. The way-bills containing the names of passengers and the amounts paid for their fare, made out by an agent of a company of stage contractors and transmitted to them or to their other agents, are admissible in evidence against the sureties for the faithful accounting and paying over of the agent; because it was part of the agent's duty to make out and transmit these bills; and it was the mode of accounting and charging the agent which must have been contemplated by the sureties when they guaranteed his fidelity in paying what he might collect in the course of his agency.

3. It is a well established rule that where a person who has peculiar means of knowing a fact makes a declaration or a written entry of that fact, which is against his interest at the time, such declaration or entry is, after his death, evidence of the fact as between third persons.

4. If a defendant could set up mere delay or want of diligence in the plaintiff as a defense at law against an express unconditional covenant, it could operate at most but to relieve the defendant to the extent of the loss thereby thrown upon him.

THIS was an action of covenant brought upon the following instrument:

"We, the undersigned, guarantee that Watson W. Woodburn will pay to Anthony Bencini any and all amounts of money that may come to his hands as agent for Peck, Wellford & Co.

Given under our hands and seals this 15th day of October, 1836.

JOHN A. GILMER. (Seal)
(Signed) H. HUMPHREYS. (Seal)
JOS. A. MCLEAN. (Seal)"

(392) On the other side of the same sheet on which this was written was a letter addressed by Woodburn to Bencini, in which he proposed the terms upon which he would keep the stage house and act as stage agent for the plaintiffs at Greensborough, in Guilford County, and requested that it might be shown to Mr. Price, who was one of the firm of Peck, Wellford & Co., and the whole was sealed up as a letter and sent by the stage to Mr. Bencini, at Milton, in this State.

The defendants pleaded *non est factum* and *conditions performed and not broken,* upon which issues were joined and the case tried at Caswell, on the last circuit, before his Honor, *Settle, J.*

The plaintiffs having on the trial offered evidence of the execution of the instrument by the defendants and that the letter aforesaid was in the proper handwriting of Woodburn, proposed to read them to the jury, but the defendants objected: First, that the covenant created an obligation in favor of Bencini but not to the plaintiffs; secondly, that the letter endorsed, being in Woodburn's handwriting, could not be read against the defendants. His Honor allowed both to be read. The plaintiffs then called as a witness A. Bencini, who stated that the plaintiffs were contractors for carrying United States mail in four-horse coaches on two lines, one passing through Greensborough and the other ending there, for four years from and after 1 January, 1835; that he was their agent in superintending said line, and had received the obligation declared on in the letter aforesaid a few days after it bears date; that in consequence thereof Woodburn, who was the keeper of a tavern in Greensborough, was allowed to keep the stage house at that place and to

receive money for their fare from passengers travelling on either of the routes before mentioned. That the transfer of the stage to Woodburn's house took place on 1 January, 1837; that Woodburn settled with him, Bencini, as agent of the plaintiffs, at the expiration of the first quarter of that year, ending 1 April, and paid over to him the balance then due. He further stated that in the usual course of business on those stage lines way-bills were sent by each stage, in which were inserted the names of the passengers, the amounts paid by each, and to whom (393) paid, entered by the particular person receiving the money and attested by his signature; that Woodburn continued to be a receiver for the plaintiffs until September, 1837, when he died, reported to be wholly insolvent, and that there had been no executor or administrator of his estate; that there had been no settlement or payment by him to witness after 1 April aforesaid. The plaintiffs then offered in evidence the way-bills, on proving Woodburn's handwriting of the entries charging himself with the receipt of moneys. This evidence was objected to by the defendants, but admitted by the court. The defendants all resided in Greensborough, where Woodburn lived, and the plaintiffs, one of whom lived in Caswell County and the others in Virginia, showed a formal demand made on each of the defendants in writing on 6 April, 1838, before this suit was instituted, and refusal by them.

The defendants in cross-examining the witness Bencini, inquired whether he had not heard Wellford, one of the plaintiffs, say that he had sold his interest in the mail contracts aforesaid to one Crusenberry? The plaintiffs objected that such sale could be made only in writing and with the approbation of the Postmaster General, and that parol declarations were not admissible to prove the transfer. His Honor admitted the evidence and the witness stated that he had been told by Wellford that he had made a sale of his interest aforesaid to Crusenberry on certain conditions, in the summer of 1836, but that Crusenberry failed to comply, and he sold to Price, one of the plaintiffs. It was insisted by the defendants that if Wellford had transferred his interest he was improperly joined in the action; that the plaintiffs had been guilty of laches, which would prevent a recovery by failing to notify the defendants that they accepted the covenant aforesaid—by failing to settle with Woodburn during his life—by failing to take any steps against his estate after his death, and by failing to demand payment from the defendants until the April following; and that what was due diligence was a question of law. His Honor instructed the jury that the instrument declared on was not negotiable, and that if Wellford had assigned his interest in the stage concern so as to transfer it in equity, he was still a proper and necessary party to an action at law on the instrument. That it was necessary for the plaintiff to show that the defendants had (394)

notice that their covenant of guaranty was accepted by them, and the jury were to inquire from the evidence in the cause whether the defendants had such notice. That it was also incumbent on the plaintiffs to prove that they had used due diligence, and that what was due diligence was partly a matter of law and partly a matter of fact. That if the account of Woodburn against the plaintiffs for the keeping of horses, etc., in the second quarter of the year ending 1 July, was equal to the amount of his receipts for them during that period, then there was no want of diligence in not calling on him to account during his life; that in general a guarantor had a right to notice from the guarantee of the default of the principal; but if they were satisfied that Woodburn died insolvent and that there had been no executor or administrator of his estate, nor property which could be subjected to the plaintiffs' claim, then no demand on them earlier than that shown in this case was necessary to enable the plaintiffs to recover. A verdict was returned for the plaintiffs, upon which a judgment was rendered and the defendants appealed.

J. T. Morehead for the defendants.
W. A. Graham for the plaintiffs.

GASTON, J. The two first objections taken by the defendants on the trial have not been pressed upon the Court in the argument here, but as they appear upon the record they must be noticed, and may, with propriety, be considered together. The covenant declared upon does not in terms express with whom it is made. It is a "guaranty" under the seals of the defendants "that Woodburn will pay to Bencini all such sums of money as shall come to his hands as the agent of Peck, Wellford & Co.", and it was transmitted by mail on the day it bears date by Woodburn to Bencini, with an indorsation in Woodburn's handwriting that it should be shown to Price, one of the firm of Peck, Wellford & Co. It was objected by the defendants that upon the covenant itself it appeared to have been made with Bencini, and that the indorsation being the act of Woodburn alone could not be received in evidence to alter the

(395) effect of the covenant. It is not to be questioned but that the action upon this contract must be brought by the party with whom it was made, because in *him* is vested the legal interest in the contract. But the instrument does not in express terms declare with whom the engagement is entered into, and therefore *per se* must be wholly inoperative, unless we can fairly collect from the scope of the engagement threin set forth to whom the defendants became bound. We are of opinion that it does sufficiently appear upon the face of the instrument that the contract was made with Peck, Wellford & Co. It is a contract of

guaranty for the performance of a duty on the part of Woodburn, growing out of his relation as agent to Peck, Wellford & Co., and affecting the disposition of their property. Now, although a covenant expressly made with A, but declared to be for the benefit of B, vests the legal interest in A, yet where the *covenantee* is not expressly declared the inference of law, because the inference of reason is that the covenant is made with him or them for whose benefit it purports to have been given. The moneys to be received by Woodburn are the moneys of Peck, Wellford & Co., not of Bencini, and a failure to pay them to Bencini would be their loss, not his. Woodburn is the agent of Peck, Wellford & Co., not of Bencini, and they, and not he, have an interest in the fidelity of that agent. Although the moneys thus collected in the course of this agency are to be paid to Bencini, yet they are to be so paid as the moneys of Peck, Wellford & Co., in discharge of a duty to them. The covenant of guaranty is therefore in legal contemplation made with them. They could release it—they have a right to enforce it. Entertaining this opinion we are relieved from the necessity of a particular consideration of the second objection, for the evidence, whether competent or not, could in no way prejudice the defendants.

The next question presented to us respects the admission in evidence of the way-bills which were offered by the plaintiffs to show the amount that had been received for them by Woodburn, while acting as their agent. These way-bills had been made out by him and transmitted at the times they bear date to the plaintiffs or their other agents, setting forth the names of the passengers going with the way-bills and the sums by them paid for their passage money respectively. The recep- (396) tion of this evidence was opposed upon the ground that it amounted to no more than the declarations of Woodburn, and could not bind the present defendants. We are of opinion that the evidence was competent and proper. It is a well-established rule that where a person who has peculiar means of knowing a fact makes a declaration or a written entry of that fact, which is against his interest at the time, such declaration or entry is, after his death, evidence of the fact as between third persons. *Warren v. Greenville,* 2 Strange, 1129; *Barry v. Bibbington,* 4 Term Rep., 514; *Higham v. Ridgway,* 10 East Rep., 109; *Middleton v. Milton,* 10 Barn. and Cres., 317 (21 Eng. Com. Law Rep., 84). It is true that in the case of *Goss v. Wattington,* 3 Brad. and Bing., 132 (7 Eng. Com. Law Rep., 379) the Chief Justice, in delivering the judgment of the Court, expresses an opinion (if the reporters be correct) that receipts given by a collector for taxes *to those making payment,* are not to be admitted as evidence against his sureties for the faithful discharge of his duties, after the death of the collector. It is worthy of remark, however, that the point was one wholly immaterial to the deci-

sion of the case, and that in *Middleton v. Milton* the correctness of that opinion has been very strongly denied. But there was a peculiar propriety in receiving the evidence here objected to. It was admissible within the *principle* sanctioned in *Goss v. Wattington, Whitmarsh v. George,* 8 Barn. and Cres., 556 (15 Eng. Com. Law and Rep., 295) and other cases, because it was a part of Woodburn's duty to make out and transmit these bills exhibiting his receipts on account of his principals, and they were made out and transmitted in the discharge of that duty in the regular and ordinary course of business. It was the mode of accounting and charging Woodburn which must have been contemplated by the defendants when they guaranteed his fidelity in paying what he might collect in the course of his agency.

It appears from the case stated that upon the cross-examination of the witness Bencini, he was asked by the counsel for the defendants whether he had not heard from Wellford, one of the plaintiffs, (397) that *he* had sold his interest in the mail contracts to one Crusenberry, and that the witness answered that he had heard Wellford say that he had sold his interest to Crusenberry upon conditions in the summer of 1836, and that those conditions not having been complied with he had sold that interest to Price, another of the plaintiffs. Thereupon the counsel for the defendants insisted that Wellford was improperly joined as a party plaintiff, but the Court instructed the jury that Wellford's interest in this covenant was not negotiable and that a sale of his interest in the mail contracts could operate as a transfer only in equity. It has been urged here that the fair inference is that the sale by Wellford to Price was made either before the covenant was executed, or before Woodburn entered upon his agency for the mail contractors, or at all events before that agency was concluded by Woodburn's death; that such sale passed the legal interest of Wellford, and that the plaintiffs could sustain no action on the guaranty, or at all events no action for the damages sustained after such sale. This Court is of opinion that no such inference can be drawn by them, or could have been legitimately drawn by the jury; first, because it is distinctly stated in the case that Woodburn acted as the agent of *the plaintiffs,* up to the day of his death; and secondly, because the cross-examination left it wholly uncertain when the sale to Price was made. If the sale was made before the death of Woodburn this was a fact which it was incumbent on the defendants to establish. No instruction could be asked for upon a hypothetical statement of facts, and the *prima facie* right of the plaintiffs to recover could not be defeated by vague conjecture. We feel it our duty, therefore, to dismiss the consideration of this objection without expressing any opinion upon it.

We also forbear from considering whether there was any laches on the part of the plaintiffs in not calling Woodburn more frequently to account, or in not notifying the defendants earlier of his failure to pay over the moneys by him received, and also whether the instructions given by the judge in relation to the alleged laches and the legal consequences thereof, if shown, were correct or incorrect. It does not appear that any evidence was offered showing, or tending to show, that an injury had been sustained by reason of such alleged laches. (398) Were it admitted that the defendants could set up mere delay or want of diligence in the plaintiffs as a defense at law against an express unconditional covenant—and had such laches been ever so clearly established—it could operate, at most, but to relieve the defendants to the extent of the loss thereby thrown upon them.

The result is that the defendants have not established any sufficient error upon which to reverse the judgment rendered below, and it must, therefore, be affirmed with costs.

PER CURIAM. Judgment affirmed.

Cited: Peace v. Jenkins, 32 N. C., 357; *Williams v. Alexander,* 50 N. C., 163; *Carr v. Stanley,* 52 N. C., 133; *Shaffer v. Gaynor,* 117 N. C., 24.

THOMAS V. ROBERTS QUI TAM. v. HENRY J. CANNON.

Qualification of Voter—Residence—Domicile.

1. Under the eighth section of the Constitution a residence within the State for twelve months immediately preceding the day of an election—no matter in what county or counties of the State—is sufficient to entitle one, otherwise qualified, to vote for members of the House of Commons for the county in which he resides at the day of election.

2. By a residence in the county, the Constitution intends a *domicil* in that county. This requisition is not satisfied by a visit to the county, whether for a longer or a shorter time, if the stay there be for a temporary purpose, and with the design of leaving the county when that purpose is accomplished. It must be a fixed abode constituting it the place of *his home.*

3. Arguments upon the policy of law, though undoubtedly admissible, are to be listened to with much caution. The interpreters of a law have not the right to judge of its policy, and when they undertake to find out the policy contemplated by the makers of the law there is great danger of mistaking their own opinion on that subject for the opinions of those who had alone the right to judge of matters of policy.

(399) THIS was an action of debt, brought by the plaintiff, to recover of the defendant the penalty prescribed by law (see 1 Rev. Stat., ch. 20) for having voted at an election for members of the House of Commons without being entitled to vote at such election. It was commenced by a warrant before a single justice and carried by successive appeals to the Superior Court, in which it was tried on the last fall circuit, at Northampton, before his Honor, *Judge Saunders.* Upon the trial the facts were agreed and were as follows:

At the election in the county of Northampton, in August, 1838, the defendant voted for members to represent that county in the House of Commons of the General Assembly. He was a native citizen of the State, and an inhabitant of that county; had attained the full age of twenty-one years, had repeatedly paid public taxes, and had resided in the State all of his life, but he had not been an inhabitant of the county of Northampton twelve months immediately preceding the day of election, having removed into that county in the month of November, 1837, from the county of Wake, where he had always theretofore resided. His Honor, upon these facts, was of opinion that the plaintiff was entitled to recover, and gave judgment accordingly, whereupon the defendant appealed.

Battle for the defendant.

(403) *B. F. Moore for the plaintiff.*

(405) GASTON, J., after stating the facts of the case as above, proceeded as follows: The question of law arising upon these facts is, whether the defendant had the right to vote at the said election.

The 8th section of the Constitution, upon which the controversy arises, is in these words: "All freemen of the age of twenty-one years, who have been inhabitants of any county within this State twelve months immediately preceding the day of any election, and shall have paid public taxes, shall be entitled to vote for members of the House of Commons for the county in which he resides." The plaintiff insists that this section confines the right of voting to those who have been inhabitants of the particular county in which they reside at the day of election, for twelve months immediately preceding that day; while the defendant contends that a residence within the State for twelve months preceding the day of election—no matter in what couny or counties of the State—is sufficient to entitle one, otherwise qualified, to vote for members of the House of Commons for the county in which he resides at the day of election. There is a very striking grammatical inaccuracy in the language of this section, for which it is difficult to account—unless it be that the section does not retain its original form, but in passing through the Congress received some amendments which were so inserted as not to fit in exactly

with its general structure. "All freemen," etc., are entitled to vote for members of the county "in which *he* resides." It is evident, also, that whichever of the constructions contended for shall be adopted, the intent of the framers of the Constitution will be found not to have (406) been expressed in the most precise terms. These considerations but impress upon us more deeply the propriety of observing the leading rule in the exposition of laws, of assigning to words their popular signification without indulging in critical refinements.

By the plaintiff it is assumed that the obvious sense of the words "any county" is some *one* county. We do not think so; and no better evidence can be asked to establish the reverse of this proposition than by recurring to other parts of the same instrument, where "any" is annexed to nouns in the singular number. By the 16th section of the Constitution each member of the Council of State is authorized to have his dissent recorded to "any" part of the proceedings of the body. Can it be doubted but that, under this section, he may have his dissent recorded to as many parts of the proceedings as he may disapprove of? In the 19th section the Governor is declared to have power, by the advice of the Council of State, to prohibit the exportation of "any" commodity. In the 23d section officers offending against the State by a violation of "any" part of the Constitution are declared liable to impeachment. By the 25th persons who have been receivers of the public money are rendered ineligible to "any" office until they shall have accounted for and paid into the treasury the sums thus received. In the 27th it is declared that "any" member of the Senate, House of Commons, or Council of State, accepting a certain office, shall thereby vacate his seat. It is needless to multiply instances. In all of them it is manifest that "any" is used in its largest sense as synonymous with "whoever" or "whatever," and as embracing one or more as the case may be.

It is further urged on the part of the plaintiff that if a residence of twelve months within the State be qualification intended by this section, the words "in any county" are superfluous, and may be rejected as unmeaning. Without denying all force to this objection it may, nevertheless, be observed that amid the infinite varieties of style which give character to the expression of thought, the most rare is that which compresses within the smallest compass of words, while it faithfully conveys all that is intended to be communicated. Redundancy of lan- (407) guage is so common that it would be hazardous to draw any definite conclusion with much confidence, from the mere use of unnecessary words. On the other hand it is insisted that if the purpose of the section be to require a residence of twelve months within the county where the vote is tendered, the words at the end of the section "for the county in which he resides" are not only superfluous but inap-

propriate. They are superfluous, because the sense would be complete without them, and they are inappropriate, for they hold out the idea that the county of residence on the day of election may be different from that in which the previous term of residence has been completed. Upon the whole were we to confine out attention altogether to the words of this section we should probably lean to the construction set up by the defendant, because the other or more rigorous interpretation is not indicated with sufficient distinctness.

But however this might be there are other considerations which tend very strongly to establish the interpretation which we are inclined to adopt upon the words of the section. In the immediately preceding section, prescribing the qualifications of voters for the other branch of the Legislature, the language is: "All freemen of the age of twenty-one years, who have been inhabitants of *any one* county within the State twelve months immediately preceding the day of any election, and possessed of a freehold within *the same county* of fifty acres of land for six months next before and at the day of election, shall be entitled to vote for a member of the Senate." If the residence required by the 8th section were the same with that required by the 7th, how are we to account for the marked change of phrase from "any *one* county" to "*any* county"? Why is the emphatic and exclusive term "one" used in the 7th section, discarded in the 8th? Again: In the 7th section where "county" is twice mentioned, when it occurs the second time it is described as the "same county." Now, it is exceedingly improbable that in the 8th section, where county is also twice mentioned, the same form of expression would not have been used when the word occurs the second time if the same county were in this section also intended. This striking change
(408) of phraseology indicates a change of purpose. It indicates, we think, that for the exercise of the limited franchise of voting for a Senator the Constitution requires not only a freehold, but a residence of twelve months in the county of the freehold; while it gives the more general right of voting for the popular branch of the Assembly to all freemen who have attained full age and have paid a public tax, and have resided twelve months in the State immediately preceding the election; and it provides that this right shall be exercised in the counties repectively, whereof they may be actually inhabitants at the time when their suffrages are given.

Besides, if the rigorous construction be adopted every citizen who shall have removed from one county to another within twelve months before the election of members of the General Assembly, is, in that election, altogether deprived of a vote. He cannot vote in the county to which he has removed, because he has not been an inhabitant of that county for twelve months immediately preceding the day of election, nor can he vote in

the county from which he has removed, because he is not residing there at the day of election. Now, when we take into consideration that when the Constitution was framed, elections were *annual,* it can scarcely be believed that this penalty of temporary disfranchisement, consequent upon every removal, was designed to be imposed. In the first place the genius of the Constitution is favorable to the extended right of suffrage, which makes representation go hand in hand with taxation. No removal exempts the citizen from the obligation to pay his tax—and the right of being heard in the disposition of the revenue, to which he has contributed, will not lightly be supposed to be suspended by a change of residence from one side to the other of a county line. Still less should we be disposed to yield to this supposition when we contemplate the known state of things when the Constitution was formed. Population was flowing in a regular and constant tide from the seaboard into the interior; every day new settlements were formed farther and farther towards the West; and new counties were springing up almost every year as the Indians retired and the white man advanced into the more distant recesses of the forest.

The requisition of a previous residence of any duration in *the* (409) *county* where the suffrage should be offered, was wholly unknown under the colonial government. The oath which the freeholder (for none but freeholders could then vote) was required to take, if his qualifications were disputed, is given in Davis's Revisal, page 248. "You shall swear that you have been six months an *inhabitant of this Province;* and that you have been possessed of a freehold of fifty acres of land for three months past in your own right, in the county of————; and that such land hath not been granted to you fraudulently, on purpose to qualify you to give your vote; and that the place of your abode *is* in the county of————; and that you have not voted in this election." A previous residence of six months within the province provided the person offering to vote had the requisite freehold qualification, entitled him to vote in the county which was the place of his abode on the day of election. The Constitution hath very clearly substituted the payment of a public tax for the freehold qualification, and required a residence of twelve, instead of a residence of six, months, but that it has introduced an entirely new qualification, a previous residence exclusively within the county in which the voter has his abode on the day of election, ought distinctly to appear, before we can presume it to have been intended.

Certain considerations of public policy have been suggested in the argument of the plaintiff's counsel as having probably operated on the minds of the framers of the Constitution, so as to induce them to require, and which should influence the judgment of the expounders of the Constitution in construing it, to require this exclusive and continued resi-

dence as one of the qualifications of the voter. It has been said that, without it, the voter cannot be supposed to have acquired that knowledge of the peculiar interests of the county, or that acquaintance with the character, talents and political views of the candidates for his suffrage, as to enable him to aid in selecting a fit representative of the county. Arguments of this kind, though undoubtedly admissible, are to be listened to with caution. The interpreters of a law have not the right to judge of its policy, and when they undertake to find out the (410) policy contemplated by the makers of the law there is great danger of mistaking their own opinions on that subject, for the opinions of those who had alone the right to judge of matters of policy. Now what is there upon which we can ground anything like a confident belief that the considerations now urged upon us had the weight with the framers of the Constitution supposed in this argument? Whether strong or weak they are obvious considerations, and could scarcely have escaped notice. Is it absurd to suppose that when thus presented to notice, they were met by other considerations of policy, which in their judgment, outweighed them? Might not the Congress have thought that in a State almost exclusively agricultural, where the occupations in one county were the occupations in all the counties, a residence of twelve months within the State was sufficient to give the citizens that knowledge of its general interest, to excite that sympathy for the common weal, and to afford that acquaintance with the principles and talents of the candidates for popular favor, as to render it unwise to stifle altogether the voice of him who had divided his residence between two or more counties? Such, beyond question, was the opinion which had been generally entertained up to the time of framing the Constitution, and without some evidence, we are not to presume that this opinion was then abandoned. But, in truth, the evidence, if any, is all the other way. Before the Revolution there had been conferred on certain towns a distinct right of representation in the legislative body, and this privilege, to a certain extent, was preserved and secured by the Constitution. The avowed purpose for granting this special franchise was for that the inhabitants of these towns, because of their peculiar pursuits, were supposed to have important interests, distinct from those of the great body of the community, which required the protection of representatives selected exclusively by them. Now, when the Constitution defines the qualifications of a voter in one of these towns it explicitly declares that he shall either have a freehold in and be a resident thereof at the day of election, or "shall have been an inhabitant of such town twelve months next (411) before *and* at the day of election;" thereby unequivocally manifesting that, in regard to these municipalities, having peculiar interests, it was designed that the voter should have that connection and

sympathy with these interests as would induce him to prefer a fit representative of them. Thus we see that when the framers of this instrument deemed an exclusive residence of a determinate duration, within the limits of a particular town, an essential qualification for a voter in that town, they declared this purpose in express terms, and the inference is almost irresistible that such purpose would have been as plainly declared, with respect to the voters in a county, if, in regard to county representation, that purpose had been entertained. *Expressio unius est exclusio alterius.*

It may not be amiss to remark that by a residence in the county the Constitution intends a *domicil* in that county. This requisition is not satisfied by a visit to the county, whether for a longer or a shorter time, if the stay there be for a temporary purpose, and with the design of leaving the county when that purpose is accomplished. It must be a fixed abode therein, constituting it the place of *his home.* This residence or domicil is a fact not more difficult of ascertainment, when required as the qualification of a voter, than residence or domicil at the moment of a man's death, which is so important in regulating the disposition and management of his estate after death.

It has been urged that there is more room for the commission of frauds if the liberal construction insisted on by the defendant be adopted than there would be if the rigorous construction contended for by the plaintiff were established. The correctness of this remark is admitted. There is not the same facility in feigning with success a continued residence of twelve months in a county, as in falsely pretending a residence on the day of the election—nay, it may be, when a general election throughout the State takes place in neighboring counties on different days that, by a change, or a pretended change of residence between these different days, the fraud may be practised of voting twice at the same election. But the remark is of little weight as an argument to show what is the qualification *actually* required by the Constitution. It proves only that the more the elective franchise is fettered by restrictions the more difficult becomes the usurpation of it by those (412) not entitled—but it neither proves nor tends to prove that because of such difficulty the franchise is to be restrained by construction where it is not clearly restrained by the Constitution. The sole inquiry is, what are the limits there imposed upon it? and it is the proper business of legislation to prevent those abuses of fraud or violence, to which all that is valuable here below is necessarily exposed. In the discharge of this duty the Legislature has provided that every person tending a vote at any election may be required to swear that he has not previously voted in that election, and that he possesses the qualifications required of a voter by the Constitution; and it has also imposed penalties on those

who may vote contrary to law. If these provisions, and those securing impartial judges of elections, should prove ineffectual it is not to be doubted but that other and more efficacious provisions will be devised to meet the mischiefs disclosed by experience.

We believe that, in truth, *frauds* in elections are not often committed with us. There has been, we understand, some difference of opinion in a few of the counties in relation to the question now under consideration, which has produced an unsteadiness of practice, which, in moments of strife and excitement is too readily ascribed to corrupt motives. The general opinion and the general practice have, undoubtedly, however, been in conformity with what we understand to be the true meaning of the Constitution. That meaning, once fully settled and generally known, there is great cause to hope that neither fraud nor mistake in relation to this subject will prevail to any very injurious extent. It is the opinion of this Court that the judgment of the Superior Court ought to be reversed with costs.

PER CURIAM. Judgment reversed.

Cited: Lawrence v. Pitt, 46 N. C., 349; *Hannon v. Grizzard,* 89 N. C., 120; *Fulton v. Roberts,* 113 N. C., 428.

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(413)

JOHN GOODBREAD, ADMR. OF DAVID DICKEY, CHAIRMAN, ETC., FOR THE USE OF JOHN HALFORD v. NEWMAN WELLS ET AL.

Judgment Not Final—Appeal.

An appeal will not lie from a judgment which is in its nature and professes to be final, when it appears that at the same term wherein the judgment purports to be rendered, a rule was obtained by the party cast to exclude from the taxed costs certain witness tickets, which rule was "suspended and continued over to the next term of the court for hearing."

AFTER the new trial granted in this cause at December Term, 1837 (See 2 Dev. and Bat. Rep., 476), it was again tried at Rutherford, on the last circuit, before his Honor, *Judge Toomer,* when a verdict was rendered in favor of the plaintiff upon the issue joined, and his damages assessed to $84.50. A motion for a new trial was made by the defendant's counsel, which being refused, he obtained a rule upon the plaintiff that the tickets of certain witnesses should not be taxed against him in the bill of costs, which rule was "suspended and continued over to next court." The record then shows that there was a judgment of the court "that the plaintiff recover of the defendants in this case the sum of $84.50, with interest on $50 from 30 April, 1839, until paid and costs,"

from which judgment the defendants prayed and obtained an appeal to the Supreme Court, and a case was stated by his Honor and sent up with the transcript, showing the legal matters urged by the defendants on the trial of the issue and the instructions prayed in relation thereto, the refusal of the Court to give such instructions and the exceptions of the defendants to that refusal.

No counsel appeared for the defendant in this Court.
D. F. Caldwell for the plaintiff.

GASTON, J. Upon examination of the record in this case we are of opinion that we cannot take jurisdiction of it. Appeals to this court from judgments in the Superior Courts, are of two kinds. Appeals may be allowed from any *final* judgment, sentence or decree of the Superior Court, and in every case of such appeal the Supreme Court may render such sentence, judgment, or decree as, on the inspection of (414) the whole record it shall appear to them ought, in law, to be rendered thereon, and may cause the same to be enforced and executed by any proper process. It is also in the discretion of the judges of the Superior Courts to allow an appeal to the Supreme Court from any interlocutory order, judgment, or decree, at the motion of the party supposing himself aggrieved thereby, upon such terms as they shall deem it just and equitable to prescribe; and when such appeal shall be allowed, the judge allowing the same shall direct so much only of the record and proceedings in the cause to be certified to the Supreme Court, as he shall think necessary to present the question or matter arising upon such appeal fully to be considered by the Court. In appeals of this kind the record of the *cause* still remains in the Superior Court, and the Supreme Court cannot enter any judgment reversing, affirming, or modifying the order, judgment, or decree appealed from, but has authority only to cause its opinion to be certified to the Superior Court, with instructions how to proceed upon the subject-matter of the appeal. See 1 Rev. Stat., ch. 4, secs. 22, 23, 28; ch. 33, sec. 11.

The record transmitted to us purports to be *the record* of *the cause.* It contains the pleadings, the issues, and the finding of the jury thereon. It sets forth a case in the nature of a bill of exceptions, showing the legal matters urged by the defendant on the trial of the issue, and the instructions prayed in relation thereto, the refusal of the court to give such instructions, and the exceptions of defendants to that refusal. It further shows that a motion for a new trial was made by the defendants, and that this motion was overruled; that a judgment was thereupon rendered that the plaintiff do recover of the defendants the sum or $84.50, with interest on $50 from 30 April, 1839, until paid, and costs,

and that defendants being dissatisfied with said judgment prayed an appeal to the Supreme Court, which was granted. Thus far the judgment has every quality of a final judgment, and none whatever of an interlocutory judgment. The appeal is taken as of right to remove the entire record into this court for affirmance, reversal, or correction, according to law, and is not at all in the nature of a consultative appeal directed by the court below, at the request of one of the parties,
(415) but still in the exercise of its discretion, to obtain the advice of this Court upon the decision of some plea, or in regard to some default or other proceeding which does not determine the suit, and of the propriety of which decision the court below doubts. If we have cognizance of the cause it is of the whole cause as of one brought up by appeal from a final sentence. But the record shows that however final this judgment may profess to be it has in truth been *suspended* in its operation by the court which rendered it—and therefore cannot be viewed by us as one *final* in its *nature*. The record shows that at the very term wherein the judgment purports to have been rendered a rule was obtained by defendants upon the plaintiff to show cause wherefore the taxed fees of certain witnesses of the plaintiff should not be excluded from *the costs* to be recovered by the plaintiff, and that this rule was "continued over *to the next term of the court for hearing.*"

The cause therefore is still in the court below for further action thereon, and until that action be had it cannot be removed because of alleged error into this court. Suppose that on an inspection of the whole record we should discover no error, what judgment could we render in respect to that part of the plaintiff's costs which is yet the subject of dispute in the court below? Ought *these* to be included in or excluded from our judgment? Or should our judgment, whatever it might be in regard to this as yet undecided part of the controversy, be rendered subject to the correction of that court? These are stated as some of the absurd consequences which would result from our regarding the judgment appealed from as a final judgment.

The cause is kept below professedly indeed for one purpose only—but *nothing* has been finally adjudged there. While the cause remains below it is subject to the control of that court for all legitimate purposes. That court may yet allow amendments—award a repleader—grant a new trial, and do any other matter in relation to the subject-matter in controversy before it which any court may lawfully do in regard to a cause before its final disposition.

Our only proper course, we think, is to dismiss the appeal as premature.

PER CURIAM. Appeal dismissed.

(416)

WILLIAM H. HORAH, CASHIER, v. WILLIAM W. LONG ET AL.

Words of Description of Payee—Discontinuance.

1. A note payable to A. B., "cashier, or order," and "negotiable and payable" at a particular bank, is payable to A. B., individually, the word "cashier" being only descriptive of the person; and the expiration of the charter of the bank at which the note is "negotiable and payable" will not at law affect his right to recover on it.

2. If, after a judgment against him, the defendant comes into court at a subsequent term and procures the judgment to be set aside and pleads to the action, and a verdict is subsequently rendered against him, it is no discontinuance of the action of which he can take advantage; and if it were a discontinuance it would be cured by the verdict under our act of amendment. 1 Rev. Stat., ch. 3, sec. 5.

THIS was an action of debt upon a bond, which was made payable to "William H. Horah, Cashier, or order," and "negotiable and payable at the Branch of the State Bank at Salisbury." The action was commenced in the county court of Mecklenburg, and at November Term, 1834, of said court, the parties by their attorneys appeared in open court, when the following entry was made, viz: "Judgment." At May Term, 1835, the cause was, by order of court, reinstated on the trial docket, and the defendants entered their pleas and at a subsequent term it was tried and a verdict and judgment rendered in favor of the plaintiff, upon which the defendants appealed to the Superior Court, where, on the last circuit, it was tried before his Honor, *Judge Nash,* when the plaintiff having obtained a verdict the defendants moved in arrest of judgment, and assigned the following reasons: First, because the charter of the State Bank had expired. Secondly, because it appeared on the face of record, certified from the County to the Superior Court of Mecklenburg, that there had been a discontinuance of said suit. The reasons in arrest were overruled by the Court, and judgment being rendered for the plaintiff, the defendants appealed.

Boyden and A. M. Burton for the defendants.
D. F. Caldwell for the plaintiff.

GASTON, J. Neither of the exceptions in arrest of judgment (417) is good. The expiration of the charter of the Bank, whereof the plaintiff was cashier at the time of the execution of the note on which he brought this action, is a circumstance which in no way affects his right to recover the debt demanded. It was due to him personally. The word "cashier" was but descriptive of the individual to whom the note

was made payable. The legal interest of the debt was in the plaintiff. The action was properly brought by him and the judgment rendered for him in his natural capacity. Whether he was a trustee for the Bank, or any other person, is an inquiry with which a court of law has no concern.

There has been no discontinuance of the action, whereof the defendants can take advantage. A judgment had been rendered for the plaintiff, which put the defendants out of court. But they came into court, had the judgment set aside, and, at the same term pleaded over to the action. Subsequently to this voluntary appearance on their part the cause has been regularly continued in court until the final judgment. But if there had been a discontinuance, it is cured by the verdict under the statute, 32 Henry VIII, and our act of amendment. 1 Rev. Stat., ch. 3, sec. 5. The judgment is affirmed with costs.

PER CURIAM. Judgment affirmed.

Cited: Whitehead v. Griffin, 47 N. C., 4; *Fox v. Horah,* 36 N. C., 359.

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(418)

DEN ON DEM. OF DANIEL MURRAY ET AL. v. ANDREW SHANKLIN.

Appeal—Lost Papers—Certiorari.

Where a judgment has been given *pro forma* in the court below, and an appeal taken to the Supreme Court in order to get its decision upon certain questions, but the judge omitted making up a case during the term, and the attorneys of the parties took the papers from the clerk's office and carried them off for the purpose of making out the case and did not return them to the office till it was too late for the clerk to send up the transcript in time, which he swore he would have done had the papers been returned soon enough, a *certiorari* will be granted to the appellant upon his deposing that he never intended to abandon his appeal.

A MOTION was made for a *certiorari,* to bring up the record in this case. It appeared that the action had been brought by order of Court, for the purpose of deciding certain questions of title and possession, material in a petition for partition, pending between the parties; that the jury found a verdict for the lessors of the plaintiff, subject to the opinion of the court on a case agreed; and the court, *pro forma,* gave judgment for the lessors of the plaintiff. That the defendant appealed and it was agreed by the lessors of the plaintiff that he should not give security for the appeal. The deputy clerk of Hyde Superior Court

stated in his affidavit that the case for the Supreme Court was not made up by the judge during the term, and that the papers in the cause were taken to Beaufort County by the attorneys in the cause, and he did not get them back to Hyde in time to make out a transcript before Friday in the second week in June, when he mailed the transcript for the Supreme Court. The transcript did not, and could not, arrive in time. The defendant deposed that he never intended to relinquish his appeal; that his attorney promised that he would see that the case should be sent to the Supreme Court.

Devereux for the defendant.
Badger for the lessors of the plaintiff.

DANIEL, J., after stating the facts upon which the motion for (419) the *certiorari* was founded, proceeded as follows: If the case had rested simply upon the neglect of the defendant or his attorney in not sending the transcript to this Court in time we should have had no hesitation in deciding against the motion. But there are other circumstances arising out of the case and the affidavits which induce us to think it ought to be granted. First, there was no other mode of bringing the case to this court but by appeal, and therefore *that form* was observed, but it is apparent that, in substance, the cause was to come up by consent. The case underwent little or no examination in the court below, and it was the intention of the court and both the parties that it should be brought here for a full examination and final determination as to the law. Secondly, the papers belonging to the office, from which the clerk was to make a perfect record, had been taken from the office by the consent of each of the attorneys, and carried with them to another county (we suppose to make out a case) and were not returned in time so as to enable the clerk to make a transcript to reach Court in time. If the case had been made out in term time by the judge or the attorneys, and the papers belonging to the cause had not been carried away, the clerk himself, it seems, would have sent the transcript here in time, although not bound to do so. The defendant did not mean to abandon his appeal, and if he had called at the office for the transcript he could not have got it in time. We think, for these various reasons, that a *certiorari* ought to issue as prayed for.

PER CURIAM. *Certiorari* ordered.

Cited: Roulhac v. Miller, 89 N. C., 196; *McCormic v. Leggett,* 53 N. C., 427; *Stickney v. Cox,* 61 N. C., 496.

(420)

DEN ON DEM. OF HENRY FULLENWIDER v. THOMAS ROBERTS ET AL.

Inadequacy of Consideration—Prior Voluntary Conveyance.

1. A purchase at a grossly and manifestly inadequate price is not such an one as, under the statute of 27 Eliz., ch. 4, sec. 2 (1 Rev. Stat., ch. 50, sec. 2), can avoid a previous voluntary conveyance; but to constitute a purchaser entitled to the benefit of that statute the purchase must be *in good faith and for a fair price;* and this the court should declare as a rule of law, and not leave it as a question of intent to be passed upon by the jury.

2. The court will not enter into the question of the inadequacy of the consideration, as *per se* vitiating the sale, unless it be plain and great or gross, as it is commonly called. Prices may range between the extremes of what close men would call a good bargain on one hand, and a bad and even hard bargain on the other, and the law will not interfere. But when such a price is given, or pretended to be given, that everybody who knows the estate will exclaim at once, "Why, he has got the land for nothing!" as only one-tenth, or even perhaps one-third, part of the value of the land were given, the law would be false to itself if it did not say, sternly and without qualification, to such a person, that he had not entitled himself to the grace and protection of the statute.

3. It is generally true that deeds void by reason of bad faith as to creditors are also void as to purchasers. They are not, indeed, void as to purchasers *because* they are so as to creditors, but by reason of the bad faith which alike vitiates them as against both purchasers and creditors. There may, perhaps, be instances in which purchasers would not stand on the same footing with creditors.

4. The term "purchaser" is not used in the statute of 27th Eliz. in its technical sense, for one who comes to an estate by his own act. It is to be received in its popular meaning as denoting one who buys for money, and buys fairly, and of course for a fair price.

5. The same rule prevails in equity as at law with regard to purchasers setting aside voluntary or fraudulent conveyances under the statute, 27 Eliz.

6. Fraud and good faith are generally questions of intent, and therefore proper for the jury, whose province it is to look into the mind and heart; but this proposition is not to be carried to the absurd extreme of cutting off the court from drawing from admitted facts any inference, however consonant to reason or necessary it may be. Hence the courts have laid down rules as laws for the parties upon the question of inadequacy of price in a purchaser under the statute of 27th Eliz.

7. This power of the court is not a novel assumption, nor can it prove practically dangerous or inconvenient. There will be differences of opinion as to the value of estates; also, opposing evidence as to the price paid or agreed to be paid, and much allowance is to be made for the unwillingness of many men to lay out money unless they get a bargain, and likewise for their reluctance to purchase what is claimed by another, and cannot be got by them without the trouble and expense of litigation. These are all proper considerations to be left to a jury and to be weighed by them, under proper information at the same time as to the law.

FULLENWIDER *v.* ROBERTS.

THIS was an action of ejectment for a tract of land, upon which was a valuable gold mine, tried at Lincoln, on the last circuit, before his Honor, *Judge Nash.*

Upon the trial many points were raised, and the facts connected with them are fully stated in the record. But as the opinion of this Court turns upon one or two of those questions only it will be useless to advert to any facts but those relative to the points on which the case is here decided.

Both parties claimed under one William Falls, who was seized in fee, and in 1818 conveyed in fee to John Dixon, upon the consideration stated in the deed of $500. At that time Falls was indebted to several persons, and he and Dixon, who were brothers-in-law, stated that the deed was made for the purpose of preventing Falls' creditors from selling the land, and of preserving it for Falls' family. On the part of the plaintiff evidence was also given that the consideration, or pretended consideration was $500, as mentioned in the deed, but that it was divided into three installments—one payable in five years, another in nine years, and the third in seventeen years. On the part of the plaintiff there was then given in evidence a deed from the same William Falls to the lessor of the plaintiff for the premises in fee, bearing date 2 March, 1836, purporting to be made in consideration of $50, which sum was paid to said Falls, who then said that his reason for selling the land was that he was poor and unable to go to law about it.

On the part of the defendant evidence was then given that the creditors of Falls at the date of his deed to Dixon had been all since satisfied, and that at the time of the contract between the lessor of the plaintiff and Falls and the execution of the deed in 1836, the premises were worth $25,000. The action was brought shortly after the (422) lessor of the plaintiff took his deed. On the part of the plaintiff it was contended that the deed to Dixon was fraudulent and void as against his lessor.

On the part of the defendants it was, however, contended that although that deed might be fraudulent as to creditors and purchasers, yet the plaintiff's lessor could not take advantage thereof, because he did not represent any creditor of Falls, and because he was not a purchaser from him for a valuable consideration and *bona fide.*

His Honor instructed the jury "that if the deed from Falls to Dixon was made to defraud the creditors of Falls, though it was good as against Falls himself and all claiming under him as volunteers, yet it was void as to the creditors of Falls and as to purchasers from him, purchasing for a valuable consideration and *bona fide,* by force of the statute; that money was a valuable consideration; and that in coming to a decision of the question, whether the plaintiff's lessor had brought himself within

the protection of the statute, they would take into consideration the real value of the land and the price given, and the circumstances attending the transaction. That the inadequacy of the price was not of itself sufficient to deprive the purchaser of the benefit of the statute, yet it must not be such an inadequacy as shows the price was merely colorable and merely intended to get rid of the first conveyance. That when this is the case, or when the transaction is accompanied by any other circumstances showing a fraudulent intent on the part of the purchaser, or a fraudulent combination between the purchaser and the seller to defeat the prior conveyance—in neither case can a subsequent purchaser entitle himself to the protection of the statute." And in applying those principles to the particular case the jury was directed that "if they were satisfied that the price the lessor of the plaintiff paid was merely colorable, or that his purchase was made with a fraudulent intention, or through a combination with Falls to defeat the conveyance to Dixon, then the lessor of the plaintiff was not a *bona fide* purchaser for a valuable consideration within the language and meaning of the statute, and was not entitled to its protection. That on the contrary, if they should believe that the price was inadequate, yet that the lessor of the
(423) plaintiff had purchased in good faith he was entitled to the protection of the statute, and the deed to Dixon was void as to him."

The counsel for the defendants then moved the court further to instruct the jury "that if the price given by the lessor of the plaintiff to Falls was greatly inadequate, or he purchased on speculation, his purchase was fraudulent and not entitled to the protection of the statute against the deed to Dixon." But his Honor refused the instruction prayed for, and repeated that before given, and there was a verdict and judgment for the lessor of the plaintiff, and the defendants appealed.

Badger for the defendants.

D. F. Caldwell, Alexander, Boyden and Hoke for the lessors of the plaintiff.

RUFFIN, C. J., after stating the case as above, proceeded as follows: The counsel for the defendants contend that the court erred in laying down, in the first part of the instructions, that the deed to Dixon, if designed to defraud the creditors of Falls, was void as against purchasers from Falls as well as against his creditors; and it is insisted that it was a prejudice to the defendants to leave the case to the jury upon that erroneous and irrelevant proposition.

But we think the judgment cannot be reversed on that ground. It is generally true that deeds void by reason of bad faith, as to creditors, are also void as to purchasers. They are not, indeed, void as to the purchas-

ers, *because* they are so as to creditors, but by reason of the bad faith, which alike vitiates them as against both purchasers and creditors. There may, perhaps, be instances in which purchasers would not stand on the same footing with creditors. If so, this certainly is not a case of the kind, for if the deed be fraudulent as to the creditors it is so upon the grounds that the sale to Dixon was merely colorable and in trust for Falls or his family, and that the consideration was never to be paid, if we are to judge from the relation of the parties and the distant periods to which the payments were deferred. Now the same considera-
tions would render the deed voluntary, and so void as against a (424)
subsequent purchaser under the statute, 27th Elizabeth. See 1
Rev. Stat., ch. 50, sec. 2. This is, as we think, what his Honor is, in fairness, to be understood to mean. At all events, the supposed error, if committed in this case, worked no prejudice to the defendants, and therefore furnishes no reason for setting aside the verdict. It could do the defendant no harm, because, clearly, the deed was here as much void under the 27th Elizabeth against the one class as it was under the 13th Elizabeth against the other class of those persons. But furthermore, the defendants did not even contend that the deed was good against purchasers, but in the instruction prayed by them expressly admitted it to be void both as to creditors and purchasers, and relied only on this: That the lessor of the plaintiff was not such a person as could claim the benefit of the statute for the protection of "purchasers for money or other good consideration." The defendants cannot, therefore, complain that the court accepted their own admission on this point.

But upon the point on which the defense was placed, as just stated, the opinion of the court is that the law is for the defendants. Fifty dollars is not such a consideration for conveying an estate worth $25,000 as will defeat a prior voluntary conveyance. It is too palpably and glaringly deficient to amount to a purchase within the Statute 27th Elizabeth; and so, we think, the jury ought to have been told. They were, on the contrary, instructed that, notwithstanding the price was inadequate, and greatly inadequate, they might find that the transaction was or was not fraudulent, according to the intent of the parties; whether it was or was not merely to defeat the previous deed. Without reading the instructions hypercritically we understand them to be substantially that *any sum* of money constitutes a purchaser under the statute, and that the inadequacy of the consideration, *however great,* will not, of itself, take the case out of the statute unless the *jury* shall infer therefrom, *as a fact,* that the second conveyance was a contrivance merely to defeat the first.

In those opinions this Court does not concur. We think there
are cases, and that the present is one of them, in which the inade- (425)

quacy of the consideration alone is sufficient to condemn the transaction, and strip from it the mask of a purchase, and that the court ought so to have stated to the jury as a matter of law.

The opinion of his Honor as to the effect of inadequacy of price was, probably, drawn from the doctrine that an agreement cannot be set aside as between the parties merely for that cause. But the reason of that is that, if one will, without imposition, distress or undue advantage, make a bad bargain with his eyes open, *he* must stand to it. His agreement is sufficient, because his interests alone are effected by it. The cases of his creditors, however, or persons claiming under a previous conveyance from him, admit of a very different consideration. They fall within *Lord Hardwick's* fourth class of cases in *Chesterfield v. Jansen:* that of a fraud and imposition on third persons, not parties to the agreement. To the complaint of such third person it cannot be replied that he cannot call the consideration petty and inadequate because he had assented to it. As against creditors and prior donees the price must be sufficient in itself to sustain the deed, without the aid of their acceptance; for no such acceptance exists. Then it is to be inquired what price will put the statute in operation, or what inadequacy will prevent its operation? We think that a *fair* and *reasonable* price, according to the common mode of dealing between buyers and sellers was meant by the Legislature; and at all events, no case is within the statute in which the purchaser cannot, with a good conscience, claim to hold the estate upon the ground and for the sake of the price paid, and not merely upon the score of the vendor's agreement, and that the present is not such a case.

The term "purchaser" is not used in the statute in its technical sense, for one who comes to an estate by his own act. It is to be received in its popular meaning, as denoting one who buys for money, and, as we think, buys fairly and of course for a fair price. Very soon after the act of Parliament passed, the case of *Upton v. Bassett.,* Cro. Eliz., 445, was decided and by judges of whom some had assisted in framing the act. It is there laid down that every purchaser ought not to have the
(426) benefit of the statute, nor even every one that pays money, but only those who come to land upon good consideration lawfully, and not without consideration, nor by any indirect means. The case does not leave us at a loss, what we are to understand by the expressions "without consideration" and "indirect means," for it proceeds immediately to exemplify the principle laid down by giving a case wherein one made a voluntary conveyance, and afterwards another procured him, for £500, or *"other petty consideration,"* to sell unto him the land, worth £500 per annum; and it was held that, although he paid money, yet he should not avoid the first conveyance. It is clear that it was then understood, as matter of law, that the act only extended to such

purchasers as gave a substantial price, or come in upon other good consideration, as marriage. When the consideration was pecuniary, a "petty" sum, when compared with the value of the land—and the amount of a year's rent was thus denominated—would not help a second over the head of a first conveyance. In *Doe v. Routledge, Cowp.,* 705, the same doctrine is found, yet more distinctly expressed. In that case it was admitted by the counsel for the plaintiff that a consideration of five shillings, which he calls colorable or nominal—would be bad; but he contended that £200 could not be deemed colorable only, and as the statute did not require the *full* value that the sum of £200 was sufficient to place the second surrender before the first, which was purely and entirely voluntary. But the court held otherwise. *Lord Mansfield* called the second transaction "a gross fraud and no purchase at all," and said that it could not set the former deed aside. Now, why was that *no purchase at all?* Not for the want of a valuable consideration, if money simply be such a consideration within the statute, for the £200 was actually paid, and there was no circumvention of the settler. It was the inadequacy of price, singly—a property worth £2,000 sold, or pretended to be sold, for £200. There was nothing else in the case but the disparity of the consideration. The words of *Lord Mansfield* are, "the consideration of £200, compared with the real value, *shows it* to have been no purchase at all, but a *gift.*" To make a purchase within the statute he declares it must be a *bona fide* transaction, and "a fair purchase in (427) the understanding of mankind," which, from the context, obviously means an honest purchase at a *fair price. Mr. Justice Aston,* admitting that the full value need not be given, says that purchase was by no means *fair;* and for that relies on the same ground of inadequacy of price, and on that only.

The same rule prevails in equity, where what is called a gross inadequacy of price is always fatal to the alleged purchase. This is not on a ground or doctrine peculiar to the Court of Equity, but is founded on the statute as interpreted at law, and for that reason adopted in equity. In *Metcalf v. Pulvertoft,* 1 Ves. and Bea., 183, it was insisted that the party was not a good purchaser to defeat a previous gift, because he gave only one-third of the value, and *Lord Eldon* not only expressed his assent to that proposition but founded his assent upon the doctrine as established at law, and cited to that purpose the case of *Doe v. Routledge.*

The principles established by the cases referred to are inconsistent with some of the opinions delivered by his Honor, and show that at least in refusing the instructions last prayed for by the defendants there was error.

It is indeed wonderful, under the instructions given, if understood as favorably for the plaintiffs as their terms will admit, that the jury could have found the verdict given in this case. We cannot conceive how anyone at all conversant with the motives and dealings of mankind, could look at this transaction as being anything else but a gift, under the simulated appearance, or, rather the assumed and unmerited name of a sale, or doubt that the price was not the real inducement with Falls, but only to give color to the transaction. We should suppose that the jury had drawn conclusions from the instructions not contemplated by his Honor, were it not that the verdict was allowed to stand. Thence it is to be presumed that it was approved by the court, and if so, then the instructions were, in our opinion, erroneous, not only as they were understood by the jury, but as they were meant to be understood.

(428) We think clearly that the jury was misdirected when told that inadequacy of price, of itself, was not in any case fatal to the transaction, as preventing its being a purchase within the statute; and also that the court erred in refusing to direct the jury that a "great inadequacy of consideration" was thus fatal. If the jury had been so advised, the result of their deliberations must have been different from what it was. With the error of the jury, so far as it is exclusively theirs, this court cannot deal, but so far as it was, or might have been induced by the court, it is our duty to correct it. In our opinion it ought to have been laid down as the rule of law, that if the consideration was grossly and manifestly inadequate it was not a good purchase, but that, to constitute such a purchase *good faith and a fair price are requisite.*

We go further and say that, in our opinion, the court might have safely said, and therefore ought to have said, that the plaintiff in this case was *not* a purchaser within the statute.

Against such a direction as this last it is urged, as it has often been before, that fraud and good faith are questions of intent, and, therefore, proper for the jury, whose province it is to look into the mind and heart. The correctness of the proposition, as a general one, is not controverted, but we think it is not to be carried to the absurd extreme of cutting off the court from drawing from admitted facts any inference, however consonant to reason and necessary it may be. We have seen that upon this very question the courts both of Law and Equity, have laid down rules, as laws for the parties, and in the same or similar cases it ought again to be done. This very case is an instance of the mischief of leaving at large to the jury a question of this sort, on which to some extent at least, and to most, if not all useful purposes, a certain rule can be propounded as matter of law, applicable with unchangeableness to all similar cases. It is no objection to this, that no rule can be laid down which will be decisive of every case. However much it may perplex the

mind to attempt beforehand to trace the precise line of demarcation between the provinces of the court and jury so that in every case each body may perform its appropriate function, yet that ought not to prevent its being done in any case; and as far as it is practicable to lay down a rule as that of the law, it ought to be done. At all events, we have no difficulty in excluding this plaintiff from the protec- (429) tion of the statute. The price paid by him will not entitle him to supersede a former alienee, on the ground that such former alienee paid *nothing*. If the same thing cannot with strict truth be said of him it certainly may that he paid *next to nothing;* and that, in reason and law, is the same thing in respect of those merits around which the statute meant to place a safeguard. This power of the court is not a novel assumption, nor can it prove practically dangerous or inconvenient. There will be differences of opinion as to the value of estates; also opposing evidence as to the price paid or agreed to be paid, and much allowance is to be made for the unwillingness of many men to lay out money unless they get a bargain, and likewise for their reluctance to purchase what is claimed by another and cannot be got by them without the trouble and expense of litigation. These are all proper considerations to be left to a jury and to be weighed by them, under proper information at the same time as to the law. We do not attempt to enumerate the cases in which the court should pronounce on the sufficiency of the consideration, nor undertake, in anticipation, to say how much less than the value will in every case be deemed inadequate. We think, indeed, that the statute did not mean that a donee should be disturbed unless by one who gave a solid price and such a one as shows that he bargained for and thought he was buying the land itself, and not the chance of gaining it at law. But it is easier and more discreet to confine ourselves to saying what will not do, as the cases arise, and not go beyond adjudged cases in laying down rules *a priori*.

Certainly, we think, the Court will not enter into the question of the inadequacy of consideration, as *per se* vitiating the sale, unless it be plain and great, or gross, as it is commonly called. We have seen that in *Upton v. Basset* a year's income was called a petty and inadequate consideration. In *Doe v. Routledge,* one-tenth part of the value would not sustain the conveyance. In *Metcalf v. Pulvertoft, Lord Eldon* thought one-third of the value too little; and so should we also think. Prices may range between the extremes of what close men would call a good bargain on one hand and a bad or even a hard bargain on (430) the other, and the law may not interfere. But when such a price is given, or pretended to be given, that everybody who knows the estate will exclaim at once, "why, he has got the land *for* nothing," the law would be false to itself if it did not say sternly, and without qualifica-

tion, to such a person, that he had not entitled himself to the grace and protection of the statute. It is obvious that there is no morality to vindicate the attempt on the part of a donor to defeat his gift by a sale for even a full price. Yet it is acknowledged that another may lawfully purchase from him and may hold, provided he be really a purchaser Now, to make him such, it would seem clear that he must give such a price as *thereby* to create a conviction in an honest mind that the former donee ought to give up the land, or be deprived of it, rather than he should lose the money paid. Now, can that be said in this case? No. It is to be remembered that no facts are left in doubt here. The value of the land and the price to be given are admitted by the plaintiff or proved by his own evidence; and it thence appears, *that the consideration was just one five-hundredth part of the value.* Surely, *that* consideration is so utterly and enormously inadequate as to make it a palpable fraud to attempt, under the pretence of it, to defeat a previous deed. How could the lessor of the plaintiff contend with a creditor of his bargainor? Suppose Falls to have been indebted in the sum of $25,000, and to have sold this estate—of that value—for this pitiful sum of $50. Would it require a moment's thought to arrive at the conclusion that such a sale could not stand against the creditor's execution? Why? Because the sale was not one for the value, nor for a sum that could be mistaken for the value by the parties or anyone else, or could be called so with a serious face. This case stands upon precisely the same reason, for he who is deemed a purchaser or a volunteer in the one case, must bear the same character in the other.

It is a mockery for the plaintiff to set up his lessor as a purchaser. The consideration is so very diminutive, so nearly nominal, as not to give even a color of fairness to the transaction as a purchase of the land. It would hardly pay for a ticket in a lottery for it on any common
(431) scheme. It is, to the purpose now under discussion, the same as five shillings or a pepper corn. Each will make a conveyance formally sufficient as between the parties to it. But, neither will do, to turn that conveyance, which is really a gift, into a purchase, to the prejudice of third persons.

The judgment of the Superior Court is reversed and a *venire de novo* directed.

PER CURIAM. Judgment reversed.

Cited: Harris v. De Graffenreid, 33 N. C., 92; *Potts v. Blackwell,* 57 N. C., 60; *Worthy v. Caddell,* 76 N. C., 86; *Shober v. Wheeler,* 113 N. C., 378; *Monroe v. Fuchller,* 121 N. C., 104.

DEN ON DEM. OF DANIEL MURRAY ET AL. *v.* ANDREW SHANKLIN.

Deed by Infant—Confirmation—Adverse Possession.

1. The possession of a vendee, taken under a deed from an infant, whether that deed is to be considered as void or voidable only, is adverse to the infant (and much more is such the case where the deed has been executed by the infant jointly with others); and the infant cannot, after he comes of age, convey a valid title to the land while such adverse possession continues.

2. Where an infant executed a deed for land by signing, sealing and delivering it, and after he came of age endorsed on it, "I have signed the within deed for the expressed purposes; and with the desire to ratify the same I hereunto affix my hand and seal," and after signing and sealing the endorsement, delivered the instrument to the vendee again: *It was held*, that if the deed were absolutely void in the first instance, it was rendered valid by the re-delivery, and if only voidable, the endorsement, under the hand and seal of the vendor, was a proper act of confirmation.

3. Adverse possession is constituted by an actual, exclusive possession, taken or held with the intent to put or keep out all others. The title which the party has, is not, therefore, decisive of the character of the possession; for frequently that is to be inferred more from the title which the deed under which he claims *purports* to convey, than from that which it really *does* convey.

EJECTMENT, tried before his Honor, *Judge Saunders,* at Hyde, (432) on the Spring circuit of 1838.

Peter Sermon died seized in fee of a tract of land situate on Mattamuskeet Lake, in Hyde County, and the same descended to his heirs-at-law, of whom Reuben Berry, John Berry, Rachel Berry, and Levisa Berry were part, to whom, as representing a deceased parent, one undivided fourth part of the Sermon tract of land belonged. Such proceedings were had by the heirs of Sermon that partition of the descended land was made between them by the judgment of the County Court, in which one-fourth part of the whole tract was laid off and allotted as the share of the said Reuben, John, Rachel, and Levisa, together, and they entered into the said share or lot, containing sixty-six acres, as tenants with each other of that lot in fee. Being thus in possession the said Reuben, John, Rachel, and Levisa Berry, on 5 March, 1831, sold for the sum of $1,000, and conveyed jointly, by their deed of bargain and sale, to the defendant, Andrew Shanklin, the said lot, and one-fourth part of the said tract of land in fee simple, with general warranty. Thereupon the defendant took possession and placed a tenant on the land, who has exclusively occupied it ever since.

When the deed to the defendant was executed Levisa Berry, one of the bargainors, was an infant. She attained full age on 28 November, 1834,

and on 1 December, 1834, she, in consideration of $200, executed a deed of bargain and sale to Daniel Murray, for one undivided fourth part of the said lot of land, containing sixty-six acres, in fee. On 28 November, 1834, the defendant caused to be written on the back of the deed made to him and bearing date 5 March, 1831, an instrument in the following words, to wit: "I do acknowledge that I have signed, by making my mark, the within deed for the expressed purposes; and with the desire to ratify the same I hereunto affix my hand and seal," which instrument she, the said Levisa, in January, 1835, executed by signing and sealing; and after being duly attested she delivered both of the said instruments to the said Shanklin again.

(433) Afterwards the said Levisa Berry filed against Andrew Shanklin her petition for partition, in which she claimed one-fourth part of the said tract of sixty-six acres, and prayed to have it laid off to her in severalty. In that suit the defendant pleaded that the petitioner was not tenant in common with him, but that he was in the actual adverse possession of the whole tract, and had the sole seizin thereof. The Court stayed the proceedings therein until the petitioner could bring an ejectment to establish her right to the possession, and thereupon the present action was brought in May, 1837, upon the several demises of Levisa Berry and Daniel Murray.

On the trial the defendant contended that the plaintiff could not recover on the demise of Murray because the deed to him was void by reason of the adverse possession under the defendant, when that deed was executed. The defendant also contended that the plaintiff could not recover on the demise of Levisa Berry, because her title was divested by her two deeds to the defendant.

There was a verdict for the lessors of the plaintiff, subject to the opinion of the Court on the two points stated, with liberty to set aside that verdict and enter one for the defendant if, in the opinion of the Court, the law was for the defendant on the facts stated. The Court *pro forma* gave judgment for the lessors of the plaintiff, and the defendant appealed.

Devereux for the defendant.
Badger for the lessors of the plaintiff.

RUFFIN, C. J., having stated the case as above, proceeded as follows: We think the judgment must be reversed and verdict and judgment entered for the defendant. It is not stated on which count the plaintiff had judgment in the Superior Court, but we do not deem that material here, as, in our opinion, both points raised are in favor of the defendant.

The deed to Murray is null, because it was executed by a person out of possession of the land conveyed. The actual possession, it cannot be denied, was in Shanklin's tenant, and *prima facie,* therefore, Levisa Berry was not in possession. But it is said that the pos- (434) session of Shanklin is her possession, because he entered rightfully under her by force of her voidable deed; that the entry and possession must be taken to have been according to the title, and therefore could not become adverse to her, from whom it was derived by such an instrument. It may be true that the character of a possession is often to be judged of according to the title under which it was acquired, as the possession of one tenant in common, though in the sole enjoyment, is the possession of his brethren. But the possession of one tenant in common is not necessarily that of his companions. It may become adverse; and is, in fact and law, rendered so by an actual ouster, or by such other circumstances as show clearly that he denies the right of his companion and holds for himself exclusively. Adverse possession, indeed, is constituted by an actual exclusive possession, taken or held with the intent to put or keep out all others. The title which the party has is not, therefore, decisive of the character of the possession, for frequently that is to be inferred more from the title which the deed under which he claims *purports* to convey, than from that which it really *does* convey; as if one tenant in common, for instance, convey the whole tract and the alienee enter and remain in possession seven years, he acquires title to the whole tract under the statute of limitations, and consequently his possession was adverse to the other tenants in common throughout. *Burton v. Murphy,* N. C. Term R., 259. A possession taken under a deed in fee made by an infant, although the same be voidable, is not, therefore, to be deemed a possession of or for the infant, but is that of the actual possessor. If it were not so the statute of limitations never could operate when the conveyance was by an infant, because the possession could not be adverse. But, in truth, every vendee in fee takes possession adversely to his vendor as much as to other persons. The possession of one who has a particular estate is subservient to the title of him from whom it is derived and cannot be deemed to have been adverse during the continuance of his estate. But when an owner professes to convey all his estate to his vendee, and the latter enters, he does not hold the possession any more than he does the title *for* the vendor, from whom (435) he derived both. A sale by an infant, whether his deed be void or voidable as a conveyance, is not an exception to this principle. There is no reason why it should be. The question is, *quo animo* the vendee took possession, and surely that is clearly evinced by the *purport* of the conveyance under which the possession was taken. The vendee may not indeed have known of the infancy; but whether he did or not, it is cer-

tain he did not enter for his vendor, but for himself exclusively, and consequently against all the world, including his vendor.

But this case is still stronger against the plaintiff on this point, seeing that the deed, under which the defendant claims, is not from L. Berry alone, but from her and three others, and does not purport to convey their several undivided shares as tenants in common, but to convey the whole jointly. The possession of the defendant taken under this deed was unquestionably adverse to the three other bargainors, and why is it not as against the fourth? Each one conveyed the whole tract, and against each and all of them, therefore, the vendee claimed the whole. A possession taken under such a claim must be deemed adverse.

Hence, we think the deed to Mr. Murray is void. That being so, there was nothing to interfere with the power of the lessor of the plaintiff, L. Berry, to re-deliver her deed to the defendant, if void, or to confirm it if voidable. The state of facts renders it unnecessary to determine whether the deed of bargain and sale of an infant be void or voidable. If void at first it may be delivered a second time, as was here done. Co. Lit., 48; Shep. Touch., 60. It is true that if it be voidable only, a second delivery after full age is ineffectual, because the first had some legal operation, and is therefore irrevocable. But, if it be voidable, it admits of confirmation in some way, and if in any, it must be by the execution of an instrument of equal solemnity with the original instrument. The party after full age, by her deed on the same paper, re-acknowledges the first instrument, and expressly ratifies it. This comes up to the requisition of *Lord Ellenborough,* in *Baylis v. Dineley,* 3 Maul and Selw., 482,

(436) and must amout to a confirmation, if the instrument admits of a confirmation, as every voidable act or instrument necessarily does. In whatever way it be taken, therefore, the defendant has the title at law.

The judgment must be reversed and the verdict set aside, and a verdict entered for the defendant and a judgment accordingly.

PER CURIAM. Judgment reversed.

Cited: Anders v. Anders, 31 N. C., 218; *Pope v. Mathis,* 83 N. C., 172.

WILLIAM J. INGERSOLL v. NICHOLAS M. LONG.

Endorsers—Liability as Sureties.

1. The Act of 1827, 1 Rev. Stat., ch. 13, sec. 11, making the endorsers of negotiable notes liable as sureties applies in those cases only where not only the endorsement in question, but all the antecedent endorsements (not expressed to be without recourse) have been made within this State.

2. The object of the Act of 1827, 1 Rev. Stat., ch. 13, sec. 11, making the endorser of a negotiable note liable as surety, was not to bind him as though he had signed the note with the maker as surety—not to make him liable to the endorsee if the endorsement were made without consideration; nor to deprive him of the protection which the acts of limitation had extended to endorsers; but simply to change the engagement which the law theretofore implied from an endorsement not expressed to be without recourse into an engagement to pay the note to the holder at all events if the maker did not pay it.

THIS was an action of assumpsit, submitted to his Honor, *Judge Saunders,* at Northampton, on the last Fall circuit, upon the following statement of facts as a case agreed:

"On 7 February, 1837, William K. Paulding, of Greensborough, Alabama, made, at that place, his promissory note to Benjamin G. Shields, for $3,168, negotiable and payable at the Branch of the Bank of the State of Alabama, at Mobile, on 1 January, 1838. This note was afterwards endorsed in *blank* by Shields, the payee, at the said Greensborough, at which place he was a resident, and passed with such (437) endorsement, in Alabama, to the defendant Long, for a full and valuable consideration by him paid therefor. And the said Long afterwards, being in Halifax, North Carolina, where he resided, passed the same to John D. Amis, with his endorsement in *blank,* and for a valuable consideration. Amis being a citizen of Mississippi, carried out the note so endorsed and passed the same to one H. W. Carter, cashier of a bank in Columbus, Mississippi, and by him the note was endorsed and sent to the plaintiff cashier of a bank in Mobile, and the said Carter filled up the previous endorsements before transmitting the said note to the plaintiff, by whom it was received in Mobile on 10 January, 1838, enclosed in a letter of Carter's, dated 21 December, 1837. On 31 January the plaintiff presented the note at the bank in Mobile at which it was made payable and demanded payment, which, being refused, he caused the same to be protested by a notary public, who the same day put notices of the dishonor of the note in the postoffice, directed respectively to the first, second, and third endorsers, at their several places of residence."

The plaintiff sought to recover of the defendant on his endorsement the principal and interest of the said note, as a surety of the maker, and

it was agreed that if the defendant was, in the opinion of the court, liable, then judgment should be entered for the plaintiff for the sum of $3,168, with interest from 7 February, 1837. If the court should be of a contrary opinion a judgment of nonsuit was to be entered. It was further agreed by the parties that the law merchant, as adopted by and making part of the law of England, was the law of Alabama. His Honor, upon this case, being of opinion in favor of the plaintiff, gave judgment for him, from which the defendant appealed.

Badger for the defendant.
No counsel appeared in this Court for the plaintiff.

GASTON, J. If this case come within the operation of our act of 1827, 1 Rev. Stat., c. 13, s. 11, the plaintiff is entitled to judgment; but if it do not, then, according to the agreement of the parties, there (438) must be a judgment of nonsuit. We have heretofore had cause to regret that the statute in question was expressed in such general and obscure terms as not to afford to those whose duty it is to execute the law, the means of knowing with certainty the intention of the law-makers. We feel the same regret on this occasion, because in regard to the matter now before us, there is at least equal danger of mistaking that intention.

Before the passing of the act of 1827 the law implied from the endorsement of a negotiable note an engagement, from the endorser, similar to that which the law of merchants imposed on the drawer of an accepted inland bill of exchange. He engaged that the maker of the note should pay it, if presented at the time and place when the same was made payable, and if the maker made default that *he* would pay the same if notified of that default, and required to make payment without delay. We have held, *Williams v. Irwin,* 3 Dev. and Bat., 74, that the object of the act in declaring the endorser liable as surety, was not to bind him as though he had signed the note with the maker as surety—not to make him liable to the endorsee, if the endorsement were made without consideration, nor to deprive him of the protection which the acts of limitation had extended to endorsers—but simply to change the engagement which the law theretofore implied from an endorsement not expressed to be without recourse into an engagement to pay the note to the holder, at all events, if the maker did not pay it. In coming to this conclusion we did not advance any pretension to deny operation to the statute where it was productive of absurd consequences, but in the construction of vague terms we considered ourselves bound to presume that the Legislature intended nothing plainly repugnant to justice and public convenience.

Our purpose was to give full operation to all that the Legislature willed, but, at the same time, not to intend, from an affected or superstitious veneration for the semblance of their will, *that* to have been enacted, which we believed they did not mean to enact, and therefore, in fact, had not enacted. Their meaning was the whole end, aim and object of our inquiry.

Pursuing the present investigation in the same spirit I think (439) that we shall be brought to the conclusion that the act of 1827 does not operate upon an endorsement, where it cannot operate upon the preceding endorsements. The endorsement of a note previously negotiated without the State is not, in the opinion of the Court, distinctly embraced within the words of the act, and was not within the view of its makers. The language of the enacting clause is "that where any bill, bond, or promissory note, made negotiable by the act of 1762, entitled, etc., or by the act of 1786, entitled, etc., shall be endorsed after the first day of July next, such endorsement, unless it be otherwise plainly expressed therein, shall render said endorser or endorsers liable as surety or sureties to any holder of such bill, bond, or promissory note." It is admitted that the act has no operation, and was intended to have no operation, on an endorsement made out of the State, but that such indorsement was left to take effect according to the custom of merchants or the law of the particular State in which it was made. The act, therefore, is to receive the same construction as if, in words, it had said, "where any bill, bond, or promissory note, made negotiable, ets., shall, after the 1st of July next, be endorsed within the State." Upon the words themselves it would seem that the Legislature had before them, as a subject of legislation, the case of a note, bill, or bond to which antecedent acts had given the character of negotiability, but which had not yet been negotiated. While proceeding to declare the engagement which the endorsement of such an instrument should create on the part of the endorser, and contemplating directly the first endorsement only, it occurred to them, before their purpose had been finally declared, that, as every endorsement was like the drawing of a new bill, whatever liability was made to attach to the first endorser, the same, of consequence, extended to subsequent endorsers; and thus, although but one act of endorsement is mentioned in the body of the act, the words "or endorsers" were inserted after endorser, and the words "or sureties" added after surety. And this view derives some support, or perhaps illustration rather, from the title of the act, where, although the word "endorsers" is found, the word "surety," in the singular, remains yet unaltered. Borrowing every ray of light we can get to help us on to (440) the object of our search, we find something in the proviso attached to the enacting clause, not altogether useless. The proviso is in these

words: "Provided that nothing herein contained shall apply, in any respect, to bills of exchange, whether inland or foreign." Now, it is certain that nothing therein contained could apply to bills of exchange, whether inland or foreign, simply because neither of them were within the words nor by any interpretation could be brought within the purview of the enacting clause. The act of 1762 made promissory notes, for the payment of money, assignable by endorsement in like manner as inland bills of exchange were by the custom of merchants in England, and the act of 1786 made bills, bonds, or notes, under seal, for the payment of money, transferable by endorsement, as notes called promissory or negotiable theretofore were. The insertion of the proviso, so wholly inoperative as an exception, while it shows an unusual want of precision in the the act, is, at the same time, indicative of an intent which cannot well be reconciled to the sweeping operation which the plaintiff asks for from its enacting words. Notes, after they have been put into circulation by endorsement, acquire, by positive enactments, the qualities of inland bills of exchange, and this extreme legislative solicitude that their enactments should not be extended to inland bills, is hardly reconcilable with the idea that they were meant to operate upon what had, to most practical purposes, acquired the properties of inland bills. It strengthens the belief that the subject which alone was intended to be regulated by the act, was the circulation of negotiable paper among our own people.

The Court holds, therefore, that the terms of the enactment are not so precise and unequivocal as not to leave fair room for doubt, and to call for explanation, and if so, the results of the one or the other exposition are very fit to be considered in determining the intent of the law-makers. These justify, as the Court thinks, the conclusion that the act applies in those cases only where not only the endorsement in question, but all the antecedent endorsements (not expressed to be without recourse) have been made within the State. The act makes the endorser liable
(441) to the holder as a surety—that is to say, liable on failure of the maker to pay, and that without demand on him or notice to the endorser. In applying this strong enactment to the first endorser on a note, wherever made, if first endorsed here, it is to be remarked that while the law implies this engagement it preserves for the endorser the rights and remedies of a surety. If the endorser has to pay the note he has a direct recourse against the principal, who is absolutely liable to him. So, in applying the enactment to the next endorser, the very act which makes him surety gives him all the rights of a surety as against the prior endorser, while by the general law he has them against the maker. But if the act be so expounded as to hold a second or any subsequent endorser responsible as surety to the holder, while by law he cannot hold those primarily liable on the note as principals or respon-

sible absolutely to him, then we attribute to the act the absurdity of *implying* the obligations of a surety where they do not exist, and where the law cannot give the correlative rights of a surety.

The injustice of such a construction cannot be better exemplified than in the case before us. It is a principle of natural equity that no man shall hold another bound to an engagement made in aid of, or as a surety for, another, when by his own conduct he deprives the person thus liable of the means of indemnity from his principal. This principle does not require that there should be generally imposed an a creditor, who has two bound to him, the obligation of active diligence against the one primarily liable; for it is not usual for the creditor to have in his hands the control over the surety's means of redress. Usually, therefore, he is not charged with the care of the surety's rights. But when these means of indemnity are wholly in the creditor's hands it would shock good faith to permit him, either through willfulness or neglect, to throw them away, hold the surety nevertheless bound, and impose upon him irretrievable loss. *Capel v. Butler,* 2 Sim. and Stewt., 457. By the neglect of the plaintiff in not presenting this note to the maker for payment in reasonable time—which presentation could be made only by him or those whom he represents—the first endorser on this note, who had guaranteed the defendant against its dishonor, is forever discharged. Can it be just that the plaintiff, who has as effectually (442) taken from the defendant this guaranty as if he had in terms released it, should enforce the payment of the note from the defendant?

It is also unreasonable to attribute to the Legislature an intent which in general would make the act operate unequally against our own citizens. We know that the custom of merchants obtains generally if not universally elsewhere with respect to the endorsement of negotiable notes. If an endorsement of a note in North Carolina is to be construed a peremptory engagement, while all the previous endorsements thereon are special only, the consequences to our citizens would be disastrous. The Legislature had no such purpose. Their enactment was intended to apply in a case where they had legislative cognizance of the entire subject-matter—the negotiation of the note from the first—and giving it any other construction would involve absurd, unjust, and impolitic consequences, and fix that for law which they did not intend to be law.

It may be said that although this harsh construction should prevail it would be in the power of an endorser to escape the severe enactment by specially providing in the endorsement that he would not be liable to any subsequent holder of the note unless demand should be made of the maker and notice of the default given to him without delay. Perhaps, probably, the observation is correct, for although doubts have been entertained how far a man can specially limit the negotiation of an instru-

ment (to which the law had given the character of general negotiability, of late), this has been allowed to a qualified extent. But supposing the suggestion to be undoubtedly correct, and that by the exertion of unusual caution a citizen might save himself from the absurd, unjust, and impolitic consequences likely to follow from the transaction—this would indeed afford room to hope that such consequences would not universally result from it—but they do not very materially affect the inquiry whether the Legislature intended a rule which would ordinarily lead to such consequences. Besides, such special and minute stipulations as to the effect and character of an endorsement, would be very incon-
(443) venient in practice, as affecting the circulation of negotiable paper, and leading to endless disputes whether the precise degree of diligence stipulated for in the several endorsements had been observed.

Upon the whole it is the opinion of the Court that the judgment rendered below is erroneous and ought to be reversed, and that on the case stated there ought to be judgment of non-suit.

PER CURIAM. Judgment reversed.

Cited: Topping v. Blount, 33 N. C., 64; *Bank v. Simpson,* 90 N. C., 471; *LeDuc v. Butler,* 112 N. C., 459.

DEN ON DEM. OF ANDREW BELFOUR'S AND STEPHEN HENLY'S HEIRS v. JACOB DAVIS AND ZACHARIAH NIXON.

Sub-tenant Cannot Deny Title of Landlord.

1. A tenant cannot, by merely ceasing to pay rent to his lessor and paying it to another person, change the tenancy so as to enable himself to dispute the title of his landlord in an action of ejectment by the latter to regain the possession.

2. One who is admitted to defend in an action of ejectment with, or in the stead of, the tenant in possession, cannot set up any defence which is forbidden to the tenant. He stands with, or in the place of the tenant, and is entitled to his rights and subject to his disadvantages. Hence, if the tenant cannot dispute the title of the plaintiff's lessor, because it appears that he occupied the land as his tenant, the person claiming to be landlord and admitted to defend as such will also be precluded from disputing such title.

THIS was an action of ejectment for two tracts of land, adjoining each other, and containing, the one 416 acres and the other 100 acres, tried at Randolph, on the last cricuit, before his Honor, *Judge Settle.*

BELFOUR AND HENLY HEIRS *v.* DAVIS AND NIXON.

The material facts of the case were that G. Mullenex was seized of the tract of 416 acres in fee, and in 1810 contracted to sell it to Jesse Nixon, who entered and paid the purchase money, except the sum of $40, but never took a conveyance. In 1815 Stephen Henly and Andrew Belfour, who were the uncles of Jesse Nixon, and, as sureties, had paid large sums of money for him, paid that residue of the pur- (444) chase money to Mullenex, and he then executed the deed or instrument hereinafter mentioned, bearing date 12 June, 1815. It begins thus: "This indenture, made this, etc., between G. Mullenex, of the county of Randolph, etc., of the one part, and *Stephen Henly and Andrew Belfour,* both of said county, *of the other part,* witnesseth, that the said G. Mullenex, for and in consideration of the sum of $365, to him in hand paid *by the said Stephen Henly and Andrew Belfour,* the receipt, etc., hath granted, bargained and sold, and doth grant, bargain and sell unto the said *Stephen Henly's and Andrew Belfour's heirs and assigns forever,"* the tract of land in question; and it then proceeds, "to have and to hold the same, with the appurtenances, *unto the said Stephen Henly's and Andrew Belfour's heirs and assigns,* to the proper use and behoof of the said *Stephen Henly's and Andrew Belfour's heirs and assigns forever."*

At that time Jesse Nixon was living on the land, but having become insolvent, left it in October, 1815, and removed to South Carolina, and has ever since resided there. He afterwards executed to Stephen Henly and Andrew Belfour a deed for the 100-acre tract adjoining the other tract of 416 acres.

When Jesse Nixon left the land Henly and Belfour entered and leased it, and received rent until the death of Henly, which happened in 1820, after which Belfour and the heirs of Henly made leases until the death of Belfour, which happened in 1825. The heirs of Henly and the heirs of Belfour respectively (who are the lessors of the plaintiff) then claimed the land by descent, and leased the same to Jacob Davis, the original defendant in this action, as a tenant from year to year, and he entered under them and continued in possession until this suit was brought against him in May, 1837. On 9 October, 1829, Jesse Nixon entered upon the tract of 416 acres, and there made and delivered a lease for a term of years to Thomas Davis, a son of Jacob, then living with his father on the land; and on 16 October, 1829, Jesse Nixon executed to Zachariah Nixon a deed of bargain and sale in fee for the same land. After this, Jacob Davis did not pay rent to the lessors of (445) the plaintiff, nor was rent paid by him, or his son Thomas, to any person, except for the year 1833 or 1834, when it was then paid by the two to Zachariah Nixon, and Thomas then went off the land.

Upon the service of the declaration on him Jacob Davis, the tenant in possession, appeared, entered into the common rule, and pleaded not guilty. At the same term Zachariah Nixon came in, and, by leave of the Court made himself a defendant also.

Upon the trial it was contended, on behalf of the defendants, that the deed from Mullenex was not to Henly and Belfour, but *to their heirs,* and was, therefore, void, as Henly and Belfour were both living at the time of its execution. And also that it was void because it was executed by Mullenex when he was out of possession of the land and Jesse Nixon was in possession.

His Honor instructed the jury that the deed was, upon a just construction, a sufficient bargain and sale to Stephen Henly and Andrew Belfour, and that upon their several deaths the land descended from them to the lessors of the plaintiff, provided it was not void on the other ground mentioned. And upon that his Honor further instructed the jury that the deed was void if, at the time of its execution, Jesse Nixon was in the actual possession of the land and claimed it adversely to Mullenex. But that if, in their opinion, that deed was made at the instance or by the consent of said Nixon, in satisfaction of the debts which he owed his uncles, then his possession ought not to be considered adverse, and the deed was valid.

And the jury was further instructed that as Jacob Davis was the tenant of the lessors of the plaintiff he could not deny their title.

And the jury was further instructed that as Jesse Nixon had no title to the land and as Jacob Davis was at the time living on it as the tenant of the lessors of the plaintiff, the entry of the said Nixon to make the lease to Thomas Davis, on 9 October, 1829, did not change the possession of the land, so as to enable him, Jesse Nixon, to convey to the de-
(446) fendant, Zachariah Nixon, on 16 October, 1829, and also, that the deed last mentioned could not, for that reason, operate as color of title.

There was a verdict and judgment for the lessors of the plaintiff and the defendant appealed.

No counsel appeared for the defendant in this Court.
Mendenhall for the lessors of the plaintiff.

RUFFIN, C. J., after stating the case as above, proceeded: Whatever doubts may be raised upon some of the questions found in the record, the justice of the plaintiff's case is so apparent that it is gratifying to find that there are other points on which the law is clearly in his favor, and which are decisive of the cause.

In the opinion of the Court it is not competent to these defendants to dispute, in this action, the title of the lessors of the plaintiff, upon any of the grounds taken at the trial by them. If that be so, all the other points may be dismissed from our consideration, without decision or further observation. That the defendants are concluded in the present suit we entertain no doubt.

Jacob Davis was, originally, the sole defendant in the action. It is stated that he entered into the land under a lease from the lessors of the plaintiff, in 1826, and occupied expressly as their tenant through the years 1826, 1827, 1828, and 1829. No disclaimer by him, at any time, is anywhere stated, nor any fact from which it could be inferred that his possession became adverse to the lessors of the plaintiff. It must, indeed, be assumed that either the lessors of the plaintiff had refused to renew the lease and given their tenant notice to quit, or that he denied their title before their suit was brought, because something of the sort was requisite to turn him into a trespasser so as to sustain this action. The assumption is necessarily made from the omission of this defendant to resist the recovery for the cause that his term still continued. But the period at which the relation between those parties was severed cannot, without evidence, be carried further back than the end of the year preceding the suit. Let it be said that the payment of rent to Z. Nixon, in 1834, was the joint act of Jacob and Thomas Davis, and constituted both of them tenants to the person to whom they paid the (447) rent. Yet, that would be only between those parties themselves, and could not prevent the lessors of the plaintiff demanding from Jacob Davis the possession he derived from them. It is not now a question how far a very long possession, after payment of rent or other acknowledgments of the tenancy, accompanied by a claim of title either for the tenant or some other person, may constitute evidence of a disclaimer, and give to such possession the character of adverseness, and call into action the statute of limitations. In this case nothing of the kind exists. The interval between the payment of rent to Z. Nixon and the commencement of this suit was but little more than two years, and would have amounted to nothing had the lessors of the plaintiff known of such payment, of which there is no evidence.

The action, therefore, as brought, was nothing more than the common one by a landlord at the end of the term against an unfaithful tenant, who holds over. Authorities need not to be cited to sustain his Honor's position that *he* cannot deny his lessor's title.

With quite as good, if not for the same, reason must the other defendant, Z. Nixon, be precluded from setting up such a defense. The action was not brought against him, nor intended to draw into question his title or affects his rights. Indeed, it could not be brought against him,

because he was not in possession. The possession was in Jacob Davis, and the object of the suit was to recover it from him. If another be admitted to defend, what is he to defend; what may he allege in defense? He is allowed to defend the possession of the tenant, for that is the matter in contest. He is allowed to do so because he alleges an interest in that possession, and because he may be able to make fuller defense than the tenant would make. It is possible the tenant, through ignorance or negligence, would not make all he might of his case. Therefore, one claiming to be his landlord, is permitted to set up any defense which the tenant might have brought forward. But it is neither within the purposes of justice or the dictates of reason to permit him to come in and set up a defense which the tenant could not. This subsidiary party stands with or in the place of the tenant, and is entitled to his (448) rights, and subject to his disadvantages. Hence, we held in *Carson v. Burnett,* 1 Dev. and Bat., 560, that the landlord cannot be charged in this action for his own trespasses, but only in respect of the land in the possession of the tenant, the original defendant. So, on the other hand, it has been decided, that only such defense was open to the landlord as was open to the tenant in possession. The case of Doe ex dem. *Knight v. Smythe,* 4 Ma. and Selw., 347, so rules, and is directly in point with our case. There, one entered into possession under an agreement for a term of years, paid rent, and then disclaimed. The term having expired the lessor brought ejectment against the lessee, who did not appear, but another person claimed to defend as his landlord, and did appear and defend in his stead. The Court held that this person could not set up any title to himself in that action, for since the tenant could not dispute the plaintiff's title, neither could one, claiming in privity to him and defending in his stead, do so.

PER CURIAM. Judgment affirmed.

Cited: Whissenhunt v. Jones, 80 N. C., 349; *Wise v. Wheeler,* 28 N. C., 199; *McDowell v. Love,* 30 N. C., 504; *Foust v. Trice,* 53 N. C., 493; *Isler v. Foy,* 66 N. C., 550; *Wiggins v. Reddick,* 33 N. C., 381; *Davis v. Evans,* 27 N. C., 531; *Gilliam v. Moore,* 44 N. C., 97; *Maddrey v. Long,* 86 N. C., 385.

(449)

DAVID HONEYCUT v. DANIEL ANGEL.

Fraudulent Levy—Evidence—Damages.

1. A count in a declaration for a malicious and excessive levy and sale by a constable, which states a seizure and sale by the officer of "the property" to a greater value than the debt to be satisfied, is insufficient; for "the property" may be either real or personal. If the former, then the plaintiff sustained no injury by the acts of the defendant, because neither the levy nor sale by a constable can divest the owner of land of his title, or disturb his possession; if the latter, then there is no averment that it was not an entire thing, or that there were, at the time of the levy, other goods or chattels of the plaintiff, known to the defendant, in such different and distinct parcels or kinds, that the defendant might have taken a reasonable part thereof, and not the thing which he did take, and which was of a greater value than the sums to be raised.

2. In a declaration against a constable for fraudulent levy upon the lands of the plaintiff and a return of the same to the court, whereby an order of sale was obtained, and the lands sold by the sheriff, it is necessary to state an eviction of the plaintiff, or some disturbance by the defendant, or by some person deriving a title under the sheriff's sale and conveyance; and the allegation that the sheriff "made title to the purchaser," without stating that some person in particular, claiming and getting title by virtue of the sheriff's deed, turned or kept the plaintiff out of possession, is insufficient.

3. Upon a motion for a new trial every presumption is to be made in favor of the verdict of the jury and the correctness of the instructions of the court; hence, the want of *a case* stated in the record sufficient to authorize the verdict, or give rise to the opinions delivered by the judge, does not, *per se*, render the judgment erroneous. It is deemed right until the contrary appear; and therefore the record must set out such of the proceedings at the trial as will show affirmatively that there was no error, otherwise it must necessarily be affirmed.

4. The cases of *Pickett v. Pickett*, 14 N. C., 7, and *Atkinson v. Clarke, Ibid*, 171, approved.

5. While the court, upon a motion for a new trial, is bound to presume every fact necessary to support a verdict; upon a motion to arrest the judgment it is restrained from presuming or admitting any matter of substance not found in the record. The plaintiff cannot have a judgment unless he allege in his pleadings such facts as, in justice and in law, entitle him to it.

6. If either of two counts in a declaration be defective, and the verdict be entered generally upon both, the plaintiff cannot have judgment.

THIS was an action of trespass on the case, tried at Yancey, (450) on the Fall circuit of 1837, before his Honor, *Judge Settle.*

The declaration contained two counts. The first stated two writs of *fieri facias*, issued by a justice of the peace for the county of Buncombe

and directed to any lawful officer of said county, commanding him to levy of the goods and chattels of the plaintiff Honeycut, two debts of $2.16 and $2.05 respectively, besides costs, etc., before then recovered by one Joseph Ray, against the said plaintiff, before a justice of the peace of the said county, and to have the said moneys, etc.; and if no goods and chattels were to be found, then to levy on the lands and tenements of the said Honeycut; which writs were on, etc., at, etc., delivered to the defendant Angel, who then, etc., was constable of and in said county; and then alleged that "by virtue of which said executions, afterwards, and before the return of the said executions, viz.: on, etc., at, etc., as such constable did seize and take into execution, *the property* of the said David Honeycut, of much greater value than the debts aforesaid of $2.16 and $2.05, and the costs aforesaid, well knowing that part of *the property* so taken into execution was sufficient to satisfy the said debts, etc., yet contriving, etc., the said Daniel afterwards, to wit, on, etc., at etc., did expose to sale and did sell the *property* so levied upon, which was much more than sufficient to pay the debts of, etc., and costs aforesaid; by means whereof the said David Honeycut was then and there wholly deprived of the use of *the said property* so levied upon, and hath been, and is by means of the premises, greatly injured and damnified, etc."

The second count, after setting forth the judgments and executions as in the preceding one, and the delivery of the writs to the defendant, proceed as follows: "By virtue of which said executions the said Daniel Angel, so being constable as aforesaid, afterwards, viz.: on, etc., at, etc., did fraudulently levy upon the lands of the plaintiff, well knowing at the time of said levy that the said David Honeycut had personal property, subject and liable to be levied upon by said executions, much (451) more than sufficient to satisfy the said debts of, etc., and fraudulently contriving and wrongfully and unjustly intending to injure, oppress and impoverish the plaintiff, afterwards, to wit: on, etc., at, etc., under color and in pursuance of said levy upon the land aforesaid, did return the same to the Court of Pleas and Quarter Sessions of the county aforesaid, and the sheriff of said county, in pursuance of his duty as sheriff of said county, and in pursuance of a writ of *venditioni exponas,* to him directed from the said Court of Pleas and Quarter Sessions, which said *venditioni exponas* was issued according to act of Assembly in such case made and provided, upon and in pursuance of said levy, did sell and dispose of at public sale the said land of the said David Honeycut, levied upon by the said Daniel, constable as aforesaid, and made title thereto to the purchaser, by means whereof the said David Honeycut was then and there wholly deprived of the use and possession of his

land, and hath been, and is by means of the premises greatly damnified, etc."

The case was tried on the general issue, and a general verdict rendered in favor of the plaintiff for $589.82. The defendant moved for a new trial on the ground of misdirection to the jury, which was refused, and a judgment rendered for the plaintiff, from which the other party appealed.

Upon the motion for a new trial the case stated in the record is, "that it was in evidence that the plaintiff had notice of the proceedings in court relating to the levy upon the land by the defendant, but had no notice of the levy before the return to court. Upon this it was insisted by the counsel for the defendant that the measure of damages should be expenses incurred in court and in selling the land after the return of the defendant as constable. But his Honor charged the jury 'that the plaintiff was entitled to recover all the damages he sustained in consequence of the illegal act of the defendant.' And, under these instructions the jury assessed the plaintiff's damages to the full value of the land at the time of the levy, deducting the debts and costs."

D. F. Caldwell for the defendant.
A. M. Burton and Hoke for the plaintiff.

RUFFIN, C. J., after stating the case as above, proceeded: On (452) the part of the defendant it has been contended that there ought to be a *venire de novo,* because it is obvious that there was no evidence applicable to the first count, and because, upon the second count, the damages assessed could be proper only in the case that the plaintiff was the owner in fee of the land and had been deprived, by means of the defendant's conduct, both of the possession and property in it—neither of which circumstances appear to have existed.

The Court, however, is of opinion that the judgment cannot be reversed upon those grounds. It has been repeatedly declared by the Court that every presumption is to be made in favor of the verdict of the jury and of the correctness of the instructions of the Court. Hence, the want of *a case,* stated in the record, sufficient to authorize the verdict or give rise to the opinions delivered by the judge, does not *per se* render the judgment erroneous. It is deemed right until the contrary appear, and therefore the record must set out such of the proceedings at the trial as will show affirmatively that there was no error, otherwise it must necessarily be affirmed. *Pickett v. Pickett,* 3 Dev. Rep., 7; *Atkinson v. Clarke,* 3 Dev Rep., 171. If the facts deemed by the counsel for the defendant essential to the correctness of the verdict be really and legally so, then it must be presumed that they were proved, because it cannot be

supposed the verdict would have been rendered without such proof, so we must likewise determine with respect to the judge's charge. In itself, indeed, it is so obviously correct that it must be assented to by everyone, "that the plaintiff was entitle to recover all the damages he had actually sustained." The error, if any, consists in not stating to the jury that, in this case, the plaintiff could not recover the whole value of the land because he had not lost his estate in or his possession of the land. But it in no manner appears that the plaintiff had not sustained those injuries, and it is not in the power of this Court to assume that he had not, the verdict to the contrary notwithstanding. Whatever the right of the defendant may, therefore, have been in this respect we are, by reason of his own defective statement of the proceedings at the trial, unable to assist him.

(453) In anticipation of this opinion of the Court, upon the motion for a new trial, the counsel for the defendant also insisted that the judgment ought to have been arrested, and moved the Court to reverse the judgment, and now arrest it. Upon this motion our opinion is with the defendant. And here it is to be remarked that while upon the former question the Court was bound to presume every fact necessary to support the verdict, we are, in this stage of the case, restrained from presuming or admitting any matter of substance not found in the record. The plaintiff cannot have a judgment unless he allege in his pleadings such facts as, in justice and in law, entitle him to it. Here the case of the plaintiff, as stated in the declaration, is, in our opinion, radically defective.

The verdict is entered generally upon both counts, and therefore, if either be defective the plaintiff cannot have judgment. We think, indeed, that both counts are bad. The first count was intended to be for a malicious and excessive levy and sale by the defendant as a constable. It does not specify the things levied on or sold, but simply alleges that the defendant seized and took into execution and sold "the property" of the plaintiff to a greater value than the debts, when he well knew that a part of *the property* so taken was sufficient to satisfy the debts and other sums to be raised on the executions. It is observable, first, that the *property* levied on and sold may have been *real* or *personal* property. If the former, then the plaintiff sustained no injury by the acts of the defendant, because neither the levy nor sale by a constable can divest the owner of land of his title, or disturb his possession. The sale would be merely void, and work no injury to the plaintiff. Next, if *the property* be admitted to have been personalty, then there is no averment that it was not an entire thing, or that there were, at the time of the levy, other goods or chattels of the plaintiff in such different and distinct parcels or kinds that the defendant might have taken a reasonable part

thereof, and not the thing which he did take and which was of greater value than the sums to be raised. The plaintiff cannot complain that the officer seizes an article of greater value than the debts and sold it, unless he shows, farther, that it was divisible, or that the officer had notice that there were other articles existing separately, and (454) nearer in value to the money to be raised. It is not a wrong in an officer to levy on the only thing known to him as belonging to the debtor, whatever may be its value. But not to insist on defects in the first count —on which probably no evidence was given—we will consider next, on which the evidence was given, and which, therefore, involves the merits of the controversy.

Not to speak of the imperfect and inartificial statements, in several respects, of the second count, in point of form, it is sufficient to say that, in point of substance, it is essentially insufficient, in not stating an eviction of the plaintiff or some disturbance by the defendant, or by some person deriving a title under the sheriff's sale and conveyance. Supposing that we may understand, by the words "made title thereto to the purchaser," that the sheriff had sold and conveyed the land in a valid manner; yet it must appear that some person in particular, claiming and getting title by virtue of the sheriff's deed, turned or kept the plaintiff out of possession, at the least. It may be sufficient, in the case of personal chattels, to state the levy and sale, as the means whereby the injury accrued; because by the sheriff's seizure the owner lost his possession, and by the sale was finally divested of his interest. But it must be otherwise with respect to land. The mere levy, sale and conveyance can never, by themselves, constitute an injury. They may possibly form a cloud over the plaintiff's title, but they do not interfere with his enjoyment of the property, unless the purchaser asserts and acts on his title by taking possession under it. The purchaser may have been the agent of the plaintiff, and have bought in trust for him. In fine, unless the plaintiff has been disturbed, however serious the injury meditated by the defendant, none has been really inflicted on the plaintiff, nor loss sustained by him. It will be time enough to ask that the defendant shall pay him for his land when he shows that he has lost it in consequence of the defendant's acts. The judgment must be reversed with costs to the defendant.

PER CURIAM. Judgment arrested. (455)

Cited: Jones v. Palmer, 83 N. C., 305; *Cowles v. Railroad,* 84 N. C., 312; *Chasteen v. Martin, id.,* 395; *State v. Craige,* 89 N. C., 479; *State v. Lanier, id.,* 520.

Dist.: Brown v. Kyle, 47 N. C., 443.

BENNET HESTER ET AL. v. ZACHARIAH HESTER ET AL.

Failure of Clerk to Send Up Transcript—Certiorari.

1. Where an appellant relies upon the clerk to send up the transcript, and the clerk makes an ineffectual attempt to do so, the appellant will not be relieved by a *certiorari*, unless the attempt be such as, if made by the party himself, would have been deemed a substantial compliance with what the law requires of him. If the transcript had been mailed in due time to reach the court, it is probable that would be so considered; but the placing of it in the hands of a gentleman, who is under no special obligations to attend to its filing, is not such a compliance.

2. The cases of *Davis v. Marshall*, 9 N. C., 59, and *State v. Williams, Ibid*, 100, approved.

THE transcript of the record in this cause not having been filed within the time prescribed by law (1 Rev. Stat., ch. 4, sec. 25) an application was made by the appellant's counsel for a *certiorari* to bring up the record. The application was founded upon the following affidavit of Henry W. Miller, Esq.: "A short time before the last term of the Supreme Court, Mr. Willie, clerk of the Superior Court of Granville," (where the cause was tried), "handed me a letter directed to Mr. Devereux (one of the appellant's counsel) with a request that I should deliver it to Mr. Devereux on his arrival. On the back of the letter was endorsed *'Hester v. Hester.'* Not knowing that the papers were a transcript to the Supreme Court I placed them amongst the other letters in my possession belonging to Mr. Devereux. Mr. Willie has informed me that he requested at the time the papers were handed me that should Mr. Devereux not reach town before the meeting of the Supreme (456) Court I should give them to the clerk. This request I did not hear, though it may have been made without my noticing it, as I was busy at the time preparing my papers as one of the clerks of the Senate. Most of the letters directed to Mr. Devereux which were in my hands I gave him immediately on his arrival, but those in the case of *Hester v. Hester,* I did not, having overlooked them for several days after he came up. I think Mr. Devereux remarked at the time it was too late to file them. I had no idea that Mr. Willie have given me a transcript to the Supreme Court or I should most certainly have handed it without delay to the clerk."

Devereux and W. H. Haywood for the applicants.
Badger contra.

GASTON, J. We think that this application for a *certiorari* must be refused upon the principles heretofore established by the Court. In *Davis v. Marshall and Russell,* 2 Hawks, 59, and the *State v. Williams,*

2 Hawks, 100, it was ruled that where the appellant trusts to the clerk to send up the transcript and the clerk neglects to do it, the appellant must abide the consequences of the carelessness or forgetfulness of his agent. The principle must apply with equal force where the clerk ineffectually attempts to send it up, as where he wholly forbears from doing so, unless the attempt be such as, if made by the party himself, would have been deemed a substantial compliance with what the law requires of him. If the transcript had been mailed in due time to reach this Court, this, it is probable, would have been so considered. *Erwin v. Erwin,* 3 Dev., 528. But the placing of it in the hands of a gentleman who is under no special obligations to attend to its filing, whose own engagements may render him inattentive to or forgetful of the commission with which he is troubled is not such a compliance. The appellant or the appellant's agent, trusting to the performance of such an act of friendship, must run the risk of its non-performance.

PER CURIAM. *Certiorari* refused.

(457)

OSMOND F. LONG v. DANIEL W. GANTLEY.

Endorsement—Usury

1. If a note be endorsed for the accommodation of the maker, to enable him to raise money upon it, and be handed to a bill broker, who gets it discounted at a greater rate than seven per cent in New York and hands the proceeds to the maker, the transaction will be usurious as between the endorser and endorsee; but if the endorsee pay the broker the full value upon discounting the note, the latter's withholding from the maker more than enough of the proceeds to cover his fair commission, will not make the transaction usurious, the endorsee in such case not being affected by the misconduct of the broker.

2. The Supreme Court cannot grant a new trial upon the ground that the verdict was against the evidence, or the weight of the evidence—that being a matter of discretion with the judge who presides at the trial in the court below, which cannot be revised upon appeal.

3. It is not to be assumed that a bill broker, undertaking to negotiate notes in the market for another person, upon the best terms in his power, took them on his own account—especially when a third person is found to be the holder and it appears that he acted as broker in good faith.

4. A bill broker may be constituted the agent of the buyer, and also of the seller of notes, and in that character, by acting for each of his principals in the usurious discount of a note may make a contract which may be an usurious one, entered into by the principals through the broker as their common agent. But there is nothing in the character of a bill broker, or in his transactions, that necessarily constitutes him the agent of both the seller and buyer of paper passing through his hands; the contrary is to

be inferred, and it is to be supposed that he is the agent of one only, because after contracting with one, it is inconsistent with the interest of that one, and with the broker's duty to him, to undertake the same office for the other party.

THIS was an action of assumpsit, brought by the plaintiff as a remote endorsee, against the defendant as endorser of two promissory notes executed by one Peter R. Wykoff, in the City of New York, the one dated November 12, 1836, for $2,250, payable five months after date, and the other dated December 10, 1836, for $3,000, also payable five months after date. The case came on for trial at Orange, on the last circuit, before his Honor, *Judge Settle,* upon the pleas of the gen-
(458) eral issue, and the statute of usury of the State of New York, and the plaintiff proved a case, which *prima facie* entitled him to recover.

The defendant then read in evidence a statute of New York, which fixes the rate of interest at 7 *per cent,* and enacts that all notes and securities whereupon or whereby there may be reserved or taken any greater rate of interest, shall be void. The defendant, after releasing him, proved by Wykoff, the maker of the notes, that he executed them in New York for the purpose of raising money on them by a sale in the market, and that the defendant endorsed them in New York without consideration, and merely for the accommodation of Wykoff, and that, after the notes were endorsed by the defendant, he, Wykoff, received them from the defendant and placed them in the hands of Charles Buck, a broker, in the City of New York, to be by him negotiated for and on account of Wykoff on the best terms in his power. That Buck afterwards paid to Wykoff the sum of $1,960.03 as the proceeds of the note for $2,250, retaining one-half per cent, $11.25, for his commission, and the residue, $278.44, was for the discount or interest; and also paid him the sum of $2,550 as the proceeds of the note for $3,000, retaining for his commission $15, and the residue, $435, was for the discount at the rate of 3 per cent a month, and that Wykoff was not to receive anything more from Buck and had not received anything more from him for those notes, but the two sums of $1,960.03 and $2,550 before mentioned.

The defendant also proved that he had endeavored to obtain the testimony of the broker, Buck, and had summoned him to give his deposition in New York, where he still resided, but was unable to procure his attendance.

His Honor, upon this evidence, instructed the jury that if the notes were made by Wykoff and were endorsed by the defendant for his accommodation, and to enable him to raise money on them, and were sold in New York for him by Buck at the sums stated to have been received by him, Wykoff, or at a greater rate than 7 per cent discount, then they

were infected with usury, and the plaintiff could not recover. But the proof of the plea devolved on the defendant, and unless they were satisfied that the broker, Buck, negotiated the notes at an usurious rate of discount to the persons who purchased them from him, (459) then their verdict ought to be for the plaintiff.

The counsel for the defendant then moved the court further to instruct the jury that if they believed that Wykoff received for the notes respectively only the sums stated by him, the broker being the agent of both the maker and the vendee—then the transactions were usurious, no matter what passed between the broker and the vendee of the notes. This instruction the court declined to give, and there was a verdict and judgment for the plaintiff and the defendant appealed.

W. A. Graham for the defendant.
Badger for the plaintiff.

RUFFIN, C. J., after stating the case as above, proceeded as follows: On all the points in this case, which are open to action of this Court, our opinion accords with that delivered in the Superior Court. Perhaps, if the jury had been fully informed of the course of business transacted by a bill-broker, and of the state of trade in New York towards the end of the year 1836, they might in a civil cause have felt it their duty to infer, from the evidence and circumstances, that Buck paid over to Wykoff all the money he got or was able to get for the notes, excepting only his commission of ½ per cent, which does not seem to have been an unusual or unreasonable compensation. But for this error of the jury, if it be an error, the only remedy is a new trial, granted on the ground that the verdict was against the evidence or the weight of evidence; and to grant or to refuse a new trial upon that, or a similar ground, rests exclusively in the sound discretion of the judge who presided at the trial. This Court could not interpose, although it might appear clearly, in our opinion, that injustice had been done by the verdict. If injustice has been done to the defendant at all, it seems to us to consist entirely in the erroneous conclusion on this question of fact, which the jury adopted, and not in the misdirection by the court.

If the jury had believed that Buck got from the person to (460) whom he passed the notes no more money then he paid over to Wykoff, then they must, according to the instructions, have found for the defendant, for his Honor stated explicitly that in that case the contracts were usurious and the notes void. With this instruction we fully concur, as the notes were endorsed for the accommodation of the maker, and had not been put into circulation until passed by Buck, as the agent of the maker. *Ruffin v. Armstrong,* 2 Hawks., 411. With that instruction the defendant, we think, ought to have been satisfied, and placed his

case before the jury on the truth of the fact hypothetically stated in the instruction. But the defendant declined leaving the case upon that point, and moved a further instruction that if Wykoff received only the sums stated by him the notes were usurious, no matter what passed between the broker and the vendee of the notes. This was refused by the court, as we think, properly.

The correctness of the instruction as prayed for is urged upon several grounds, none of which strike us as sound. It is said in argument here that the defendant is at liberty to consider Buck himself to have been the discounter, in which case there was, unquestionably, usury. But, without some evidence upon the point it cannot be admitted or assumed that a bill-broker, undertaking to negotiate notes in the market for another person upon the best terms in his power took them on his own account, especially when a third person is found to be the holder, and the testimony of Wykoff excludes the idea that Buck acted otherwise than as broker in good faith. Besides, the very terms of the instruction admit him thus to have acted, since it is supposed therein that something passed between Buck, as broker and as vendee of the notes.

Again, it is contended here, as in the Superior Court, that the broker is the agent of both the maker and the purchaser of the notes, and therefore, as the agent of the discounter, paid the maker a less sum for the notes than he ought, which constitutes usury against the discounter. Neither the premises, as here stated, nor the deduction from them, can be sanctioned by the Court. A person may, by placing money in his hands for that purpose, or otherwise, make a broker his agent to
(461) buy notes, and if the person thus constituted agent undertake to sell notes for another person, and by virtue of his several powers from his principals respectively, make a bargain with himself, purporting to be a discounting of the note at usurious interest, and hand over the note to him for whom he was to buy at that rate, and the money to the former owner of the note; it may be admitted to be an usurious contract, entered into by the parties through their agent, the same person happening to be the agent of each. But there is nothing in the character of a bill-broker, or in his transactions, that necessarily constitutes him the agent of both the seller and buyer of paper passing through his hands. The contrary is to be inferred, and it is to be supposed that he is the agent of one only, because, after contracting with one, it is inconsistent with the interest of that one, and with the broker's duty to him, to undertake the same office for the other party. Besides, the argument is altogether fallacious in this: that it visits upon the purchaser of the note the consequences of the dishonesty of the broker in withholding from the original owner of the note a part of the price actually placed into his hands by the purchaser, and this, upon the alleged ground that the broker is the

agent of the purchaser, and that the latter is consequently bound by the acts of the former. Now, the argument admits the broker in this case to be at least equally as much the agent of the seller as of the purchaser, and that being so, it follows that when the purchaser pays to the broker the full price for the note, deducting only legal interest, he, in so doing, pays it to the seller himself. Consequently, the subsequent abstraction of the price, in whole or in part, by the broker from his principal, the maker of the note, cannot affect the assignee of the note with an implied imputation of corruption from usury, when, in fact, there was no corruption on the part of the assignee, but the full value was paid by him. The proposition from which conclusions thus contradictory can be legitimately drawn, must be unsound in itself. The truth is, this broker was not the agent of both the parties, but only of the one who, according to the evidence, employed him; namely, Wykoff, the maker of the note. The broker did not deal for the purchaser, but with him, (462) and on behalf of the seller. The assumption then of the joint agency of Buck, being unfounded, the argument built upon it must also fall.

From the remaining terms of the instruction prayed for, and taking it in connection with the instructions previously given, it is substantially that the contract of the purchaser was corrupt and usurious, although he might have paid to Buck the full sums mentioned in the notes, deducting only the interest for the time they had to run, and after the rate prescribed by the statute, provided, and because Buck paid over to Wykoff a less sum, but kept back a part thereof, over and above his reasonable commission. The expression "no matter what passed between the broker and the vendee of the notes," can be understood in no other sense when it is recollected that the court had just informed the jury that if Buck received no more than he paid to Wykoff then the purchaser was guilty of usury. It was to supply an alleged defect in that instruction that the further one was prayed, which must, therefore, mean that if Buck had received more than he paid over to Wykoff and even received the whole sums mentioned in the notes, the purchaser would still be guilty of usury, simply by reason of Buck's dishonestly keeping back part of the price, a proposition so unreasonable in itself that as soon as it is stated, so as to be understood, it must be rejected.

The judgment is affirmed.

PER CURIAM. Judgment affirmed.

Cited: Reed v. Moore, 25 N. C., 314; *S. v. Gallimore,* 29 N. C., 148; *S. v. Smallwood,* 78 N. C., 562; *Greenleaf v. R. R.,* 91 N. C., 38; *Goodson v. Mullen,* 92 N. C., 212; *S. v. Best,* 111 N. C., 643; *Edwards v. Phifer,* 120 N. C., 406; *Benton v. R. R.,* 122 N. C., 1010.

(463)

THE STATE v. DANIEL MUSE.

Warrant for Penalty—Amendment—Retailing Without License.

1. The Acts of 1800, 1808 and 1809 (see 1 Rev. Stat., ch. 99, sec. 91), prohibiting the sale of spirituous liquors and other articles, except by licensed stores and taverns, near a church, meeting-house, or other place where persons are assembled for divine worship, are constitutional.

2. In a warrant for the penalty incurred by a violation of these acts it is not necessary to name the person or persons to whom the articles were sold, because each act of selling is not a distinct offense, but only one offense is committed, and only one penalty incurred by the same individual, by any number of sales to one or more persons in the same day.

3. *A warrant for the penalty under these acts should conclude against the form of the statutes; the rule being that when an act cannot be made out to be criminal, or a penalty to be incurred, without reading more than one statute, it is then necessary that the indictment or declaration should conclude "against the form of the statutes"—in the plural.

4. A conclusion in a warrant for a penalty against the form of the statute, when it should be against the form of the statutes, is a substantial defect, which is not cured by the verdict. But the Supreme Court, under the 1st and 10th sections of the third chapter of the Revised Statutes, may amend the defect, as it does not change the issue between the parties, and is according to the right and justice of the matter found by the jury.

THIS proceeding was commenced by warrant in the form following: "State of North Carolina—Moore County.

"To any lawful officer:

"Whereas, John Philips personally appeared before me, Cornelius Dowd, Sr., one of the justices of the peace in and for said county, on on this 2d day of September, 1837, and made oath that Daniel

(464) Muse, on the 27th day of August last past, did bring to Friendship meeting house, in said county, cider and ginger cakes, and did, within one hundred and fifty yards of said meeting house, on the day aforesaid, sell cider and cakes, many persons being then and there assembled for divine worship, contrary to the form of the statute in such case made and provided: You are therefore commanded to take the body of said Daniel Muse, if to be found in your county, and have him before some justice of the peace of said county, within, etc., to answer

*The warrant in this case was brought for an offense committed before the Revised Statutes went into operation. It is presumed that since the acts referred to have been revised and consolidated in one act (see 1 Rev. St., ch. 99, secs. 9, 10, 12), the conclusion "against the form of the statute" would be proper. *Rep.*—See *State v. Bell*, 25 N. C., 506.

the State to the use of the poor of said county, of a plea that he render the sum of ten dollars, a penalty incurred by the said violation of said statute."

On the foregoing warrant the defendant was convicted before the magistrate, and upon appeal was found guilty by the jury in the Superior Court, at Moore, on the last circuit, before his Honor, *Judge Pearson.* After verdict the defendant moved in arrest of judgment: first, because the warrant did not name any person to whom the defendant sold; and secondly, because the act of Assembly creating the offense was unconstitutional. But his Honor refused the motion and gave judgment against the defendant, from which he appealed.

The Attorney-General for the State.
Strange for the defendant.

RUFFIN, C. J., after stating the case as above, proceeded as follows: The counsel for the defendant in this Court has very properly abandoned the second ground stated in the record. There can be no doubt that the Legislature hath power, and that there is an obligation in sound morals and true policy on that body to protect the decency of divine worship by prohibiting any actual interruption of those engaged in worship, or any practices at or near the place, in which the Legislature may see a tendency to produce such interruption.

The Court is also of opinion that the warrant is sufficient (465) without naming any person as a vendor of the articles sold. It would not be if the penalty was incurred by each and every act of sale, for then the sale ought to be set forth in its particulars of time, place, and persons, in order that the defendant might conveniently plead to a second prosecution. But the provisions of the statutes under consideration are of a different nature. They do not give a penalty for each act of sale, nor in any sale necessary to constitute the offense. The object of the Legislature was to prohibit the first step towards an establishment that might draw the idle, thoughtless or dissipated from the opportunities of wholesome edification to be derived from uniting in or witnessing divine worship. An attempt, therefore, to sell spirituous liquors or other like articles, or erecting a booth or a stand adjacent to a place of worship, for the purpose of such selling or giving away, is each an offense within the words of the act of 1808, 1 Rev. Stat., ch. 99, sec. 9. If a selling be not necessary to constitute the offense, *a fortiori* it need not be stated to whom a sale was made, or whether it be made to one person or to fifty different persons, there is, under this act, but one offense committed, and but one penalty thereby incurred, on the same day.

In addition to the reasons urged in the Superior Court the arrest of judgment is insisted on here, for the further reason that the warrant concludes "against the form of the *statute*," whereas it should have been "*statutes*." Upon looking into the acts of Assembly, and the authorities to be found in the books the Court thinks this objection well founded.

We understand the rule to be that when an act cannot be made out to be criminal or a penalty to be incurred, without reading more than one statute it is then necessary that the indictment or declaration should run "*contra formam statutorum*." Such is the case here. The act of 1800 (Rev. St., c. 564), is restricted to the church or meeting house *yard*, and would not include *per se* the present case. The act of 1808 (Rev. St., c. 761), is in amendment of the former, and enacts "that the said act shall extend to and exclude all places *within half a mile, etc.*, and every person offending, etc., shall be *subject to the same penalty*, as if the act was committed at church or meeting house yards, and in every respect the like proceeding shall be had thereon." Neither will this act, (466) looked at by itself and not helped by the proceding one, sustain this proceeding, because it expressly refers to the first act, and thus adopts its provisions; and without knowing them the latter act cannot be perfectly understood. As we conceive the law to be, therefore, the process ought to have concluded in the plural.

It is said, however, by the Attorney-General, that this is not matter of substance and is cured by the verdict. But the authorities appear clearly to be the other way. The conclusion, "against the form of the statute," when the proceeding is founded on a statute, is substantial and indispensible. *Scroter v. Harrington*, 1 Hawks, 192; *The Buncombe Turnpike Company v. McCarson*, 1 Dev. and Bat., 306. Until the law shall be altered by a statute (as has been recently done in England) the same reasons require, as a matter of substance, a conclusion in the plural, where it is proper at all. The reason why the conclusions, *contra formam statuti or statutorum* are respectfully necessary, is that the pleadings should show the grounds of fact and of law, on which the accusation is founded. Hence, formerly, the penal statute was recited, and consequently, if it was necessary to have recourse to two statutes to show that the fact charged was a crime, it was requisite to recite both statutes. When the reference to the statute or statutes in the general terms now used was permitted it became the duty of the pleader in each case to conclude properly, according to the creation of the offense, being by one statute or two, just as much as it was before, in similar cases, to recite one or both of the statutes.

Upon the supposition of the foregoing opinion being entertained by the Court, the Attorney-General moved the Court to allow the requisite amendment to be made. That, we think, may be done under the act of

1824, and the Revised Statute, c. 3, ss. 1 and 10. *Grist v. Hodges,* 3 Dev. R., 199. The amendment does not change the issue between the parties and is according to the right and justice of the matter found by the jury. In ordinary cases this amendment would be allowed only on the payment of the costs, for the reasons given in the case cited. But as the State does not pay costs in any case the amendment will be allowed, and a judgment entered for the State for the penalty, (467) upon condition that no costs are claimed in either of the courts against the defendant. The result is that the defendant must pay the penalty and his own costs; so that the effect of the amendment is merely to save the parties the trouble, expense, and delay of further litigation, leaving the costs to fall just as they would if the judgment were arrested.

PER CURIAM. Amendment allowed and judgment affirmed.

Cited: S. v. Sandy, 25 N. C., 575; *Washington v. Frank,* 46 N. C., 441; *Justices v. Simmons,* 48 N. C., 189; *S. v. Foy,* 82 N. C., 681; *S. v. Stovall,* 103 N. C., 418; *S. v. Moore,* 104 N. C., 717; *Caldwell v. Wilson,* 121 N. C., 458; *S. v. Sharp,* 125 N. C., 632.

DAVID LEWIS, ADMR. OF DAVID AND JOHN KEMP v. OLLAN MOBLEY.

Seven Years Presumption of Death—Trover.

1. Where a slave, who was bequeathed to one for life and then over, had been carried off and not heard from for more than seven years before the death of the tenant for life: *It was held,* in an action of trover for the slaves by the ultimate proprietor, after the death of the tenant for life, that a presumption of the slave's death arose after seven years' absence without being heard from; and that the plaintiff must fail in his action, because there was no proof of property in himself, nor a conversion by the defendant, both of which were necessary to sustain his case.

2. To maintain the action of trover it is indispensable that the plaintiff should show a conversion by the defendant of property whereunto the plaintiff, *at the time of that conversion,* had a present right of possession. Therefore, where the puchaser of a slave from the tenant for life, sold him *out* and *out,* during the life of the tenant for life: *It was held,* that the ultimate proprietor could not maintain trover against the seller for the alleged conversion, because, during the life of the tenant for life his right of possession had not accrued, and after the death of such tenant there was no act of conversion.

THIS was an action of trover, brought to recover damages for the conversion of a negro woman, slave, named Ruth, and tried at Bladen, on the last circuit, before his Honor, *Judge Pearson.* (468)

It was in evidence on the trial that Joseph Kemp died in 1805, leaving a will which was duly admitted to probate, and William Kemp qualified as administrator with the will annexed at the November term of that year. The will, among other clauses, contained the following: "I give to my son, William Kemp, two negro women, Dorcas and Ruth, during his natural life, and at his death to his eldest lawful son, if he arrives to the age of maturity; but if he should have no son, or he should not arrive to full age, in that case, said negroes and their increase to be equally divided between my two sons, David and John Kemp." William Kemp took the negroes into possession, and died in December, 1836, without having had a child—David and John Kemp both died some years before William; and after the death of William the plaintiff took out letters of administration upon the estates of David and John; and in October, 1837, demanded the negro Ruth of the defendant, to which he replied that he had bought Ruth from William Kemp in the year 1810, and shortly after sold her to one Van, in the county of Duplin, and had never seen her since, nor had anything to do with her. Some time afterwards the plaintiff again demanded Ruth of the defendant, who replied, "You have just been nonsuited and you never will recover from me." Plaintiff said: "I will bet $50 I will gain the suit the next trial." Defendant said: "I will bet $500 you never do gain it"; and the plaintiff soon after brought this action. There was no evidence that the negro woman Ruth had been seen or heard of since the year 1811.

His Honor charged the jury "that to entitle the plaintiff to recover he must prove property in the negro; that unless Ruth was alive in December, 1836, when William Kemp died, the plaintiff had failed in making out his proof as to property; for that under the will, Ruth was to belong to David and John Kemp, or their representative, the plaintiff, at the death of William, and, although William was now dead, without having had a son, yet if Ruth died before William the remainder
(469) to David and John never took effect: that whether Ruth was dead or alive in December, 1836, was a question of fact for the jury; that when a person is proved to have been alive the presumption is that she continues to live until the contrary appears; but this presumption ceases if she is not seen or heard of in seven years; and the presumption that she is dead gets stronger and stronger the longer it is after this that she is not heard of; that, supposing the plaintiff had proved property, he was then to prove a conversion by the defendant. The plaintiff, in the first place, alleged that a conversion was made out by the demand; that whether there was a conversion was a question of fact for the jury; that, to say nothing of the absence of proof that the defendant was in possession of the negro at the time of the demand there could be no conversion at that time, unless the negro was then alive, as

to which the same remarks were applicable as before made. The plaintiff, in the second place, alleged that a conversion was made out in 1810 by the admission that the defendant had then sold the negro; that if the defendant had merely bought William Kemp's life estate, and merely sold his interest there would be no conversion; but if he sold the negro out and out, that is, the whole estate, and the negro was alive at the death of William Kemp, then this act of the defendant would be an encroachment upon the rights of the plaintiff, which came into existence at the death of William, and would amount to a conversion; but this depended upon whether the negro was dead or alive at the death of William, about which they had already been charged." There was a verdict and judgment for the defendant, and the plaintiff appealed.

Strange for the plaintiff.
W. H. Haywood for the defendant.

GASTON, J. Upon examining the instructions which were given to the jury in this case, we discover no error of which the plaintiff has cause to complain.

There is an opinion, however, expressed in these instructions, which we apprehend to be erroneous, and which, had the verdict and judgment been in favor of the plaintiff might have justified a reversal of the judgment upon the appeal of the defendant. And we notice (470) this opinion now because we have reason to believe from our meeting with it not only here, but in a case tried before another learned judge, that it is of importance to check it before it receive a too general acceptance. His Honor was of opinion, and so charged the jury, that if the defendant, having purchased William Kemp's life estate in the negro woman Ruth, had, in 1810, sold the negro *out and out,* and subsequently William Kemp had died, living the said negro, then the persons entitled in remainder might have maintained an action of trover and conversion against the defendant, because of that conversion. We think they could not. To maintain this action it is indispensable that the plaintiff should show a conversion by the defendant of property whereunto the plaintiff, *at the time of that conversion,* had a present right of possession. It is certain that an action could not have been brought for this alleged conversion during the life of William Kemp, because the right of possession had not then accrued to the ultimate proprietors. *Gordon v. Harper,* 7 Term., 9; *Andrews v. Shaw,* 4. Dev., 70. And it follows as clearly, we think, that it could not lie after the death of William Kemp, when the right of possession accrued, because there was no act of conversion thereafter. Upon the death of William Kemp, the rightful proprietors being entitled to the possession, might have demanded their property

from any person having possession thereof. And a withholding of it then would have been, on the part of such a person, an act of conversion, for which they might have brought trover. What redress they could have against the tenant for life, who by a previous alienation of the subject-matter of his and their property might have defeated the beneficial enjoyment of their right when the time for its enjoyment arrived, is a question well worthy of consideration. But trover could not be maintained against him.

The judgment below is affirmed with costs.

PER CURIAM. Judgment affirmed.

Cited: Cole v. Robinson, 23 N. C., 544; *Brazier v. Ansley,* 33 N. C., 14; *Haughton v. Benbury,* 55 N. C., 341; *Jones v. Baird,* 52 N. C., 154; *Isler v. Isler,* 88 N. C., 580; *Ladd v. Byrd,* 113 N. C., 471.

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(471)

DAVID LEWIS, EXECUTOR OF JOSEPH KEMP, v. DAVID SMITH, ADMR. OF WILLIAM KEMP.

Bequest—Assent of Executor.

An assent by an executor by a bequest for life, where, upon the termination of the life estate, it is not necessary, for the purposes of the will, that the executor should retake possession of the thing bequeathed, operates as an assent also to the ulterior bequests. And where the tenant for life, who is himself the executor, retains possession of the thing bequeathed, for thirty years, the jury not only may, but is bound to infer an assent to the bequest.

THIS was an action of detinue for a negro woman slave named Dorcas, and her two grand-children, Jim and Maria. Plea—*non detinet.*

Upon the trial, at Bladen, on the last circuit, before his Honor, *Judge Pearson,* it appeared that the plaintiff was the administrator *de bonis non cum testamento annexo* of one Joseph Kemp, who died in 1805, leaving a will which was duly admitted to probate, and William Kemp, the testator of the defendant, qualified as administrator with the will annexed, at the November Term of that year. The will of Joseph Kemp, among other clauses, contained the following: "I give to my son, William Kemp, two negro women, Dorcas and Ruth, during his natural life, and at his death to his eldest lawful son, if he arrives to the age of maturity; but if he should have no son, or he should not arrive to full age, in that case the said negroes and their increase to be equally divided be-

tween my two sons, David and John Kemp." William Kemp, as administrator, etc., of his father, Joseph Kemp, took possession of the slaves, Dorcas and Ruth, and retained possession of Dorcas and her two grand-children, Jim and Maria, until his death in 1836, claiming the said slaves as his own. After the death of William Kemp the plaintiff took out letters of administration *de bonis non,* etc., upon the estate of Joseph Kemp; and, after a demand and refusal of the slaves from the defendant, who held them as the executor of William Kemp, brought this action. It also appeared that William Kemp died without having a child, and that the two remaindermen, David and John Kemp, had died some years before William, and the plaintiff had also (472) taken out letters of administration upon their estates.

His Honor charged the jury "that if, from the evidence, they inferred an assent to the legacy for life by William Kemp, the administrator with the will annexed, there would be a presumption of an assent to the limitations over; the rule being that where the will did not require the executor to do anything after the termination of the life estate, an assent to the legacy for life was an assent to the whole; and if so, then the plaintiff, as administrator of Joseph Kemp, had no right to maintain this action." The defendant had a verdict and judgment, and the plaintiff appealed.

Strange for the plaintiff.
No counsel appeared for the defendant in this Court.

GASTON, J. We entirely approve of the instructions given in this case. No position can be better established than the assent of an executor to a bequest for life, where, upon the termination of the life estate it is not necessary for the purpose of the will that the executor should retake possession of the thing bequeathed, operates as an assent also to the ulterior bequests. And the jury in this case not only could have inferred, but was bound to infer, such an assent from the possession of the tenant for life, himself also the executor, for thirty years, under a claim of property. The judgment is affirmed with costs.

PER CURIAM. Judgment affirmed.

Cited: McCay v. Guirkin, 102 N. C., 23; *Lewis v. Kemp,* 38 N. C., 234.

(473)

DEN ON DEM. OF JOHN HOUGH v. ZACHARIAH DUMAS.

Grant—Possession—Boundary.

1. The possession of a tract of land which one claims is in law the possession of the whole, and if, while thus in possession, cultivating a part, he makes a parol contract to buy the land of another who also sets up a claim to it, and afterwards extends the fields which he had in cultivation, he cannot be considered the tenant of the other so as to estop him from disputing the other's title; for an offer to buy a claim to land which one holds as his own may be made for the sake of peace, through alarm, or from misapprehension; and so far from being conclusive of the title, is very slender, if any, evidence of it.

2. If a grant covers, in part, land not liable to entry, or which has been previously granted, it will be good for the land comprehended in it, which has not been granted, and was liable to entry.

3. Where a line of a grant is called for, and then along that and another line of the same grant to a corner of another grant in such second line, and it is not certain whether the first or third line of the grant be meant by the first call, the corner of the second grant must be gone to, whether by the way of the first or third lines of the first grant; and the corner of the second grant must be reached, whether it is immediately on the line of the first grant or some short distance from it.

4. When a grant calls for a corner of another, but leaves it indifferent which of two corners is meant, the second call of the grant may be resorted to, for the purpose of removing the uncertainty, and ascertaining which of the two was intended.

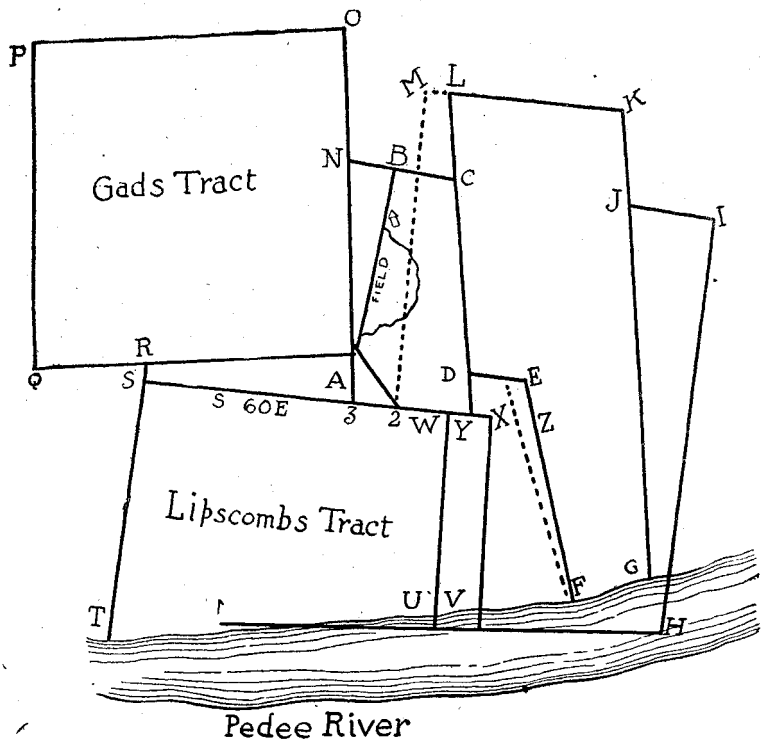
EJECTMENT, tried before his Honor, *Judge Pearson,* at Richmond, on the last circuit. The defendant admitted that he was in possession of the house and field along the line A, B, as represented on the annexed diagram.

The lessor of the plaintiff read in evidence a grant to himself, dated in the year 1812, and proved that A was the beginning corner of his grant, and was a known and established corner of the Gad tract. His grant then ran to R, S, Y, C, B, and back to A.

The defendant then read in evidence a grant to Gad, under whom he claimed, which commenced at O, then to A, Q, P. This was the oldest of any of the grants. He also read in evidence a grant to Lipscomb,

(474) which commenced at T, then to S, W, U, as the defendant contended, but to S, X, V, as the plaintiff contended, and back to T, with the river. This was the next oldest grant. He then read in evidence a grant to Harrington, which commenced at G, then to K, L, D, E, F, as the defendant contended, but to K, L, Y, Z, F, as the plaintiff contended, and then back to G. This grant was the third in age.

The defendant then read in evidence a grant to Love, under whom he also deduced title, which commenced at G, then to J, I, and to a point on the river, about five steps from G, then on to H, 1, U, W, 2, A, N, C, D, E, F, as the defendant contended; but to 1, V, X, 2, A, N, C, Y, Z, F, as the plaintiff contended, and back to G. Another view taken by the plaintiff was that when you got to 1 you then went to T and then never got back to A, Gad's corner, at all; and so the grant never closed, and of course covered no land.



The calls in the Love grant, necessary to explain this part of (475) the case, were from a stake in the river at H, thence N. 72° W. until it strikes the river bank (which would be at 1), then with the river, as it meanders opposite to Lipscomb's corner standing on the river bank, then with Lipscomb's line, the reverse, N. 30°, E. 27 chains to his third corner, then with said Lipscomb's 2d line, the reverse, N. 60°, W. 12 chains to Gad's corner standing on said line, then with Gad's line N. 20°,

E. 50 chains to a Spanish oak in said line, then, etc. This Spanish oak corner was found at N, and was established as the corner of the Love grant. The grant to Love was the fourth in age, but was many years older than the grant to the lessor of the plaintiff.

It was also in evidence that in the year 1824 the lessor of the plaintiff had contracted to sell the land covered by his grant, to the defendant; that the defendant was, at that time, and had been for some years, in the posession of the house and part of the field sued for, claiming the land as his own under the grant to Love. He also owned the Gad tract and the land adjoining. After this parol contract the defendant extended his field to its present limits. Some years afterwards, and but a short time before the date of the demise, the lessor of the plaintiff called on the defendant to complete the contract, when the defendant insisted that the land covered by the plaintiff's grant was not vacant, but belonged to the defendant before the grant to the lessor of the plaintiff issued, and that their contract was that he was to buy the lessor of the plaintiff's right, in the event only of its appearing that he had a good title, and he was now satisfied that he, the plaintiff's lessor, had no right. The lessor of the plaintiff then demanded the possession, and the defendant refused to give it.

The lessor of the plaintiff contended, first, that the defendant was estopped by his agreement to purchase of him, and by extending his field after said agreement, to deny his right to the possession.

Secondly, that the Love grant did not cover the land in dispute, because:

(476) 1. The space between the points G, H, and 1, being parts of the Pedee River, was not subject to entry, and so the two parts of the land granted to Love could not be connected, and the grant was, therefore, void.

2. That if the Lipscomb grant ran from S to X, V, and the Harrington grant from L to Y, Z, F, and the Love grant from 1 to V, X, 2, A, then the two parts of the land granted to Love would be perfectly detached, and, in getting from one to the other, you must necessarily cross the established lines of older grants, and therefore the grant was void.

3. That the call of Love's grant from 1, being with the river as it meanders, etc., may be either up or down, and there is nothing to determine whether it shall go to the beginning corner of the Lipscomb tract at T, or to the point U, or V; and if it goes to T it cannot cover the land in dispute.

His Honor charged, upon the 1st point, that if the defendant was in possession of the house and part of the field at the time of the agree-

ment, claiming under the grant to Love, his possession of a part was, in law, a possession of the whole; and, being in possession of the whole at the time of the agreement to purchase the principle contended for by the plaintiff's counsel did not apply, even as to that part of the field taken in after the agreement.

Upon the 2nd point his Honor charged, first, that if that part of the Pedee River covered by Love's grant was not subject to entry the grant was void only as to that part, but valid as to the residue. Secondly, that, supposing the grants to be located as contended for by the plaintiff, and the land covered by the grant to Love to be detached and cut into two parts, by the lines of older grants, still the grant would be valid, except so far only as it interfered with the older grants. Thirdly, that if the jury were satisfied that the corner of the Gad tract, at A, was the corner called for in the Love grant, then they must go to A; and it made no difference whether from 1 they went to T, and then around to A, or, whether from 1 they went to U, W, 2, A, or to V, X, 2, A; for, in either way, after getting to A then the next call, which it was admitted would go to N, an established corner, and so around, would take in the land in dispute.

There was a verdict and judgment for the defendant, and the (477) lessor of the plaintiff appealed.

Strange for the lessor of the plaintiff.
Badger for the defendant.

GASTON, J. We entirely approve of the instructions given to the jury. Upon the point first raised we take it to be clear that the defendant, not having entered into possession under the plaintiff's lessor, nor shown to hold under him, could not be regarded as his tenant, and was at full liberty to controvert his title. An offer to buy a claim to land, which one holds as his own, may be made for the sake of peace, through alarm, or from misapprehension; and, so far from being conclusive of the title is very slender, if any, evidence thereof.

The question involved in the first and second points of the second exception raised is substantially the same. From our earliest recollections of the law we have understood it to be settled that if a grant covers, in part, land not liable to entry, or which has been previously granted, it will be good for the land comprehended in it, which had not been granted, and was liable to entry.

The view presented by his Honor on the remaining question, the location of Love's grant, is satisfactory and conclusive. He might, indeed,

have pointed out (but it was unnecessary) other very strong indications in favor of the location claimed by the defendant, and inconsistent with the location in part attempted by the plaintiff. The difference begins at the point 1. From thence the call of the grant is "with the river, as it meanders opposite to Lipscomb's corner, standing on the river bank." Lipscomb has two corners on the river bank, the beginning corner and the fourth corner of his tract, and this call of Love's grant leaves it indifferent which of these corners is intended. But the next call removes all ambiguity—it is "with Lipscomb's line *reversed* to his *third* corner." Nothing can be more conclusive to show that the corner of Lipscomb, on the river, called for in the preceding line of Love's grant, is Lipscomb's *fourth* corner. Having arrived, in this way, to Lipscomb's third
(478) corner, the next call of the grant is "with said Lipscomb's line reversed, N. 60° W. to Gad's corner." The only difficulty in fulfilling all the requisitions of this call is that running the line described you do not meet Gad's corner, but pass to the south of it, and this difficulty imposes the necessity of either running the required line until a point be reached opposite to Gad's corner, and thence proceeding to that corner, or disregarding the *line,* and running *directly* to that corner. But, whichever of these modes be adopted, the corner at A will be reached, and thence the next call is for the established corner at N; and thus an obvious, reasonable and satisfactory construction may be put upon all the calls of the grant, which, according to the plaintiff's attempt at exposition would be made absurd and contradictory, and render a location of the grant impracticable. The judgment is affirmed with costs.

PER CURIAM. Judgment affirmed.

Cited: Tucker v. Satterwhite, 123 N. C., 530.

(479)

DEN ON DEM. OF JOHN E. BECTON v. ISAAC CHESNUT.

Natural Boundary Controls Course and Distance.

1. The *construction* of a deed, upon the question of boundary, is as much a legal question as upon any other point, although it is the province of the jury to say which, or where situate, may be the particular tree, stone or stream called for; and it is a principle of construction clearly settled, that a natural and permanent object shall be deemed the boundary in preference to the line designated by the course and distance. It is true that the call for a natural boundary may be, itself, vague or imperfect, or even contradictory; as for a stream, where there are two of the same name, or it be uncertain which of the two bears the name, or for two natural objects, *e. g.*, a branch and a pocosin, which, upon evidence, appear not to be identical, but to be at different places; then, necessarily, the case is open for evidence to the jury as to which was the object meant, and by which the survey was actually made.

2. If the call of a grant be "up a pocosin and branch N. 71 degrees W. 45 poles; thence, still along said branch and joining Keith's land, N. 15 degrees W. 98 poles; thence N. 66 degrees W. 87 poles to a gum near the branch"; and there is nothing to show a *discrepancy* in the *objects called for*, to wit, the pocosin and branch, the only question is whether the branch as a distinct natural object, in itself defined and appropriate for the line of a patent, is to be followed in preference to the mathematical description by course and distance, and it is clearly settled that it is.

3. The case of *Brooks v. Britt*, 15 N. C., 481, and *Hurley v. Morgan*, 18 N. C., 425, approved.

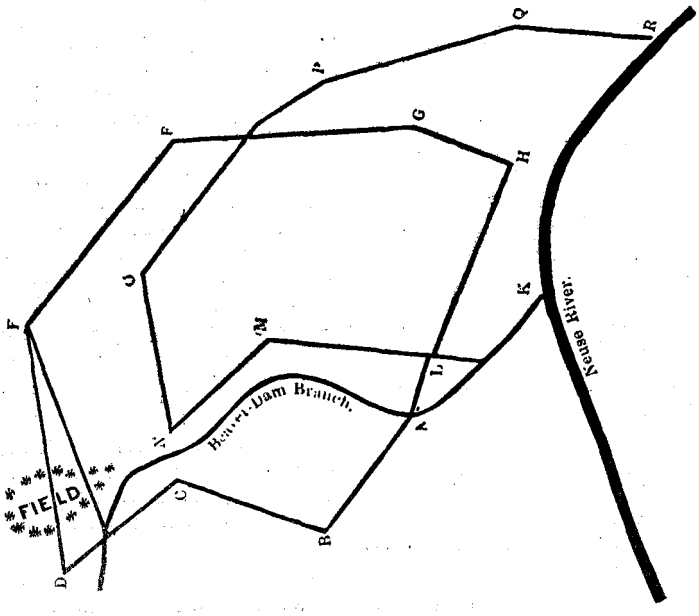
4. Where a grant describes a tract of land as lying on a river, and beginning below the mouth of a branch, and the last line but one calls for a tree on the river, and thence *up the river to the beginning*, these *termini*, independent of the other calls of the grant for the branch, clearly fix the beginning of the survey on the river.

THIS was an action of ejectment, tried at Jones, on the last circuit, before his Honor, *Judge Dick*.

The lessor of the plaintiff claimed under a patent, issued in 1738, for 288 acres of land, lying on Neuse river, and bounded as follows: "Beginning at a hickory, below the mouth of Beaverdam branch, and runs up the pocosin and branch, N. 71°, W. 45 poles; thence still along said branch and adjoining Keith's lands, N. 15°, W. 98 poles; thence N. 66°, W. 87 poles, to a gum, near the said branch; thence N. 21°, E. 90 poles to a white oak; thence N. 80°, E. 144 poles, to a red oak; (480) thence S. 60°, E. 100 poles, to a pine; thence S. 20°, E. 142 poles, to a red oak by the river side; thence up the river to the beginning." The lessor of the plaintiff claimed to begin at A, in the annexed diagram, and thence to B, C, D, E, F, G, and H, so as to include a small field of three or four acres in the defendant's possession, near the line D, E. On

the other hand the defendant insisted that the beginning of the lessor of the plaintiff's land was at K, and thence to L, M, N, O, P, Q, R, so as to exclude the land in his possession; and it was admitted by the plaintiff's lessor that if the patent did begin at K he could not recover. No hickory was found at either A or K, and it did not appear that there were any other trees corresponding with those called for in the grant.

DIAGRAM



(481) His Honor instructed the jury to find for the defendant, if they should think the beginning was at K. And he further instructed them that, supposing the beginning to be at A, then the branch must be followed for 143 poles (the length of the two first lines) because it was called for in the grant; and that, if running that way, the patent would not cover the defendant's possession their verdict should, in that case, also be for the defendant. There was a verdict and judgment for the defendant, and the lessor of the plaintiff appealed.

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

RUFFIN, C. J., after stating the case as above, proceeded as follows: The opinion of the Court is for the defendant, upon each hypothesis, as

to the beginning. If that could be supposed to have been at A, then, certainly, the plaintiff could not follow the course and distance so as to go to B, because that would be going nearly in a rectangular direction *from* the branch, instead of running *"along"* it; and the second line from B to C would not be near the branch, except at its termina- (482) tion. It is said, however, that boundary is a question of fact for the jury; and that, as both the pocosin and branch are called for in this grant this was, at least, a fit case for proof to the jury, as to which one of them should control the calls for course and distance. In support of these positions the cases of *Orbison v. Morrison,* 3 Murph., 551, and *Brooks v. Britt,* 4 Dev., 481, have been relied on. But the Court cannot allow it be questioned, at this day, that the *construction* of a deed, upon the question of the boundary, is as much a legal question as upon any other point, although it is the province of the jury to say which, or where situate, may be the particular tree, stone or stream called for; nor that, as a principle of construction, a natural and permanent object shall not be deemed the boundary, in preference to the line designated by course and distance. It is true that the call for a natural boundary may be itself vague or imperfect, or even contradictory; as for a stream, where there are two of the same name, or it be uncertain which of the two bears the name or for two natural objects, *e. g.* a branch and a pocosin, which, upon evidence, appear not to be identical, but to be at different places; then, necessarily, the case is open for evidence to the jury, as to which was the object meant, and by which the survey was actually made. Of this last kind was the case of *Brooks v. Britt,* in which it was held as a matter of law that Swift Creek swamp was the boundary, but it was left to the jury to say what was the swamp—it being uncertain whether the run or the margin of the sunken land was so called. The same rule was adopted in *Hurley v. Morgan,* 1 Dev. and Bat., 425, as which of several streams was the particular branch called for. But, in the present case, there is nothing to create the suspicion that the pocosin and branch do not so entirely coincide as to render it certain that the branch, as a distinct natural object, in itself defined and appropriate for the line of a patent, was not the special terminus of the tract. The case states *no discrepancy* in *the objects* called for. The dispute is only where the object called for, as the beginning, stood, and whether, from that, the running is to be according to the natural or the mathematical description. It is settled law that it must be according to the former.

In truth, however, the question thus submitted to the jury did (483) not arise, for we think it clear that the patent begins at K, or, in other words, on the river, and immediately below the mouth of the branch mentioned. The beginning could not be at A, which, according to the plat, is about 100 poles above the mouth of the branch, for the

patent describes the land as lying on *Neuse River,* and beginning below the mouth, that is, on the lower side of the mouth, of the branch; and the last line, but one, goes to a red oak *by the river side,* and thence *up the river to the beginning.* These termini, independent of the calls for the branch in the first and second lines, clearly fix the beginning of the survey on the river; and, consequently, by the admission of the plaintiff himself, the survey made from that point would not include the land claimed by the defendant.

PER CURIAM. Judgment affirmed.

Cited: Williams v. Kivett, 82 N. C., 115; *Redmond v. Stepp,* 100 N. C., 219; *Brown v. House,* 118 N. C., 881; *Bowen v. Gaylord,* 122 N. C., 820.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

DECEMBER TERM, 1839

(4 DEV. AND BATTLE)

GEORGE CUNNINGHAM v. JOHN L. DILLARD.

Justice—Acceptance of Surety on Appeal.

Whether in granting an appeal and accepting the security which the law requires, a justice of the peace does not act in a *judicial* character, and on a matter *within his jurisdiction, Query?* If he does, then no action can be sustained against him for taking insufficient security; for no action can be supported against a judge or justice of the peace, acting judicially and within the sphere of his jurisdiction, however erroneous his decision, or malicious the motive imputed to him. But if he does not, he is still not liable, if he acted *bona fide*, and according to his best information.

THIS was an action on the case against the defendant, a justice of the peace, for misfeasance in the performance of the duties of his office, whereby the plaintiff alleged that he had sustained damage. Plea—*the general issue.*

On the trial at Haywood, on the last circuit, before his Honor, *Judge Pearson,* the case was that the plaintiff had sued out a warrant against one Daniel Woodfin, for the penalty for obstructing a public road in the county of Haywood, upon which he obtained a judgment before the defendant for fifty dollars, and thereupon the defendant craved an appeal to the county court, which was granted upon his giving one Thomas Woodfin, his father, for security, the plaintiff objecting to the surety for insolvency; that after remaining in the county court (486) for some time the suit was referred to certain arbitrators, who awarded in favor of the plaintiff; but in the meantime the defendant, Daniel Woodfin, having become insolvent, and his surety having removed to the west, the plaintiff failed to make the amount of his recovery. The plaintiff then called several witnesses to show that Thomas Woodfin was insolvent at the time he became surety to the appeal of his son, and to

rebut this testimony the defendant introduced some witnesses to prove the contrary.

The plaintiff "insisted that if he had sustained damage by the oppressive act of the defendant, as a magistrate, in taking insufficient security, and thereby compelling him to pay costs and lose the amount of his judgment, he was entitled to recover, and further, that although ignorance would protect a magistrate in a criminal proceeding it did not protect him in a civil suit by one who had suffered damages by his act."

His Honor charged the jury that to subject a magistrate to a recovery of damages for an act of his in the discharge of the duties of his office it was not sufficient to show that damage had been sustained because of his having been mistaken in opinion or having acted ignorantly, but it was necessary to prove that he had acted wrong knowingly and corruptly. That in the cause under consideration, if the evidence satisfied them that the plaintiff had sustained the damage alleged, by the act of the defendant, they would then inquire whether Thomas Woodfin was insolvent at the time when he was taken as security. If he was insolvent then they would inquire whether his insolvency was known to the defendant. If the jury were satisfied that he was insolvent and that the defendant knew it, then the law would imply that he, the defendant, had acted corruptly, because he could have no other motive for taking him as security; and in that case the plaintiff would be entitled to recover. But if the surety was solvent, or, supposing him insolvent, the defendant believed that he was solvent, and acted under a mistake, he would be entitled to their verdict. There was a verdict and judgment for the defendant, and the plaintiff appealed.

No counsel appeared for either party in this Court.

(487) GASTON, J. Upon the trial of this cause it seems to have been taken for granted that the defendant was liable in damages if he took insufficient security for the appeal, with a knowledge that it was insufficient. We do not mean to decide whether this opinion was correct or erroneous, and notice it only, lest our silence might be construed into approbation of it. Whether in granting the appeal and accepting the security the magistrate did not act in a *judicial* character, and on a matter *within his jurisdiction,* is a question that may be well worthy of deliberate examination. If he did, then the action was not maintainable. The law is clear that in general no action can be supported against a judge or justice of the peace, acting judicially and within the sphere of his jurisdiction, however erroneous his decision, or malicious the motive imputed to him. This doctrine is to be found in the earliest judicial records, and has been steadily maintained as essential to prevent "the

slander of justice," and to protect those who are bound to administer it "from continual calumniations," *Floyd v. Baker,* 12 Co. 23, and from the peril of being arraigned for every judgment they might pronounce. *Grœnvelt v. Burnwell,* 1 Ld. Ray., 454.

But if the act complained of be not a judicial act, then we concur with his Honor in the opinion that the defendant was not liable if he acted *bona fide* and according to his best information. In the case of the *Governor v. McAffee,* 2 Dev., 15, this limitation of responsibility was not only recognized as attaching to all common law remedies for omission of duty in a magistrate, but was held impliedly to restrain the general words of a statute creating a responsibility for failure to perform a duty in a prescribed form.

PER CURIAM. Judgment affirmed.

Cited: S. v. Zachery, 44 N. C., 435; *Peavey v. Robbins,* 48 N. C., 341; *Furr v. Moss,* 52 N. C., 528; *Hannon v. Grizzard,* 99 N. C., 164.

(488)

WILLIAM D. JONES, ADMR. OF JOHN L. WARD, v. JOHN A. GREEN.

Detinue—Demand—Possession.

1. In the action of detinue a previous demand is not necessary, if the defendant had the possession and claimed the property at the institution of the suit; and *it seems* that a demand is not necessary in any case, except to fix one then in possession with a liability to this kind of action, although he may part from the possession before suit actually brought; or except for the purpose of putting an end to a bailment.

2. The possession necessary to render a defendant liable in an action of detinue need not be an actual possession, but may be one in a legal sense, as where another holds as bailee at will, or for the benefit of the defendant. Therefore, where it appeared merely that the defendant had, before the suit brought, "put the slave in question in the possession of his brother-in-law," but without any written transfer, and without consideration: *It was held,* that it was proper to be left to the jury to say how the possession was—whether in the defendant or his brother-in-law—and that the plaintiff could not be non-suited upon the ground that there was no evidence of his possession at the time of the suit brought.

THIS was an action of detinue commenced by the plaintiff's testator against the defendant, for a negro girl named Rebecca. Plea—*the general issue.*

The plaintiff on the trial at Warren, on the last circuit, before His Honor, *Judge Saunders,* offered evidence to prove that Rebecca was the daughter of a negro woman named Jenny, and produced the record of a

suit in Warren Superior Court to show that Jenny had been recovered by his testator, in his lifetime, from the defendant. The writ in that case, issued some time in January, 1834, and the plaintiff therein obtained judgment for Jenny at April Term, 1835. The writ in the present suit, issued 17 September, 1835. The plaintiff proved also that after the recovery aforesaid his testator hired Jenny to the defendant; that Rebecca was born while her mother was in the possession of the defendant, before the recovery, and a short time before the commencement of the suit in which that recovery was effected. It also appeared that the

(489) defendant, some time in March, 1835, put Rebecca in the possession of one Lane, his brother-in-law, and that the defendant being about to send Jenny from Wayne County, where he resided, to the county of Warren, where the plaintiff's testator lived, as he had bound himself to do when he hired her, told Lane that if he would perform that service he might have Rebecca, to which Lane assented. There was no evidence to show in what way the defendant had obtained possession of Jenny, anterior to the commencement of the suit in which she had been recovered, as above stated. Evidence was then offered by the plaintiff to prove that his testator sent an agent to demand Rebecca of the defendant; that the agent carried with him a writ in the name of the testator against the defendant for the girl, but the agent, who was examined as a witness, could not state whether that writ had been served or not, though the clerk of the court stated that he had no recollection of having issued any other writ in the case. The agent stated that he made the demand and the defendant thereupon said that Rebecca was in the possession of Lane, and that nothing could be done until Lane, who was absent, should return. The defendant stated further on this occasion that he had given Rebecca to Lane, but he did not deny the plaintiff's right, nor did he set up a right in himself further than that which his possession gave him, nor did he intimate that the right was in anyone else. Upon this evidence, his Honor having intimated an opinion that the action could not be maintained, because there was no proof either of a demand before the suit was brought or of possession in the defendant when the writ was sued out, the plaintiff submitted to a judgment of nonsuit, and appealed.

The Attorney-General and W. H. Haywood for the plaintiff.
Badger and J. H. Bryan for the defendant.

RUFFIN, C. J. It does not appear to us that this was a proper case for a nonsuit. We are now to take it for granted that the plaintiff is the owner of the slave, and the objection is that there was no detention by the defendant to authorize this action for the specific thing.

As to the want of a demand: We have held, in *Knight v. Wall,* (490) 2 Dev. and Bat., 125, that one is not necessary if the defendant had the possession and claimed the property at the institution of the suit. It is not easy to see, indeed, how a demand is requisite to give the action in any case, except to fix one then in possession with a liability to this kind of action, although he may part from the possession before action actually brought; for thus putting off the possession, after notice of the true owner, and a refusal to deliver to him, may be deemed covenous in respect to this remedy against the person thus refusing. According to the usages here another instance of a demand being proper is to put a bailee in the wrong. But where the possession is actually, or in a legal sense, in the defendant at the time of suit brought, that possession sustains the action without going back to any existing at a previous time. The question, therefore, is, whether the possession here was, legally speaking, in the defendant or some other person. Upon that question the opinion of his Honor seems to us to be erroneous. Not that he could have said the possession was in the defendant, when the writ was sued out, but that he could not say, upon this evidence, that the possession was not in the defendant. It was a proper case for the jury, with the aid of the court, to inquire how the possession was. There was evidence, both pertinent and cogent, to the conclusion that Lane held for the defendant, and therefore that it was the defendant's possession. Such is the case, for instance, when one holds as bailee at will, or for the benefit of the owner, or a overseer or agent. When the possession, as it is called, of Lane commenced there are probable presumptions that it was not for himself, upon a claim of either permanent or temporary property. Indeed, the case states merely that in March, 1835, the defendant put "Rebecca in the possession of his brother-in-law Lane," but mentions no terms. It could not, however, have been on the consideration set up by way, namely, of remunerating Lane for carrying the mother to Warren, because the child was placed with Lane before the trial of the suit for the mother, and the latter was carried to Warren at the expiration of a hiring made after she had been recovered, though for what period does not appear. Nor could it have been on a hiring of the child, (491) for she was only two or three years of age, and must have been a charge instead of a profit. Nor would a jury be readily persuaded that the defendant had really given the negro to Lane, as he afterwards said to the plaintiff's agent he had done: First, because that is inconsistent with the other story that the child was subsequently the price of carrying the mother home. Secondly, because if a gift had been really intended it would probably have received the legal form of being put into writing. And lastly, because gifts of negroes are not common between

brothers-in-law, while it is not so very uncommon for them to aid each other in efforts to defeat actions against them by contrivances fully as reprehensible as an attempt by shifting from hand to hand, to deceive the owner as to the possession of a chattel he wishes to recover, and thereby put him to delay and difficulty in bringing suit against a proper person. These were considerations well worthy to be weighed by the jury as tending to establish either that the alleged gift, sale, and change of possession, were feigned for the purpose of hindering the plaintiff of this remedy, and so were covenous as against him, *Purcel v. McCallum*, 1 Dev. and Bat., 221; or that, in fact, there was no contract between the defendant and Lane whereby the title was even apparently changed, but simply that Lane held the possession for the defendant, and as his agent, as seems most probably to have been the truth. At all events it was fit the jury should have judged of that, and as the case was not submitted to them on that point there must be a *venire de novo*.

PER CURIAM. Judgment reversed.

Cited: Slade v. Washburn, 24 N. C., 416; *Webb v. Taylor*, 80 N. C., 306.

(492)

THE STATE v. PETER R. SWINK ET AL.

Disturbing Divine Services.

1. An indictment will lie in this State for disturbing a congregation of people assembled for the purpose of divine service and engaged in the worship of Almighty God, although it be not in a church, chapel, or meeting-house permanently set apart by a religious society for divine worship.
2. The case of *The State v. Jasper*, 15 N. C., 323, approved.

THE defendants were indicted at Rowan, on the last circuit, before his Honor, *Judge Dick*, in the following words, to wit:

"The jurors for the State upon their oath present, that on the twelfth day of August, 1839, in the county of Rowan aforesaid, a number of the citizens of said county were peaceably assembled at the house of Joseph Weant, in said county, for religious worship, and for the purpose of offering prayers to Almighty God; and the said persons being then and there so assembled together for the purpose aforesaid, and actually engaged in divine worship, Peter R. Swink and Johnson E. Swink, well knowing the purpose of the said meeting, with force and arms, did then and there enter into said house, and by loud and abusive language, then

and there, with profane oaths and violent actions, did disturb wantonly and intentionally the worship of the Almighty, and did disturb and molest the citizens then and there assembled for divine worship, to the great contempt of religion, to the common nuisance of the citizens of the State then and there being, and against the peace and dignity of the State."

After conviction the defendants moved in arrest of judgment that the bill of indictment did not charge any indictable offense, but his Honor overruled the motion and pronounced judgment, from which the defendants appealed.

No counsel appeared for the defendants in this Court.
The Attorney-General for the State.

RUFFIN, C. J. We entertain the same opinion with his Honor, (493) and think that judgment was properly given for the State. The case is fully within the principle of *Jasper's case,* 4 Dev. Rep., 323, which is, that a congregation of people collected together for the purpose of divine service, and engaged in the worship of Almighty God, are protected by the laws and Constitution of this State from wanton interruption or disturbance. To entitle them to that protection it is not requisite that they should be assembled in a church, chapel, or meetinghouse, as in this State houses set apart by religious societies permanently for worship are generally and indifferently called. That would be the rule if the indictment were framed upon a statute protecting churches, or people worshiping in churches. But under the enlarged sense of the Constitution "a place of worship" is constituted by the congregating of numerous worshipers thereat, for it is the right of conscience, the worship of the Supreme Beirg by his creatures, that is protected, and not merely the edifice. Our opinion, therefore, is that although the assembly was at a private house—as we think must be intended upon this indictment—the defendants were guilty of a gross misdemeanor in molesting the persons there engaged in offering their common prayers, or united in other acts of worship to God. The Superior Court must consequently proceed to enforce the sentence.

PER CURIAM. Judgment to be affirmed.

Cited: S. v. Ramsay, 78 N. C., 453.

JOHN THROWER, ADMR. OF JESSE THROWER, v. ARCHIBALD McINTIRE.

Covenant to Convey Land—Action by Heir.

In a covenant to make a conveyance of land "when called for" to one, without adding "and to his heirs," if the covenantee die without having called for the conveyance, the covenantor is either not bound to convey to any person, or, if to any person, to the heir; and in neither case can the administrator of the covenantee maintain any action upon the covenant.

(494) THIS was an action of covenant on an instrument executed by defendant, under seal, in the following terms:

"I, Archibald McIntire, have sold to Jesse Thrower one tract of land, joining, etc., and containing, etc., which I bind myself to make a deed to Jesse Thrower for, when called for."

The plaintiff was the administrator of Jesse Thrower, and the breach alleged was that after the death of his intestate the plaintiff requested the defendant to execute a deed for the land in fee to certain persons, who were the heirs-at-law of the intestate, which he refused. The defendant pleaded covenants performed and covenants not broken, and upon the trial at Moore, on the last circuit, before his Honor, *Judge Toomer,* insisted that the plaintiff as administrator could not maintain this action because the covenant related to the realty, and no damage arose from the alleged breach to the personal estate of the intestate. A verdict was taken for the plaintiff upon an agreement that it should be set aside and a nonsuit entered if the court were of opinion that the administrator could not have this action. Of that opinion was the court, and gave judgment of nonsuit, from which the plaintiff appealed.

Winston for the plaintiff.
J. H. Haughton for the defendant.

RUFFIN, C. J., after stating the case as above, proceeded as follows: The opinion delivered by his Honor is, we believe, correct. Perhaps in the events which have happened no action at law by any person will lie, for if the covenant, by its silence as to the heirs, be for a conveyance to the covenantee personally, it is gone by his death. But we do not determine that question, because assuming the construction put on the agreement by the plaintiff to be correct, we are still of opinion against him. The legal effect imputed in the declaration to the instrument is that the defendant obliged himself to convey to Thrower, or to his heirs, upon their respective request, and no request having been made by Thrower the plaintiff alleges that the defendant refused to convey to the heirs when requested by them, after the death of the ancestor.

(495) It is insisted on the part of the plaintiff that the heirs cannot

have their action, because the covenant being merely an executory agreement, does not run with land and come with it to their heir, and also because the heir is not named in the instrument and thereforce cannot take benefit thereby, and it is thence inferred that the present action is sustainable, since it would be unreasonable that there should be no remedy for any person. But it may well be inquired if this agreement is by construction to be made to be an engagement to convey to the heirs of Thrower, as well as to Thrower himself, upon request, whether the same principle of construction does not make it, by implication, a covenant with the heir as well as with the ancestor, in which case, according to the old authority cited at the bar, F. N. B., 145, and Shep. Touch., 171, the heir and not the executor should have the action thereon. Be that, however, as it may, it is to be remembered that the ground of the damages demanded in this declaration is that the defendant has not conveyed to the heirs of the plaintiff's intestate. Now, the heir and administrator, as such, are strangers to each other in respect to this question, for what concern is it of the administrator whether the heir get the land or not? After the death of the intestate the defendant was either not bound to convey to any person, or, if to any person, to the heir. If the latter, and he has failed to do so, who is injured? Clearly, not the administrator; and therefore the administrator can have no action on the covenant. Every plaintiff in an action on this instrument, whether the heir or the administrator, must show a damage *to himself* before *he* can recover. *Kingdon v. Nottle,* 1 Maul. and Selw., 355; *Chamberlain v. Williamson,* 2 Maul. and Selw., 408; *Markland v. Crump,* 1 Dev. and Bat., 94.

PER CURIAM. Judgment affirmed.

Cited: Rutherford v. Green, 37 N. C., 126; *Mills v. Abrams,* 41 N. C., 460.

(496)

ALLEN GRIST ET AL. v. ALLEN BACKHOUSE.

Negotiable Instrument—Assignment—Burden of Proof.

1. A negotiable instrument payable to R. G., "agent of his assignees, or order," cannot be sued upon at law in the name of the persons who were assignees of R. G., by a deed executed before the date of the negotiable security, without his endorsement.

2. If the plaintiff were bound to support the affirmative of an issue made by the pleadings, and the judge instructed the jury that the evidence offered by him was sufficient for that purpose, when, in law, it was not, and all this appears upon the record, this Court will notice the error, although no specific exception was taken to it by the defendant on the trial.

GRIST *v.* BACKHOUSE.

THIS was an action of debt on a negotiable single bill, in which the plaintiffs declared as assignees of Richard Grist. Plea—*the general issue.*

On the trial at Craven, on the last circuit, before his Honor, *Judge Settle,* the plaintiffs proved and read in evidence the bill upon which they declared in the following words and figures, to wit:

"$233. Ninety days after date we, jointly and severally, promise to pay Richard Grist, agent of his assignees, or order, two hundred and thirty-three dollars, value received. Negotiable and payable at the Bank of New Berne. Witness our hands and seals, July 23, 1833.

"ALLEN BACKHOUSE. (Seal)
"WM. V. BARROW. (Seal)."

The plaintiffs then produced and read a deed of assignment to themselves of all the effects of Richard Grist, for the benefit of his creditors, which was executed before the date of the bill. There was no endorsement of the bill by the payee. Upon this evidence the jury, under the instruction of his Honor, returned a verdict for the plaintiffs, whereupon they had judgment, and the defendant appealed.

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

(497) DANIEL, J., after stating the case as above, proceeded as follows: We are of the opinion that the evidence offered by the plaintiffs did not support their declaration, and that the judge misdirected the jury as to the law when he told them that the plaintiffs were entitled to recover. Where a bill was made payable to A, or order, to the use of B, it was held that B had but an equitable right, not a legal interest, and that he could not maintain an action on the bill against the acceptor. *Evans v. Cramlington,* Carth., 5; 1 Leigh's N. P., 402; Byles on Bills, 84. So in this case, Richard Grist describing himself in the bill as the agent of his assignees did not give them the legal title to the bill.

The counsel for the plaintiffs insist that the defendant cannot now object to this error, because there was no specific exception taken at the trial. The defendant had placed on the record his plea; it was for the plaintiffs to support the affirmative of the issue arising on that plea. The court misdirected the jury as to the law on the trial of the issue, and told them that the evidence offered was sufficient for the plaintiffs. This error appears on the record and for that the judgment must be reversed and a new trial awarded.

PER CURIAM. Judgment reversed.

Cited: S. v. Chirly, 83 N. C., 606; *Savage v. Carter,* 64 N. C., 197; *Burton v. R. R.,* 84 N. C., 199.

(498)

DEN ON DEM. OF ROBERT LOVE v. SILAS GATES ET AL.

Ejectment—Both Parties Claiming Under Same Person—Sheriff's Deed For Taxes.

1. The defendant in ejectment is generally permitted to shew a better title than the lessor of the plaintiff, in a third person. But where both parties claim title under the same person, it is not competent to either, as such claimants, to deny that such person had title; and though the defendant, in such case, may still show that he had in *himself* a better title than that of the plaintiff's lessor, yet he cannot set up a title in a third person.

2. A sheriff's deed for land sold for taxes is not of itself sufficient to deprive the owner of his land—there must be further evidence that the taxes were due for which the land was sold by the sheriff.

[The cases of *Ives v. Sawyer*, *ante*, 51, and *Murphy v. Burnett*, 4 N. C., 14, approved.]

EJECTMENT, tried at Buncombe, on the last circuit, before his Honor, *Judge Pearson.*

On the trial the lessor of the plaintiff produced and read in evidence a grant to one Z. Candler for the land in dispute, dated in the year 1829, and then showed a regular judgment and execution against Candler, and a sheriff's deed to himself, dated in the year 1831. He then showed another judgment and execution against Candler, and proved that the sheriff levied on the same land as the property of Candler, after the date of the deed to him, the plaintiff's lessor, and sold it as Candler's property, when the defendant Gates became the purchaser and took a deed from the sheriff for the same, dated in the year 1834. The defendants relied upon showing title out of the plaintiff's lessor, and for that purpose offered to read in evidence a patent to one Blount, dated in 1794. This evidence was objected to upon the ground that the defendants were estopped from denying the title of Candler, under whom both parties claimed, but the objection was overruled and the evidence admitted. The lessor of the plaintiff then contended that the whole of the land covered by Blount's patent had been sold for taxes and passed to the State, and thereby had again become vacant, and was subject to entry at the time when Candler took out his grant, and for this purpose he (499) produced a sheriff's deed for the land, but was unable to show that the taxes were due from Blount at the date of the sheriff's deed. His Honor thought that the deed from the sheriff was not of itself sufficient to show that Blount's title had been divested, and the plaintiff's lessor in submission to this opinion was nonsuited and appealed.

No counsel appeared for the plaintiff's lessor in this Court.
Hoke for the defendants.

DANIEL, J., after stating the case as above, proceeded as follows: As the party in possession of land is presumed to be the owner until the contrary appears, the claimant in ejectment must show a good title in himself; he cannot found his claim upon the weakness of that of the defendant, for possession gives the defendant a right against every man who cannot establish a good title in himself against everybody. The defendant, therefore, generally is permitted to show a better title than the plaintiffs in a third person. But it has been decided in this State that where both parties claim title under the same person it is not competent to either, as such claimants, to deny that such person had title. *Den ex. dem. Ives v. Sawyer, ante,* 51; *Murphy v. Barnett,* 1 Car. Law Repos., 105. In this case both of the parties claimed under Candler. The defendant, although not estopped to show that he had in *himself* a better title than the plaintiff, as for instance that Candler had again acquired the title before the date of the sheriff's deed to him, or that his title was always better than even that of Candler's; still we think, according to the above authorities, he was precluded setting up any title in Blount. The admission in evidence of Blount's grant was, therefore, erroneous. We have decided at this term that the sheriff's deed only for lands sold for taxes, was not evidence sufficient in law to deprive a man of the title to his lands. It must also be shown that the taxes were due to authorize the sheriff to sell the land and make a deed. There must be a new trial.

PER CURIAM. Judgment reversed.

Cited: Norwood v. Marrow, post; Copeland v. Sauls, 46 N. C., 73; *Johnson v. Watts, id.,* 231; *Feimster v. McRorie, id.,* 550; *Newlin v. Osborne,* 47 N. C., 164; *Register v. Rowell,* 48 N. C., 314; *Worsley v. Johnson,* 50 N. C., 74; *Whissenhunt v. Jones,* 78 N. C., 362; *Ray v. Gardner,* 82 N. C., 147; *Spivey v. Jones, id.,* 181; *Ryan v. Martin,* 91 N. C., 469; *Jordan v. Rouse,* 46 N. C., 122; *Southerland v. Stout,* 68 N. C., 448; *Fox v. Stafford,* 90 N. C., 298; *Mobley v. Griffin,* 104 N. C., 115; *Thomas v. Hunsucker,* 108 N. C., 723; *Hassell v. Walker,* 50 N. C., 272.

(500)

THE STATE v. JOHN HOOVER.

Homicide—Intent—Death of Slave.

1. If death unhappily ensue from a master's chastisement of his slave, inflicted apparently with a good intent for reformation or example, and with no purpose to take life or to put it in jeopardy, the law would doubtless tenderly regard every circumstance which, judging from the conduct generally of masters toward slaves, might reasonably be supposed to have hurried the party into excess. But where the punishment is barbarously immoderate and unreasonable in the measure, the continuance and the instruments, accompanied by other hard usage and painful privations of food, clothing and rest, it loses all character of correction in *foro domestico*, and denotes plainly that the master must have contemplated a fatal termination to his barbarous cruelties; and, in such case, if death ensue, he is guilty of murder.

2. It is ordinarily true that an actual intent to kill is involved in the idea of murder. But it is not always so. If great bodily harm be intended, and that can be gathered from the nature of the means used, or other circumstances, and death ensue, the party will be guilty of murder, although he may not have intended death.

3. A master may lawfully punish his slave, and the degree must in general be left to his own judgment and humanity, and cannot be judiciously questioned.

4. But the master's authority is not altogether unlimited. He must not kill; for, independent of the Act of 1791, the killing a slave may amount to murder; and this rule includes a killing by the master as well as that by a stranger.

5. It must indeed be true, in the nature of things, that a killing by the owner may be extenuated by many circumstances, from which no palliation could be derived in favor of a stranger.

THE prisoner was put upon his trial at Iredell, on the last cir- (501) cuit, before his Honor, *Judge Dick,* for the murder of his own female slave, a woman named Mira. The witnesses, called on the part of the State, testified to a series of the most brutal and barbarous whippings, scourgings and privations, inflicted by the prisoner upon the deceased, from about the first of December to the time of her death in the ensuing March, while she was in the latter stages of pregnancy, and afterwards, during the period of her confinement and recovery from a recent delivery. A physician, who was one of the coroner's inquest, called to view the body of the deceased, stated that there were five wounds on the head of the deceased, four of which appeared to have been inflicted a week or more before her death; that the fifth was a fresh wound, about one and a half inches long, and to the bone, and was, in his opinion, sufficient to have produced her death; that there were many

other wounds on different part of her body which were sufficient, independent of those on the head, to have caused death. The reasons assigned by the prisoner to those who witnessed his inhuman treatment of the deceased were, at one time, that she stole his turnips and sold them to the worthless people in the neighborhood, and that she had attempted to burn his barn, and was disobedient and impudent to her mistress; at another, that she had attempted to burn his still house, and had put something in a pot to poison his family. There was no evidence except her own confessions, extorted by severe whippings, that the deceased was guilty of any of the crimes imputed to her; nor did it appear that she was disobedient or impertinent to her master or mistress; on the contrary she seemed, as some of the witnesses testified, to do her best to obey the commands of her master, and that when she failed to do so it was from absolute inability to comply with orders to which her condition and strength were unequal. The prisoner offered no testimony.

His Honor charged the jury "that they must be satisfied, beyond a reasonable doubt, that the prisoner killed the deceased; that he intended to kill her, and that he had no legal provocation at the time (502) of killing her, before they would be justified in finding him guilty of murder; that if they doubted on any of those points they ought not to find him guilty of murder." He charged the jury further, "that if the deceased attempted to burn the barn, still house, or kitchen of the defendant, or if she put poison in a pot to poison the family, or stole turnips, or disobeyed the orders of her master, these were all acts of legal provocation; and if the defendant killed the deceased, upon the discovery of any of the aforesaid offenses, or in so short a time thereafter that the passion of the defendant had not a reasonable time to subside, the slaying would be manslaughter, and not murder."

His Honor further charged the jury that "if they were satisfied beyond a rational doubt that the defendant was the slayer, and they were further satisfied that he had no legal provocation at the time of slaying, or so short a time before that his passion had not a reasonable time to cool and subside, they were at liberty to presume a deliberate intent to kill, and it would be murder.

The jury were further instructed "that the legal provocation which would extenuate the slaying from murder to manslaughter must be given at the time the fatal blow was inflicted, or so short a time before that there was not a reasonable time for the defendant's passion to subside and reason to assume her sway." And the jury were further instructed "that if they were satisfied beyond a reasonable doubt that the defendant was the slayer, it was incumbent on him to show that he was acting under the influence of a legal provocation at the time of the fatal deed, in order to extenuate the act from murder to manslaughter; but they

might and ought to look into all the circumstances disclosed by the testimony, and infer from the evidence, if they could do so, that the defendant was acting under the influence of passion, excited by legal provocation, at the time the fatal blow was given."

The prisoner was convicted and moved for a new trial on the ground that the jury was misdirected by the court. The motion being overruled and sentence of death pronounced, the prisoner appealed.

No counsel appeared for the prisoner in this Court.
The Attorney-General for the State.

RUFFIN, C. J. With deep sorrow we perused the statement (503) of the case as it appeared upon the evidence, and we cannot surmise a ground on which the prisoner could expect a *venire de novo.* Indeed it seems to us that the case was left hypothetically to the jury, much more favorably for the prisoner than the circumstances authorized.

A master may lawfully punish his slave, and the degree must, in general, be left to his own judgment and humanity, and cannot be judicially questioned. *State v. Mann,* 2 Dev. Rep., 263. But the master's authority is not altogether unlimited. He must not kill. There is, at the least, this restriction upon his power: he must stop short of taking life. It has been repeatedly held that independent of the act of 1791 the killing of a slave may amount to murder, and this rule includes a killing by the master as well as that by a stranger. *State v. Will,* 1 Dev. and Bat., 121. It must indeed be true, in the nature of things, that a killing by the owner may be extenuated by many circumstances, from which no palliation could be derived in favor of a stranger. But it is almost self-evident that this prisoner can claim no extenuation of his guilt below the highest grade. It is, perhaps, sufficient merely to declare that to be the opinion of the Court, without undertaking the revolting task of collating and minutely commenting on the horrid enormities detailed by the witnesses. But some of the terms used in laying the case before the jury render it our duty, as we think, to notice the circumstances somewhat more particularly.

If death unhappily ensue from the master's chastisement of his slave, inflicted apparently with a good intent, for reformation or example, and with no purpose to take life, or to put it in jeopardy, the law would doubtless tenderly regard every circumstance which, judging from the conduct generally of masters towards slaves, might reasonably be supposed to have hurried the party into excess. But the acts imputed to this unhappy man do not belong to a state of civilization. They are barbarities which could only be prompted by a heart in which every hu-

mane feeling had long been stifled; and indeed there can scarcely be a savage of the wilderness so ferocious as not to shudder at the recital of them. Such acts cannot be fairly attributed to an intention to
(504) correct or to chastise. They cannot, therefore, have allowance, as being the exercise of an authority conferred by the law for the purposes of the correction of the slave, or of keeping the slave in due subjection. The Court is at a loss to comprehend how it could have been submitted to the jury that they might find an extenuation from provocation. There is no opening for such an hypothesis. There was no evidence of the supposed acts, which, it was thought, might be provocations. But if they had been proved this Court could not have concurred in the instructions—given, doubtless, from abundant caution and laudable tenderness of life. We could not have concurred, because however flagrant the provocation, the acts of the prisoner were not perpetrated in sudden heat of blood, but must have flowed from a settled and malignant pleasure in inflicting pain, or a settled and malignant insensibility to human suffering. There was none of that *brief fury* to which the law has regard as an infirmity of our nature. On the contrary, without any sonsideration for the sex, health, or strength of the deceased, through a period of four months, including the latter stages of pregnancy, delivery, and recent recovery therefrom, by a series of cruelties and privations in their nature unusual, and in degree excessive beyond the capacity of a stout frame to sustain, the prisoner employed himself from day to day in practicing grievous tortures upon an enfeebled female, which finally wore out the energies of nature and destroyed life. He beat her with clubs, iron chains, and other deadly weapons, time after time; burnt her, inflicted stripes over and often, with scourges, which literally excoriated her whole body; forced her out to work in inclement seasons, without being duly clad; provided for her insufficient food; exacted labor beyond her strength, and wantonly beat her because she could not comply with his requisitions. These enormities, besides others too disgusting to be particularly designated, the prisoner, without his heart once relenting or softening, practiced from the first of December until the latter end of the ensuing March; and he did not relax even up to the last hour of his victim's existence. In such a case, surely, we do not speak of provocation, for nothing could palliate such a course of conduct. Pun-
(505) ishment thus immoderate and unreasonable in the measure, the continuance, and the instruments, accompanied by other hard usage and painful privations of food, clothing, and rest, loses all character of correction *in foro domestico,* and denotes plainly that the prisoner must have contemplated the fatal termination, which was the natural consequence of such barbarous cruelties.

In such a case, too, we think it incorrect to say that the jury must be satisfied the prisoner intended to kill the deceased before he could be properly convicted. It is ordinarily true that an actual intent to kill is involved in the idea of murder. But it is not always so. If great bodily harm be intended, and that can be gathered from the nature of the means used or other circumstances, and death ensue, the party will be guilty of murder, although he may not have intended death. The intent, by severe and protracted cruelties and torments, to inflict grievous and dangerous suffering, or, in other words, to do great bodily harm, imports, from the means and manner thereof a disregard of consequences, and consequently the party is justly answerable for all the harm he did, although he did not specially design the whole. 1 Hale P. C., 440; Fost, 219; East P. C., 257.

In conclusion, the Court is obliged to say that whatever error crept into the trial was in favor of the prisoner and that nothing occurred of which he can complain. It is the opinion of this Court that the judgment ought not to be reversed, which will accordingly be certified to the Superior Court that further proceedings may be there had for the execution of the sentence of the law on the prisoner.

PER CURIAM. Judgment affirmed.

Cited: State v. Robbins, 48 N. C., 256; *State v. Shirley,* 64 N. C., 612.

(506)

THE STATE v. JOHN HARSHAW.

Bastardy—Voluntary Payment.

A payment to a mother, made by the reputed father of her bastard child, in full satisfaction for the maintenance of the child, may, if made before any order for that purpose, very properly influence the Court in saying what further sum he shall pay, if it shall happen that the child is supported by her; but certainly cannot operate as a bar to the power of the Court to make whatever order in the premises the maintenance of the child, or a just compensation to the person who may have maintained the child, may require.

THE defendant stood charged as the father of a bastard child, born of the body of one Cynthia Clark, and gave the usual bond in the County Court for the maintenance of the child. At April term, 1838, the County Court made an order in the premises that Harshaw should pay into court for the support of the child the sum of $60, in the fallowing manner,

namely: $20 immediately, $20 at January, 1839; and $20 at July, 1839. A notice was served on him, returnable at July Term, 1838, to show cause why execution should not issue against him for the said several sums, which, having appeared, he opposed. But the court awarded execution and he appealed.

In the Superior Court, at Burke, on the last circuit, before his Honor, *Judge Pearson,* the defendant offered to show that before the County Court made the order he paid to the mother the sum of $40 and took her receipt therefor, in full satisfaction of all claim for any allowance for the maintenance of the child, and insisted that he was thereby protected, and that the County Court had afterwards no authority to make the order in question. But his Honor was of a different opinion and would not receive evidence of the alleged accord and payment, anterior to the order, and consequently execution was awarded for the sum which had become payable at the time the notice was issued. The defendant then appealed to this Court.

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

(507) RUFFIN, C. J., after stating the case as above, proceeded as follows: The position taken by the defendant rests on an entire mistake of the law, as we think. It supposes that the mother of a bastard child may deal with the right to an allowance for the child's maintenance, as being a claim of her own. But that is not so. The bond is taken for the indemnity of the county, and the orders are made for the benefit of the child, or of such person as the court may direct the money to be paid to, either for the past or prospective maintenance. The order of the court in favor of a particular person is the sole foundation of the right of that person to the money, and before such an order no person can give an acquittance, strictly speaking, for the maintenance of the child, or any part of it. It is true that ordinarily the mother keeps the child, so as to authorize her to ask that the order may be made in her favor. In anticipation that it will be so made it is, perhaps, not unfrequent for the father voluntarily to make to the mother some payment, and in cases where that has been done it may very properly influence the court in saying what farther sum he shall pay her, if it shall happen that the child is supported by her. But that is the only effect it can have, and that may be repelled by showing (as perhaps is also not unfrequent) that some advantage was taken of her, as by getting a receipt for money not actually paid, or by taking from her an acquaintance for the whole maintenance, when only on inconsiderable and inadequate sum was paid. It certainly cannot operate as a bar to the power of the court

to make whatever order in the premises the maintenance of the child, or a just compensation to the person who may have maintained the child, may seem to the court to require. The sums to be allowed must necessarily be in the discretion of the court, within the penalty of the bond, because, more or less may be requisite, according to the varying prices of apparel and provisions, and the constitution and health of the child. The *authority* of the court to make the order under consideration cannot be doubted, and we see nothing to induce the supposition that it was not discreetly exercised on the present occasion, though if it were not, it could not be drawn into question in this form.

PER CURIAM. Judgment affirmed.

Cited: State v. Ellis, 34 N. C., 265; *State v. Beatty,* 66 N. C., 651.

(508)

THE STATE v. BENJAMIN M. ENLOE ET AL.

Indictment—Conspiracy.

An indictment for a conspiracy to destroy a warrant in the name of the State, issued against a defendant on a criminal charge, and a recognizance for the appearance of said defendant to answer such charge, with the intent thereby to impede the due administration of justice, should *positively aver* the facts that such warrant did issue, and such a recognizance was acknowledged, and should also set forth so much of the warrant and recognizance as is necessary to show that they were valid, and therefore the destruction of them might be prejudicial to the administration of justice. Hence, if the warrant and recognizance be mentioned only by way of reference and recital; and it be not stated with any precision by whom the warrant was issued, nor before whom the recognizance was taken; and if the substance of the warrant and recognizance be not set forth, so that it may be seen whether they or either of them had legal validity, the indictment will be insufficient.

AT HAYWOOD, on the last circuit, before his Honor, *Judge Pearson,* the defendants were tried upon the following bill of indictment:

"The jurors for the State, upon their oaths present, that Benjamin M. Enloe, Alexander Crisp, and George Southerland, all late of, etc., on etc., being evil disposed persons and wickedly devising and intending not only to obstruct the due administration of the criminal law of the State, but also to prevent the laws from being duly enforced, and also to exonerate from the pains and penalties by the laws of the State made and provided against, and inflicted upon, persons guilty of assault and bat-

tery, on, etc., in, etc., with force and arms did, amongst themselves, conspire, combine, confederate and agree together, wickedly and corruptly, to burn and destroy a certain State's warrant against the said Alexander Crisp, and recognizance entered into by him, the said Alexander Crisp; and the jurors aforesaid, upon their oath aforesaid, do further present that the said B. M. E., A. C., and G. S., afterwards, to wit, on,
(509) etc., in, etc., in pursuance of and according to the said conspiracy, combination, confederacy and agreement amongst themselves, had as aforesaid, he the said B. M. E., being then and there a deputy sheriff in the county aforesaid, and having received from one Jesse C. Cockeram, a justice of the peace for the county aforesaid, a certain State's warrant against the aforesaid A. C., for an assault and battery, and a recognizance entered into by the said A. C. for his appearance at the Court of Pleas and Quarter Sessions, at its June sessions, in the year, etc., to answer the aforesaid charge of assault and battery. And the jurors aforesaid, upon their oath aforesaid, do further present that in further pursuance of said conspiracy, combination, confederacy and agreement, had amongst themselves, the said B. M. E., A. C., and G. S., as aforesaid, he, the said B. M. E., did not bring and deliver the aforesaid State's warrant and recognizance to the proper officer of the court aforesaid, as he, the said B. M. E., had promised and agreed to and with the aforesaid Jesse C. Cockeram, justice of the peace as aforesaid, who had full power and authority to take said recognizance as aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present that in further pursuance of said conspiracy, combination, confederation, and agreement, entered into as aforesaid, they, the said B. M. E., A. C., and G. S., did then and there, in the county aforesaid, with force and arms in the county aforesaid, destroy and burn the said State's warrant and recognizance aforesaid, in obstruction of the public justice, of the laws of the State, to the perversion of the due administration of public justice, to the great damage of all the good citizens of the State, to the evil example of all others in like case offending, and against the peace and dignity of the State.

"And the jurors aforesaid do further present that Benjamin M. Enloe, Alexander Crisp, and George Southerland, all late of, etc., on, etc., with force and arms in, etc., did conspire, combine, confederate and agree together to burn and destroy a certain State's warrant against the aforesaid A. C., charging him with the offense of an assault and battery, and a recognizance entered into by the said A. C., to appear at the June sessions of Haywood County Court of Pleas and Quarter Sessions to
(510) answer said charge of the State aforesaid, in the year aforesaid, to the great contempt of the laws of the State, in obstruction of the due administration of the public justice, to the great damage of the

good citizens of the State, to the evil example of all others in like case offending, and against the peace and dignity of the State. And the jurors aforesaid, upon their oath aforesaid, do further present, that B. M. E., A. C., and G. S., all late of, etc., on, etc., with force and arms, in, etc., did conspire, combine, confederate and agree together amongst themselves to prevent the aforesaid A. C. from being prosecuted for the offense of an assault and battery, after he, the said A. C., had been bound to court by one Jesse C. Cockeram, a justice of the peace for said county, and did then and there procure to be burnt and destroyed the proceedings pertaining to the guilt of the aforesaid A. C., in violation of the laws of the State, to the great damage of the said Jesse C. Cockeram, in obstruction of the due and impartial administration of the criminal laws of the State, to the evil example of all others in like case offending, and against the peace and dignity of the State. And the jurors aforesaid, upon their oath aforesaid, do further present that B. M. E., A. C., and G. S., all late of, etc., on, etc., with force and arms, in, etc., did conspire, combine, confederate and agree together amonst themselves, to burn and destroy a certain recognizance entered into by the said A. C. and Charles Levin, for the appearance of the said A. C., to answer a charge of the State against him for an assault and battery, to the great damage of the justices of the peace of the county of Haywood, as well as the State of North Carolina, and in contempt of the laws of the State, to the evil example of all others in like case offending, and against the peace and dignity of the State."

On the trial, after the jury were impanelled and before any witness was examined by the solicitor for the State, the defendants' counsel objected to the reception of any evidence on the part of the State, upon the ground that the indictment was so vague and uncertain that no evidence could be relevant, but his Honor considered this objection irregular and that the proper mode was a motion to quash the indictment; and directed the solicitor to proceed. After the evidence on the part of the State had gone through the defendants offered to prove (511) that before the papers were burnt the magistrate, Cockeram, had been consulted, and agreed that if the parties concluded to settle the matter the papers might be destroyed. This evidence was objected to by the solicitor and rejected by the court, upon the ground that though it might be a circumstance in mitigation of the punishment it furnished no legal excuse or justification.

The defendants were found guilty and moved in arrest of the judgment, which motion was sustained by the court, and the judgment arrested; whereupon the solicitor, Guinn, appealed.

The Attorney-General for the State.
Clingman for the defendants.

GASTON, J. We concur with the court below in the opinion that the indictment in this case is too defective to warrant any judgment upon it.

Without entering into a critical examination of the language of the indictment it will be enough to notice what we deem its substantial defects. The offense attempted to be set forth in each count is a conspiracy to destroy a warrant in the name of the State issued against one of the defendants (Crisp), on a charge of assault and battery, and a recognizance for the appearance of said defendant to answer that charge, with the intent thereby to impede the due administration of justice. Now, it seems to us essential that the indictment should *positively aver* the facts that such warrant did issue, and such a recognizance was acknowledged and should also set forth so much of the warrant and recognizance as is necessary to show that they were valid, and therefore the destruction of them might be prejudicial to the administration of justice. All the facts and circumstances which constitute a crime must be distinctly *charged* in the indictment, so that it may be seen that the indictors have not gone upon insufficient premises, and that the court, after the *matters charged* are found or confessed to be true, may pronounce, as a legal result therefrom, that a crime has been committed. In neither of the counts of this indictment is it charged as a fact that
(512) a warrant to arrest Crisp on a charge of assault and battery did issue, nor that the said Crisp entered into a recognizance for his appearance to answer to said charge. The warrant and recognizance are mentioned only by way of reference or recital. Nor is it stated with any approach to precision by whom the warrant was issued, nor before whom the recognizance was taken—nor is the substance of the warrant and recognizance set forth—so that it may be seen whether they, or either of them, had legal validity.

As the appeal is at the instance of the State, because of supposed error in arresting the judgment, and we are of opinion that the alleged error does not exist, we do not enter into the consideration of the question of evidence raised by the defendants upon the trial. Had we differed from the court below upon the propriety of arresting the judgment, then this question would have been open to the defendants upon the record.

This decision is to be certified to the Superior Court of Haywood as the law directs.

PER CURIAM. Judgment to be affirmed.

Cited: State v. Gallimore, 24 N. C., 377.

(513)

THE STATE v. ASA EDNEY.

Justice of the Peace—Recognizance.

1. The obligation of a recognizance entered into by a party before a single magistrate to appear and answer a criminal charge does not depend upon the inquiry whether the Court before which the party is required to appear has jurisdiction of the particular crime charged; but upon the duty and power of the magistrate to examine and admit such party to bail. Hence, under the Act of 1715, 1 Rev. Stat., ch. 35, sec. 1, prescribing the duty and powers of magistrates out of court, in examining criminals and taking bail, a recognizance taken for the appearance of a party at the County Court is good, and, if the party fail to appear, according to the condition of his obligation, may be enforced, although the offense charged is cognizable only in the Superior Court.

2. The words of the Act of 1715, prescribing that the magistrate shall take recognizances from the informer and witnesses, to appear at the next court, "where the matter is cognizable," and that the recognizances shall be returned into the office of "the court wherein the matter is to be tried," are merely directory as to the time and place of returning the proceedings, so that they may be acted on speedily and efficiently, for the advantage of each side. They mean only that the return shall be made to the next term of the court in which, according to the recognizance, the party is to appear, so that the party shall not be required to appear at one term, or in one court, and the recognizance be returned to a subsequent term, or to a different court.

THE defendant acknowledged a recognizance before a justice of the peace for Buncombe County, in the sum of $100, to be void on condition that a certain negro slave, called George, should make his personal appearance at the next term of the Court of Pleas and Quarter Sessions, to be held for the county of Buncombe, at, etc., on, etc., then and there to answer to a charge of the State, and not depart thence without leave of the said court. The slave failed to appear and the failure being recorded a *scire facias* issued to enforce the forfeiture of the recognizance. The defendant pleaded *nul tiel record,* and a special plea that the slave was charged with the crime of burglary, and that the said County Court had not jurisdiction thereof, but only the Superior Court for the county of Buncombe, and by reason thereof that the recognizance was void.
After a decision against him in the County Court the defendant (514) appealed to the Superior Court, and on the trial there on the last circuit, before his Honor, *Judge Pearson,* he relied on the single point that, for the reason set forth in the special plea the justice of the peace could not take the recognizance, and that the same was void. In support of the plea he gave in evidence the warrant on which the slave was arrested, which charged him with "being concerned in breaking into the

smokehouse of James Kincard, in the night time, and taking a quantity of pickled pork." But the court was of the opinion that the recognizance was valid and sufficient in law, and there was consequently a judgment for the State and the defendant appealed.

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

RUFFIN, C. J., after stating the case as above, proceeded as follows: It may be remarked in the first place that there was no evidence to sustain the plea that the charge was one of burglary, so as not to be, for that reason, within the jurisdiction of the County Court. The condition of the recognizance does not so express, and the warrant falls short of making a case of burglary, by omitting several of its essential requisites, as, for example, that the breaking was into the dwelling house, or that the smoke house was a part of the dwelling house, or within the curtilage. But supposing this to have been otherwise, it is quite clear, we think, that the defendant's objection is unfounded in law.

The obligation of the recognizance does not depend upon the inquiry whether the court, before which the party is required to appear, has jurisdiction of a particular crime charged against the party, but upon the duty and power of the magistrate to examine and admit such party to bail. By the act of 1715, 1 Rev. Stat., c. 35, s. 1, the duty of examination by a magistrate before commitment is enjoyed, and it is further prescribed that the magistrate shall admit the party to bail, if bailable. The mode of letting to bail is not specified, but it must be inferred that such method was meant as was authorized by antecedent laws, or
(515) such as might subsequently be enacted. This certainly includes a recognizance acknowledged before a justice of the peace and by him returned into a common law court of record and there enrolled, as enacted by ancient statutes and practiced almost immemorially. A justice of the peace has, unquestionably, the power to take recognizances for the appearance of persons, generally, to answer for any criminal matter. But it is said that if the court cannot take an indictment for the offense charged, or try the same, the party's appearance in that court is nugatory, and therefore the recognnizance must be inofficious. We think otherwise, for if that court may not try and punish the accused, it may, at least, examine further into the case, so as to ascertain what court has the jurisdiction to try and punish, and may commit or bind the party over to answer in that court. It is often a nice point to determine what court has jurisdiction. The duty of judging correctly on that point is not imposed on the magistrate, in the first instance, so imperatively as to make his mistake on it a justification of the accused for disregarding his

recognizance, and by so doing elude the service of other process and escape punishment altogether. The recognizance obliges the party to appear according to it, in order that the public justice may not be defeated; and that if he was bound at first to an improper court he may be sent to the proper court, there to have his guilt or innocence duly and fully inquired of. It is true the act of 1715 says that the magistrate shall take recongizance from the informer and witnesses to appear at the next court, "where the matter is cognizable," and that the recognizances shall be returned into the office of "the court, wherein the matter is to be tried"; and upon those provisions this objection is partly founded. But we think the act in that part of it is merely directory as to the time and place of returning the proceedings, so that they may be acted on speedily and efficiently, for the advantage of each side. It means only that the return shall be made to the next term of the court, in which, according to the recognizance, the party is to appear, so that the party shall not be required to appear at one term or in one court, and the recognizance be returned to a subsequent term or to a different court. The point made in this case is not at all within the purview of the (516) act, and we are not aware of any case and do not perceive any reason to support it.

PER CURIAM. Judgment affirmed.

DEN ON DEM. OF JOHN HARDIN v. FRANCIS BEATY AND DOWELL HOGUE.

Ejectment—Arbitration and Award—Estoppel.

If an action of ejectment be, with the consent of the parties, by a rule of Court, referred to certain arbitrators, and they make an award that the defendant was guilty of the trespass and ejectment, and shall pay nominal damages and costs, upon which a judgment is rendered accordingly, and the plaintiff's lessor put into possession of the term by a writ for that purpose, the defendant is not estopped by such an award and judgment from afterwards setting up title to the premises; because, in the action of ejectment, the *right* to the land is not put in issue and determined, and a reference to the suit by a rule of Court to arbitrators, chosen by the parties, cannot bring before them more than was in issue before the Court.

EJECTMENT, tried at Rutherford, on the last circuit, before his Honor, *Judge Pearson.*

The defendant Beaty admitted that he was in possession of the premises, as the tenant of the other defendant Hogue, who was admitted to defend as landlord. The lessor of the plaintiff, and the defendant

Hogue, both claimed under sheriff's deeds, made upon sales under executions against Francis Beaty, but the deed under which Hardin, the plaintiff's lessor claimed, was, prior to that, to one Adam Beaty, under which the defendant Hogue claimed. It was contended, however, by the latter that Hardin was estopped from setting up title against him, because his grantor, after the sheriff's sale under which he claimed, had brought an action of ejectment against Hardin, which by a rule of court was referred to certain arbitrators, who made their award that the said Hardin was guilty of the trespass and ejectment, and that he should pay 6¼ cents damage, and costs, which award being returned to court and judgment rendered pursuant thereto, a writ of possession was (517) issued, and the defendant, Hogue's grantor, put into possession.

His Honor intimated an opinion "that when an action of ejectment was decided by arbitration it differed from a case decided in the usual way, and the parties and their privies were concluded from disputing the title afterwards." The plaintiff's lessor, in submission to this opinion, suffered a nonsuit and appealed.

No counsel appeared for the lessor of the plaintiff in this Court.
Hoke for the defendant.

GASTON, J. We do not concur in the opinion that the lessor of the plaintiff is concluded by the award, or the judgment thereon, from setting up title to the premises described in the declaration. That opinion was, no doubt, founded upon the doctrine sanctioned in the case of *Doe on demise, Morris and others v. Rosser,* 3d East., 15, which has been followed out by other adjudications of respectable courts, and is recognized in elementary treatises of great general correctness. It is not necessary for us to examine whether this doctrine is a part of the law of this State, because we believe that, correctly understood, it does not apply to the case before us. In the leading case above referred to it was decided that where the lessor of the plaintiff and the defendant in ejectment had before submitted their right to the land to the decision of an arbitrator who had awarded in favor of the lessor, the award concludes the defendant from disputing the lessor's title in an action of ejectment, for, although, say the court, "the award cannot have the operation of conveying the land, yet there is no reason why the defendant may not conclude himself by his own agreement from disputing the title of the lessor in ejectment. The parties consented that the award of the arbitrator, chosen by themselves, should be conclusive as to the right to the land in controvrsy between them, and this is sufficient to bind them in an action of ejectment." To bring the award in question within the operation of the principles thus asserted it must appear that the parties had

consented that the award of the arbitrators should be conclusive as to the right to the land, and that the arbitrators had definitively adjudged in whom was the right. To us it seems that neither of (518) these is shown here. The submission and the award are of record, and by that record it appears that heretofore an action of ejectment for the same land had been instituted on the demise of one Adam Beaty, under whom the defendant, Hogue, claims as purchaser; that to this action Hardin, the lessor of the now plaintiff, was admitted a defendant, upon entering into the common rule and pleading not guilty; that under a rule of court, by consent of the parties, there was a reference to certain referees or arbitrators; that they returned an award finding Hardin guilty of the trespass, and assessed the plaintiffs damages to 6¼ cents and costs; and that a judgment was rendered by the court pursuant to this award. The submission therefore embraced the matter, and that only, which the pleadings of the parties brought into contestation before the court—and the award of the arbitrators decided and professed to decide no more than would be decided by a judgment of the court that the plaintiff should recover damages and costs for the trespass complained of. Now it is perfectly settled that the pleadings in an action of ejectment do not put directly in issue the right to the land; and a judgment in favor of the plaintiff which always includes damages and costs and generally also a recovery of his term, does not determine the right to the land. We are, therefore, unable to perceive how a mere reference of a controversy pending before the regular tribunal of justice, to one chosen by the parties, can bring before the latter more than was in issue in the former—or how a judgment of the latter thereupon can have a more extensive effect than the same judgment would have had, if rendered in the former. The submission and the award must be explained by the nature of the action, and "every estoppel, because it concludeth a man to allege the truth, must be certain to every intent, and is not to be taken by argument or inference." Co. Lit., 352b.

The judgment of the Superior Court must be reversed, and a *venire de novo* awarded.

PER CURIAM. Judgment reversed.

Cited: Ballard v. Mitchell, 53 N. C., 156.

(519)

THE STATE v. SAMUEL POOR.

Levy—Growing Crop.

To the levy of a writ upon personal property—whether a writ of attachment or of execution—the law requires a *seizure*. If, in the nature of the thing, actual seizure be impossible, then some notorious act as nearly equivalent to actual seizure as practicable must be substituted for it. Hence, in levying upon a growing crop, the officer must go to the premises, and there announce that he seizes the crop to answer the exigency of his writ.

THIS was an indictment containing two counts—the first for an assault on Joshua Cranor, as deputy sheriff, in the due execution of his office, and the second for a simple assault and battery, tried before his Honor, *Judge Bailey,* on the last circuit, at Guilford. On the trial it was proved that one Alfred Short, a constable, had in his hands an attachment against the property of one Thomas Poor, a brother of the defendant, issued on 20 August, 1838, by a justice of the peace, for $29, made returnable to Guilford County Court on the third Monday of November thereafter, upon which attachment he endorsed, "levied on a field of growing corn of Thomas Poor." This endorsement was made about 12 o'clock of the day on which the attachment issued, by the officer, without going upon or near the premises where the corn was growing; and on the same day he returned the proceedings before a justice of the peace, who entered up a conditional judgment, and at the expiration of thirty days the officer obtained a final judgment and an order of sale and advertised the sale to take place on 15 October thereafter. It was proved further that another attachment for $150, issued on 20 August, returnable to November County Court of Guilford County, which was on that day placed in the hands of Joshua Cranor, who went to the same corn field, as deputy sheriff, and levied on the corn about night, or a little after dark of the same day. It was also proved that early in October the defendant applied to Short, the constable, for leave to gather the corn for him, and that the constable authorized him and one
(520) Samuel Irvin to gather it; that on 10 October, when Joshua Cranor, the deputy sheriff, was in the act of entering the field with a wagon, for the purpose of gathering the corn, he was resisted and assaulted by the defendant.

His Honor charged the jury that the levy made by Short, the constable, by virtue of the attachment in his hands, was insufficient to attach the property, and that the defendant derived no authority from the said officer to resist Cranor, the deputy sheriff. The defendant was convicted and sentenced to pay a fine, and appealed.

W. A. Graham for the defendant.
The Attorney-General for the State.

GASTON, J. We think that it was correctly held by his Honor that the constable by indorsing on the writ of attachment in the manner set forth in the case that he had levied on the growing crop of the defendant in the attachment, did not acquire the legal possession thereof. To the levy of a writ upon personal property, whether a writ of attachment or of execution—the law requires a *seizure*. If, in the nature of the thing, actual seizure be impossible, then some notorious act as nearly equivalent to actual seizure as practicable, must be substituted for it. The least that can be required in the levy on a growing crop is that the officer should go to the premises and there announce that he seizes the same to answer to the exigency of his writ. To allow the possession and property to be transferred without a seizure, or other equivalent act, would be to violate principle and to lead in practice to mischievous results.

This decision must be certified to the Superior Court of Law for the County of Guilford, with directions to proceed to judgment and sentence agreeably thereto, and to the laws of the State.

PER CURIAM. Judgment to be affirmed.

Cited: Long v. Hall, 97 N. C., 293; *Penland v. Leatherwood,* 101 N. C., 514.

(521)

DEN ON DEM. OF WILLIAM PENTLAND v. JACOB B. STEWART.

A sheriff's deed for land sold for taxes is not sufficient to deprive the owner of his land, without showing further the authority of the sheriff to sell, by proving that the taxes for which the sale was made were due.

See *Love v. Gates,* 498, *ante.*

EJECTMENT, tried at Haywood, on the last circuit, before his Honor, *Judge Pearson.*

The lessor of the plaintiff showed that the land in controversy had been patented, and then gave in evidence a sheriff's deed to himself, setting forth that he, the sheriff, sold the land for the tax due for the year 1833, amounting to 31¼ cents, and for charges. He also proved the defendant to be in possession. The defense relied upon was that the plaintiff's lessor had not proved that the tax of 1833 was due. His Honor intimated an opinion that the plaintiff's lessor was required to prove that the tax of 1833 was due, for the purpose of showing that the sheriff had

NOTE.—A crop cannot now be levied on till mature. Acts 1844; The Code, sec. 453.

power to make the sale. Upon this intimation the lessor of the plaintiff submitted to a nonsuit and appealed.

No counsel appeared for either party in this Court.

DANIEL, J., after stating the case, proceeded as follows: In ordinary cases, where a party claims under a sheriff, he is compelled to produce a judgment and execution against the debtor, as well as the sheriff's deed. If the owner of the land was indebted for the taxes the lessor of the plaintiff had it in his power to show that fact from the records of the court. The law requires all persons to list with the justice their taxable property. If an owner of land neglects to attend the justice and give in his list the justice is directed to appoint a freeholder in the neighborhood to value the land on oath, and the freeholder is to return the valuation to the justice who adds it to his list and returns it into the County Court. In case of the failure of the owner and the magistrate, it then is the duty of the sheriff, within the time prescribed for collecting the taxes, to summon a freeholder to value the land on oath. A fair transcript of such valuation the freeholder is directed to send to the (522) clerk of the County Court, before the next succeeding court, and the clerk shall incorporate the return with those made by the justice. And the freeholder is also to deliver to the sheriff another transcript of the same. The tax lists thus returned are directed to be recorded by the clerk. These records, as it seems to us, are in the nature of judgments against each individual on the lists for the sums respectively set against their names. Within thirty days after the court to which the lists are returned the clerk is to deliver a copy of the lists to the sheriff and he is to collect the taxes due by distress and sale or otherwise. The certified copies of the tax lists delivered by the clerk to the sheriff are, in law, his warrants of distress, or executions against the property of each individual for the satisfaction of the money due on them. If there is no personal property to be found the sheriff is to distrain the land, and after advertising the same as the law directs, and also performing the duties prescribed by the act of 1819, 1 Rev. Stat., c. 102, ss. 52 and 53, he will sell the same, or so much thereof as shall be sufficient for the payment of the taxes due, and the costs of the sale. It seems to us, therefore, that until it be shown by competent evidence that a specific tax has been legally ascertained to be due, the authority of the sheriff to sell for a tax does not appear, and as his sale can operate to transfer title only by force of his authority, unless that authority be shown his deed passes no estate.

PER CURIAM. Judgment affirmed.

Cited: Garrett v. White, 38 N. C., 134; *Jordan v. Rouse,* 46 N. C., 122; *Fox v. Stafford,* 90 N. C., 298.

(523)

DEN ON DEM. OF CASWELL HARBIN ET AL. V. JOHN S. CARSON.

Lien Upon Land of Levy of an Attachment

The levy of an attachment upon land creates such a lien upon it that, if there be a subsequent judgment of combination and a sale of the land under a writ of *venditioni exponas*, the title of the purchaser will supersede that of one claiming under a judgment and *fieri facias* posterior to the date of the levy of the attachment, but prior to the judgment of condemnation and *venditioni exponas*.

THIS was an action of ejectment, tried at Davie, on the last circuit, before his Honor, *Judge Dick*. Both parties claimed title under one Bennet Austin. The lessors of the plaintiff produced a judgment against the said Austin, entered up at August Term, 1836, of Rowan County Court, an execution thereon returnable to the ensuing term in November, and a deed from the coroner to themselves for the lands in controversy, which were sold under the said execution. The defendant showed in evidence the proceedings in an original attachment issued by himself against the said Austin, on 27 April, 1836, levied on the lands in controversy the same day, and returned to May Term, 1836, of Rowan County Court. He then showed a regular final judgment entered up on said attachment at the ensuing November term of the said court, a writ of *venditioni exponas* thereon, returnable to the ensuing term in February, under which the said lands were sold, and a deed to himself therefor from the sheriff.

The only question presented to the court was whether the title passed to the lessors of the plaintiff by virtue of their purchase, under the execution issuing upon the judgment at August Term, 1836, or whether the levy of the attachment upon the lands in April, 1836, created such a lien as when consummated by a judgment of condemnation and a sale under a *venditioni exponas* issuing thereon, gave the defendant the better title. His Honor being of opinion in favor of the lessors of the plaintiff the jury found a verdict for them, upon which they had judgment and the defendant appealed.

No counsel appeared for either party in this Court. (524)

DANIEL, J. The only question in the case submitted for the decision of this Court is, whether the levy under the defendant's attachment in April, 1836, which was prior to the date of the plaintiff's execution, created such a lien on the land as when condemned and sold under the writ of *venditioni exponas*, gave to the defendant the better title. We are

of the opinion that it did. The case of *Den on dem. of Amyett v. Backhouse* 3 Murph., 63, establishes the proposition contended for on behalf of the defendant. We think that there must be a new trial.

PER CURIAM. Judgment reversed.

Doubted: McMillan v. Parsons, 52 N. C., 166.

FREDERICK NAESTED v. BENJAMIN SCOTT.

Contract—Evidence.

Where the owner of a lot of timber met a dealer in the article, who inquired of him his price for it, and, upon being informed, said he would give it, but went off without taking any account of the timber, neither inspecting nor measuring it, nor telling the owner where to carry it for measurement and delivery; and not paying for it, nor offering at any time to make a payment; and in the meantime the owner, being informed that the dealer was insolvent and unable to pay, sold the timber to another person at a higher rate, but afterwards acknowledged that he had sold to the plaintiff, and offered to pay him the difference: *It was held,* to be proper for the judge to leave it to the jury to say whether there was any contract of sale between the parties, or only a chaffering or conditional agreement between them, which the defendant, upon seeing the conduct of the plaintiff, was at liberty to disregard.

THIS was an action of assumpsit, in which the plaintiff declared specially against the defendant for that the latter had sold to Isaac W. Hughes a parcel or lot of ton timber, to which the pliantiff, by virtue of a contract with the defendant, had the right of property.

(525) On the trial at Craven, on the last circuit, before his Honor, *Judge Settle,* the plaintiff introduced a witness who stated that he was the agent of Isaac W. Hughes, and purchased of the defendant the timber in question, and that while he was settling for it the plaintiff came with his hands for the timber, when the witness informed him that he had bought it of the defendant, and was to give him thirty-one dollars per ton for the same; and in the course of the conversation the defendant, who was present, admitted that he had sold the timber to the plaintiff and that the plaintiff had agreed to give him thirty dollars per ton for it and offered to pay the plaintiff the difference between the sum agreed to be paid by the plaintiff and the sum for which he sold the timber to the witness. It was proved further that the plaintiff had not paid anything to the defendant and that the timber was taken by the

witness for his principal, and used by him; and further, that if the plaintiff had obtained the timber and sawed it up he might have realized between forty-five and fifty dollars. On the part of the defendant it was proved that before he sold to Hughes he was informed that the plaintiff was insolvent, and that he would "stand a bad chance in getting his money"; and that he then immediately sold to Hughes. It was also proved for the defendant that the plaintiff, at the time of the alleged contract, was in fact insolvent; that the timber had never been out of his, defendant's, possession, but was at the public wharf, and not at the plaintiff's mills, where it was usual to deliver it by persons selling him timber; that the timber had not been measured or taken an account of by the plaintiff, and there was no evidence on the part of the plaintiff to show an offer by him to pay, or his ability to pay, for the timber, but on the contrary it was proved that he was unable to pay.

His Honor charged the jury that if they believed from the evidence that the contract, as alleged by the plaintiff, had been made by him and the defendant, the plaintiff was entitled to recover damages commensurate with the injury which he had sustained; but if they should collect from the testimony that there was only a conversation and chaffering in relation to a contract which the parties did not complete then the title to the timber did not vest in the plaintiff and he would not be entitled to recover. The defendant had a verdict and judgment and the plaintiff appealed.

J. H. Bryan and J. W. Bryan for the plaintiff.
No counsel appeared for the defendant in this Court.

RUFFIN, C. J. We are not prepared to say that the contract (526) as laid in the declaration, or as it might be collected from the testimony, would authorize a recovery in this action, even if the contract had been definitely concluded. The declaration is for an injury to the plaintiff's right of property, and supposes, therefore, that the contract vested the right of property, if not the right of possession, in the plaintiff. That cannot be so, if the agreement was merely executory, but the action ought to have been assumpsit for the breach of the agreement. But we are not obliged to determine how that would be, since the jury have found that the parties made no contract. That puts an end to the plaintiff's demand in any form of action, provided the judge did not submit that inquiry to the jury without any evidence that could authorize a response in the negative. In our opinion there was not only evidence proper to be left to the jury on the point, but such as might well warrant their verdict as given. The question is, whether the parties considered they had conclusively bargained so as to change the property.

Now, a man from the county arrives in town with a parcel of timber in the river for sale, and is met by a dealer in the streets, who inquires of the owner his price and says he will give it. But he does not give it, and on the contrary goes off without taking any account of the article, neither inspecting nor measuring it, nor telling the other where to carry it for measurement and delivery, and above all, not paying for it nor offering at any time to make payment. What could the countryman think, under such circumstances but that the stranger meant to practice on him either a jest or a fraud? What must anyone think of it, even when subsequently considering it with deliberation? It seems to us that the parties must have conversed upon the tacit understanding that the timber was to be measured and received immediately and paid for on the spot; and that, without the cash, it was no bargain. Therefore, when the pretended buyer went away and staid, it does not appear how long, but long enough for the other party to find out that he was insolvent and could not pay for the timber, and to make a sale to another person, what could the jury reasonably infer but that the transaction had be-
(527) gun and ended in mere talk, without anything serious being finally concluded on; or if it had, that it was immediately abandoned? Against this there is nothing to militate, but that, "in the course of the conversation" afterwards, the defendant said he had sold to the plaintiff and offered to pay him the difference. But the offer may have justly been regarded as one of compromise or as having been prompted by a disposition of the defendant to satisfy the plaintiff that he had not been actuated by the difference in price. As to the observation that he had sold to the plaintiff it might have been meant, and, as things stood, probably was meant, for no more than that he had agreed to sell. That was true enough, but the agreement, from its nature, might be deemed, and was deemed by the jury to have been conditional, and therefore not binding on the defendant after seeing the conduct of the plaintiff. Upon the whole we think his Honor fairly left the question to the jury, and therefore that the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

DEN ON DEM. OF ISAAC BRONSON ET AL. v. MITCHELL PAYNTER.

Ejectment—Defect of Parties—Construction of Deed.

1. Where a party objects upon the trial that a grant is void upon its face, but the judge decides otherwise, if the copy referred to in and sent up with the case exhibits no defect, the Supreme Court cannot grant a new trial, for, if the copy sent up be a correct transcript of the grant, it is apparent that there was no ground for the objection; and if the grant be not that

whereof a copy is given, as the supposed vices or defects in it are in no way indicated, the Court is wholly without the means of reviewing the opinion complained of, and, of course, will presume it to be correct.

2. A deed wherein the grantor, in consideration of the sum of ten dollars to him in hand paid by the grantees, "remised, released and quit-claim" to them certain land, may operate as a deed of bargain and sale to pass the title to the grantees, if it cannot operate as a release for want of some interest in them.

3. Where a demise in ejectment is laid from two or more lessors, and it appears that those lessors are tenants in common with one who has not joined in the demise, the plaintiff may yet be entitled to recover according to the interest of his lessors, though if one of the joint lessors had no title the plaintiff could not recover at all.

4. Where a general verdict is found in an action of ejectment, a judgment that the plaintiff recover his term is proper in point of form.

EJECTMENT, tried at Rutherford, on the last circuit, before his (528) Honor, *Judge Pearson.*

The lessors of the plaintiff, after proving the defendant to be in possession, for the purpose of showing title in themselves, exhibited (as the case states) "a grant for the premises in dispute, to one Tench Coxe, issued in the year 1796, a copy of which grant, marked A, is referred to and made a part of this case." The copy of the grant marked A, and sent up with the case, appears to have been one in the ordinary form, made not to Tench Coxe, but to James Greenlee, Lewis Baird and William Ervine. Coxe (as the case further states) conveyed, as appeared by the deed exhibited, to Augustus Socket, in 1819, and Socket mortgaged the same in fee to Kintzing and Duponceau. Kintzing conveyed to Duponceau in 1822, and in 1824 the latter conveyed to Murray, Hoyt, A. Bronson, and Thompson, who, in the year 1826 filed a bill in equity to foreclose the mortgage, whereupon there was a decree for the sale of the premises, and in 1827 the clerk and master, in obedience to the decree, sold and conveyed them to one Stephens, and about the same time Murray, Hoyt, and A. Bronson conveyed their entire interest in fee simple to the said Stephens. Subsequently, Stephens executed a deed, whereby he, in consideration of the sum of ten dollars to him in hand paid by Murray, Hoyt, and A. Bronson, "remised, released, and quit-claim" to them, the same premises. In 1829 Murray conveyed to Isaac Bronson and in 1830 Arthur Bronson released to Hoyt and Isaac Bronson, the lessors of the plaintiff. The defendant insisted, in the first place, that the original grant to Coxe was utterly void on its face, and passed no title from the State.

2ndly. That the deed of Stephens to Murray, Bronson, and Hoyt was only a release, and could not, therefore, operate as such, for want of some interest in those to whom it was made.

3rdly. That as Thompson was the legal owner of one-fourth of the premises Bronson and Hoyt, two of the tenants in common, could not jointly demise to the plaintiff.

His Honor was of opinion, and so charged, upon the first point, that there was no such defect in the grant as could be taken advantage of in an action of ejectment. Upon the second point, he held that from (529) the whole deed it was obviously the intention to pass the title, and that although apt and proper words were not used for a deed of bargain and sale, yet the consideration of ten dollars raised an use, and the Statute of Uses transferred the legal estate to the use, and that therefore the deed did operate to pass the title. Upon the third point his Honor held that two tenants in common might make a joint demise in ejectment, although there might be another tenant who did not join. There was a general verdict and judgment thereon, for the lessors of the plaintiff, and the defendant appealed.

Clingman for the defendant.
No counsel appeared for the lessors of the plaintiff in this Court.

GASTON, J. There is an evident inaccuracy in that part of the case made out for this court, which relates to the grant exhibited in evidence by the plaintiff. It is stated to be "a grant to Tench Coxe, issued in the year 1796, a copy whereof marked A is referred to and made a part of the case." But the copy, so marked, purports to be the copy of a grant issued to James Greenlee, Lewis Baird, and William Ervine. However this inaccuracy may be, whether in the description or copy of the grant, it will not affect the judgment which it is our duty to render. It appears that the defendant insisted on the trial that "the grant was utterly void on its face, and passed no title," but the court held that there was no such defect in the grant as could be taken advantage of in this action." If the grant exhibited be that whereof a copy is given, we concur in this opinion, for we discover nothing on its face to vitiate it. If the grant be not that whereof a copy is given, as the supposed vices or defects in it are in no way indicated, we are wholly without the means of reviewing the opinion complained of, and of course must presume it to be correct.

The other exceptions taken on the trial by the defendant we hold to be unfounded. The deed from Stephens to Murray, Bronson, and Hoyt might well operate as a deed of bargain and sale, for the reasons stated by his Honor. The words of transfer, used in it, "remise, release, and quit-claim," are precisely those to which a similar operation was (530) allowed in a case decided in the Supreme Court of New York. *Jackson on dem. of Salisbury v. Fisk,* 10 Johns., 456. We also think that where a demise is laid from two or more lessors, and it ap-

pears that these lessors are tenants in common with one who has not joined in the demise, the plaintiff may yet be entitled to recover. This, it seems to us, necessarily follows from holding (as has been established here by authority) that tenants in common may join in a demise, and that such demise will effectually pass the right of each to possess the thing demised during the term. If less than the whole number join in such a demise it must operate *pro tanto*. If indeed one of the joint lessors had no title, then the plaintiff could not recover for the reasons assigned in *Hoyle v. Stowe*, 2 Dev., 318.

As the jury in this case found a general verdict the judgment that the plaintiff should recover his term was proper in point of form. *Godfrey v. Cartwright*, 4 Dev., 487.

PER CURIAM. Judgment affirmed.

Cited: Cobb v. Hines, 44 N. C., 347; *Banner v. Carr*, 33 N. C., 45; *Foster v. Hackett*, 112 N. C., 552; *Holdfast v. Shepard*, 28 N. C., 363; *Dowd v. Gilchrist*, 46 N. C., 355; *Overcash v. Kitchie*, 89 N. C., 391; *Yancey v. Greenlee*, 90 N. C., 319.

(531)

JESSE A. DAWSON v. MARK H. PETTWAY.

Contribution Between Endorser and Surety.

1. The endorser of a single bill for the accommodation of the principal obligor is not, without a special contract to that effect, liable to contribute as a co-surety with one who signed the bill as a co-obligor with the principal. The endorser, in such case, is to be taken only as a supplemental surety, and not liable to be called on for contribution by the primary surety.

2. If, in such case, the bill were given to renew a former one in which the present endorser was a co-obligor and the present co-obligor only an endorser, that circumstance might, perhaps, be evidence to the jury that the form last adopted was accidental only, and that *in fact* there had been an agreement of common and mutual liability between those who gave their names to the principal debtors.

3. The cases of *Daniel v. McRae*, 9 N. C., 590; *Smith v. Smith* 16 N. C., 173; *Gomez v. Lazarus*, *Ibid*, 205; *Hatcher v. McMorine*, 14 N. C., 228, and *Richards v. Simms*, 18 N. C., 48, explained and sanctioned.

THIS was an action of assumpsit, in which the plaintiff sought to enforce contribution from the defendant upon the allegation that the defendant was his co-security for one Peyton R. Tunstall, submitted to his

Honor, *Judge Saunders,* on the last circuit, at Halifax, upon the following statement of facts as a case agreed:

"On 30 May, 1825, a single bill, executed by Tunstall and the plaintiff Dawson, under their hands and seals, was made in order to be discounted at the State Bank, for the use of Tunstall, for the sum of $4,500, payable in eighty-eight days after date, negotiable at the State Bank and payable to the defendant Pettway, and by him endorsed in blank. On the 7th of June the said bill or note was discounted at the bank, for the accommodation of Tunstall, and the proceeds passed to his credit. After the note fell due it was renewed in full by paying the accrued interest and giving a note in the following words:

"August 30, 1825.

"$4,500. Eighty-eight days after the first day of September next, we promise to pay to Mark H. Pettway, or order, four thousand five (532) hundred dollars, for value received, negotiable and payable at the State Bank of North Carolina, at Raleigh.

"PEY R. TUNSTALL. (Seal)
"J. A. DAWSON. (Seal)

"For renewal."

This note was executed by said Tunstall and Dawson, under their hands and seals, and endorsed by said Pettway. The body of the note was written by Pettway, and the words added at the foot of the note "for renewal," in his hand-writing. This second note not being paid at maturity a suit was brought by the bank against all the parties, and a judgment recovered at Fall Term, 1826, of Wake Superior Court. An execution issued thereupon, returnable to the ensuing Spring Term of that court, on which the present plaintiff paid the sum of $4,864.92½, being the full amount of the principal, interest, and costs due 2 March, 1827, for the one moiety of which, with interest, the present action is brought. At the bringing of this action, and for several years before, the said Tunstall was dead and insolvent.

Upon the foregoing statement, should the court be of opinion that in law the plaintiff is entitled to call on the defendant for contribution, the judgment to be entered for the plaintiff for the sum of $2,432.46½, with interest from the said 2 March, 1827, in which event is to be set off and deducted therefrom the sum of $2,249.91, being the amount due this defendant, for principal, interest, and costs upon judgments obtained in Halifax County Court by the said Pettway against the said Dawson, an execution be granted for the residue. Should the court be of a contrary opinion, then judgment to be entered in this action for the defendant." Upon this case his Honor was of opinion for the plaintiff, and gave judgment accordingly, from which the defendant appealed.

Badger for the defendant.
Iredell and the Attorney-General for the plaintiff.

GASTON, J. It is a plain principle of equity that those who (533) have engaged in a common hazard should share in the loss consequent upon it, and on this principle is founded the obligation of contribution between co-sureties. The question in this case is whether, upon the facts agreed, the law infers that the plaintiff and defendant did take upon themselves a common risk. So far as the determination of this question depends upon the nature of the engagements made by the plaintiff and defendant with the creditor of Tunstall, the inquiry is free from difficulty. The plaintiff, by executing the bond as a co-obligor with Tunstall, bound himself absolutely for the payment of the debt; whereas, the defendant, by indorsing the bond, engaged to pay only upon the default of Tunstall and the plaintiff. While the plaintiff, therefore, became the surety of Tunstall, the defendant became the surety of Tunstall and the plaintiff. The form of the transaction with the creditor is, however, but *prima facie* evidence of the relation between the debtors, and does not conclusively establish the order of their liabilities as arranged among themselves; and it is insisted for the plaintiff that the fact that the plaintiff executed and the defendant indorsed the bond for the accommodation of Tunstall, and without benefit to either, makes Tunstall sole principal, both to plaintiff and defendant, and therefore constitutes them joint and equal sureties for him. To this argument we do not assent. The fact relied on certainly shows that, as between Tunstall and the plaintiff, the former was principal and the latter surety, and confirms what is to be inferred from the nature of the instrument that Tunstall was also *a* principal in relation to the defendant; but we cannot see how it establishes that Tunstall was not also a principal with respect to the defendant, as the instrument indicates. The fact is as consistent with the allegation of the defendant, that he was a supplemental surety in addition to the plaintiff, the primary surety, as with the allegation of the plaintiff that the defendant and himself were co-sureties, and therefore it in no way repels the inference to be drawn from the nature of their respective liabilities to the creditor. But the case of *Daniel v. McRae,* 2 Hawks, 590, has been pressed upon us as an authority establishing the position that where two persons, for the accommodation of a third, makes themselves responsible for his debt, the law, without regard to the nature of their engagements, pronounces them (534) to be joint sureties. We have before had occasion to declare our purpose to adhere to the adjudication in that case, *Richardson v. Simms,* 1 Dev. and Bat., 48), but, in our opinion, it is far from sanctioning the position for which it is cited. In *Daniel v. McRae,* it was decided that

where there are successive indorsers of an accommodation note, they are to be regarded, until the contrary is shown, as co-sureties for the maker, but it professes so to decide upon principles inapplicable to the case of the maker and indorser of such a note. In delivering his opinion in *Daniel v. McRae, Judge Henderson,* one of the Court that concurred in the decision, begins with laying down the doctrine that co-sureties are those who have assumed the same obligation and are equal in all their liabilities, while supplemental sureties are those who come in aid of the former, and then undertakes to show that the successive indorsers have assumed the same obligation, because the last indorsement "imposes no obligation on the holder to apply to the prior indorser, before he calls upon the subsequent indorser," while he distinguishes the obligations of a maker and an indorser, inasmuch as the holder "must make proof of his endeavors to procure payment from the maker, before he can resort to any indorser." In the subsequent case of *Smith v. Smith,* 1 Dev. Eq. Rep., 173, where the plaintiff's intestate had executed the note with the principal debtor for his accommodation, and the defendant had indorsed it at the request of the principal, and with a knowledge that it was to be discounted for his benefit, the same judge delivering the opinion of the whole court, recognizes it as the rule both of law and equity, "to regard the order of liability arising upon the face of the transaction as fixing *prima facie* the relations of principal and surety, and of co-sureties and supplemental surety"; and in noticing the argument that the circumstance of its being known to the indorser, that one of the joint makers was not a principal, but a surety only in the note, created an agreement of mutual liability between the indorser and such joint maker, "declares not only that such a doctrine had never been established, but that it would be to place a man in a grade and order of liability not in accordance with his act," and which could not be done without his (535) assent. In the case of *Gomez v. Lazarus,* 1 Dev. Eq. Rep., 205, we find a recognition sufficiently explicit of the same principles. Gomez had accepted and Clark had indorsed for the accommodation of Levy, a bill drawn by the latter. "There is no agreement," says *Judge Henderson,* "made between Clark and Gomez to change the order of their liability appearing upon the face of the transaction. Upon it Gomez stands prior in obligation to Clark, for Clark's liability was to arise upon his default. Standing in this relation, Gomez cannot call on Clark to contribute as a co-surety." And finally, in the case of *Hatcher v. McMorine,* 3 Dev., 228, where the same learned judge professes his willingness to review the case of *Daniel v. McRae,* because the decision therein had not given general satisfaction, and was contradicted by an adjudication in the Supreme Court of the United States, he sets forth the extent of that decision, viz.: "that in bills or notes, for the accommo-

dation of the drawer or maker, prior and posterior indorsers stand in equal degree as co-sureties, without any express contract to that effect, if, at the time of their respective indorsements they knew that it was accommodation paper, for the benefit of the drawer or maker, and that nothing was paid for or upon the indorsement." The case of *Daniel v. McRae* cannot, therefore be regarded as authority for the position here urged by the plaintiff, without a perversion of the declared meaning of those by whom it was decided. It lays down a rule from which, whether originally right or wrong, we cannot depart, without violence to the understanding and practice of the community, which have conformed to it —but it is a rule confined to prior and subsequent endorsers upon accommodation paper. It does not establish, nor was it intended nor has it been understood to establish, the like rule as between the maker and indorser—or the acceptor and indorser—or others liable in different characters, upon such paper. And to introduce it among these would be to violate principles, to produce confusion, and to contradict the general usages of the commercial world.

In this case the original bond on which the loan was obtained from the the bank, and the bond subsequently given in renewal, were both executed and endorsed in the same manner. Had it been otherwise, this circumstance, perhaps, might have been evidence to a jury, (536) that the form last adopted was accidental only, and that *in fact* there had been an agreement of common and mutual liability between those who gave the benefit of their names to the principal debtor.

It is the opinion of this Court that there is error in the judgment rendered for the plaintiff in the Superior Court—that for this error the said judgment should be reversed—and that upon the case agreed there must be judgment for the defendant.

PER CURIAM. Judgment reversed.

Cited: Southerland v. Fremont, 107 N. C., 569; *Atwater v. Farthing,* 118 N. C., 388.

BUTLER S. WHITE v. GEORGE WHITE.

Bequest—Construction—Assent of Executor—Evidence.

1. Acquiescence by an executor in the possession or sale by the legatee for life of the thing bequeathed furnishes a ground for inferring an assent to the ulterior bequest. But where the person nominated executor in the will refuses or neglects to accept the office, no acquiescence on his part, nor act of his, not amounting to an act of administration, will justify the inference; because, in order thereto, there must in fact be an executor to assent.

2. Jurors are not bound to take either the whole or any part of a witness's testimony as true if in their consciences they do not so believe. But where it is incumbent on a party to establish a fact, and the *only* testimony in relation thereto contradicts it, a jury cannot capriciously mangle the testimony so as to convert it into evidence of what it does not prove. If the witness be deserving of credit, the fact necessary to be shown is disproved—and if he be not worthy of credit, there is a defect of proof.

3. Where a testator, in one clause of his will, lends to his wife all his estate, real and personal, for life, and in a subsequent clause provides that after the death of his wife his son shall have a particular negro woman, but that her second born child after that time shall be given to his grandson, *it seems* that the widow takes a life estate in the child.

THIS was an action of detinue for a negro woman slave named Charlotte, tried at Iredell, on the last circuit, before his Honor, *Judge Dick*.

The plaintiff claimed title to the negro in question under the following clause of the will of John White, deceased:

(537) "I lend unto my beloved wife, Mary, all my property, real and personal, to have, hold, and use for the purpose of her sustenance during her natural life or widowhood."

"I will that after the death of my beloved wife, my son William shall have one negro woman named Lucy, but that her first born child after this date shall be given to my son Howel. The second to my grandson, Butler Stonestreet White."

It was admitted that the slave in question was the second child of the woman Lucy, mentioned in the will of John White; that she was in the defendant's possession and had been so from the time of her birth; and further, that this action had been brought within three years after the death of the testator's widow. The defendant claimed under one Robert Simonton, and it appeared in evidence that the widow of John White, the testator, and William White, one of his sons, in the spring of the year 1819, sold and delivered the negro woman Lucy to Simonton, in discharge of a debt due from the testator to the said Simonton; and that the latter, in a few days afterwards, sold her to the defendant; and that Charlotte was born after Lucy came into the defendant's possession. The defendant also proved, by one Nicholas Norton, that he, the witness, was named executor in the will of the said John White; that he was also a witness to the will, and proved its execution in the County Court of Iredell, when it was admitted to probate, but that he never qualified or in any way acted as executor. He stated further that when Simonton bought Lucy from the widow and son of the testator, he, Norton, at the request of Simonton, took her to his own house and in a few days afterwarsd delivered her to the defendant, by the direction of Simonton. Upon these facts his Honor being of opinion that the plaintiff's claim

was barred by the statute of limitations, and further, that there was no evidence of Norton's having acted as executor of John White, deceased, the plaintiff submitted to a nonsuit and appealed.

Badger for the plaintiff.
Boyden for the defendant.

GASTON, J. Before the plaintiff could entitle himself to a (538) verdict it was necessary to show an assent on the part of the executor to the legacy in his favor. Acquiescence by an executor in the possession or sale by the legatee for life of the thing bequeathed, would furnish a ground for inferring an assent to the ulterior bequest. But such an inference could not be here raised until it appeared that there was in fact an executor to assent. No man can be compelled to accept the office of executor, and without some act manifesting acceptance of the office it cannot be presumed. The ordinary mode in which this acceptance is declared is by proving the will as executor. In this case the office was not thus accepted. The individual named as executor in the will was also a witness to its execution, and on its production in court, he testified to its execution as a witness, but did not qualify to it as executor. It became, therefore, necessary for the plaintiff to show some act of administration characteristic of the office of executor, done by the person thus nominated, which was equivalent to an acceptance of the office. He offered no testimony of any kind tending to show such an act. But, it is insisted on his behalf that this defect in his testimony was supplied by the testimony on the part of the defendant. The latter examined the supposed executor, who testified that he had neither qualified nor acted as executor, and stated, also, that when the sale was made of the negro woman Lucy, by the widow of the testator, to Robert Simonton, from whom she was shortly afterwards purchased by the defendant, he, at Simonton's request, took the negro woman to his house, and afterwards, by Simonton's direction, delivered her to the defendant. Now, it is not pretended that this testimony, if true, proves or tends to prove that the witness acted as executor, but it is argued that it should have been left to the jury, because they might have believed that the acts were done, but not done in the character of agent of Simonton, and thence have inferred an intermeddling with the estate as executor. To this argument we think it is properly objected that the opinion intimated by the judge, that this testimony was not evidence of acceptance of the office, is necessarily predicated upon the supposition of its truth—and if the plaintiff denied the representation of facts as made by the witness he ought, in fairness, to have insisted that the truth of this (539) representation should have been submitted to the jury. But there is another answer to the argument, which we think satisfactory. Cer-

tainly jurors are not bound to take either the whole or any part of a witness's testimony as true, if, in their consciences they do not so believe. But when it is incumbent on a party to establish a fact, and *the only* testimony in relation thereto contradicts it, a jury cannot capriciously mangle the testimony so as to convert it into evidence of what it does not prove. If the witness be deserving of credit the fact necessary to be shown is disproved—and if he be not worthy of credit there is a defect of proof.

It is not necessary to express an opinion upon the other point. If it were, we should probably hold that according to the true construction of the will the legacy to the plaintiff was not to take effect in possession until after the death of the widow; that if he had a right of action it did not arise until her death, and that therefore this suit was not barred by the statute of limitations. The judgment is affirmed with costs.

PER CURIAM. Judgment affirmed.

Cited: Edney v. Bryson, 47 N. C., 366.

JAMES THOMPSON v. DAVID W. SANDERS.

Sureties—Contribution.

Where a party signs a note as the surety of another, and then a third person also affixes his name as a maker, adding to his signature the words "surety to the above," the first surety cannot, upon paying the note, compel contribution against the second surety, unless it is made satisfactorily to appear that the second surety intended to place himself in the relation of co-surety with the first.

ASSUMPSIT brought to recover of the defendant contribution as a co-surety, tried before his Honor, *Judge Saunders,* at Onslow, on the last Spring Circuit.

On the trial the case was that a note had been discounted at the Newbern Branch of the State Bank, of which the following is a true copy:

NEWBERN, Feb. 5, 1833.

(540) "$889:29-100. Ninety days after date we promise to pay the President and Directors of the State Bank of North Carolina, eight hundred eighty-nine 29-100 dollars, negotiable and payable at the Newbern Branch of the said Bank, for value received.

"ASA H. RHODES.
"JAMES THOMPSON.
"M. PETTAWAY.
"D. W. SANDERS. (Security to above)
"LUKE HUGGINS. (Security to above)"

The cashier of the bank stated that this note was discounted and the proceeds paid to Luke Huggins, one of the makers, and that the note was afterwards renewed by another in the same form, signed by all the parties except Huggins, David W. Sanders annexing to his name as above the words "security to the above." Upon this latter note suit was brought in the County Court of Onslow, and a judgment obtained, the execution upon which was paid equally by the present plaintiff and M. Pettaway, Aso H. Rhodes having left the State, insolvent.

For the defendant it was insisted that Rhodes, Thompson, and Pettaway were joint makers, and that he was their surety, or supplemental surety, and that this was evidenced by the note itself. The plaintiff then offered a witness who stated that he wrote the first note at the request of Luke Huggins and Asa H. Rhodes, when the latter stated that he was indebted to the former and the note was for the purpose of enabling him to raise money to pay the debt. This evidence was objected to by the defendant because the other parties were not present when the conversation took place, but was received by the court.

His Honor instructed the jury "that if Rhodes was principal in the note, and Thompson and Pettaway had received no benefit from it, and there had been no request or understanding between them and the defendant Sanders, as to the terms on which he should sign it, they were all co-securities, and the plaintiff would be entitled to recover a rateable proportion of defendant." Under this instruction, the plaintiff obtained a verdict and judgment, and the defendant appealed. (541)

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

DANIEL, J. Was Sanders a co-surety with Thompson and Pettaway for Rhodes, the principal in the note? Where a party signs a note as the surety of another, and subsequently a third person also affixes his name as a maker, adding to his signature the words "surety to the above parties," the first surety, although he pays the note, cannot compel contribution against the second surety, unless it is made satisfactorily to appear that the second surety intended to place himself in the relation of co-surety with the first surety. *Harris v. Warner,* 13 Wend., 400. If the makers of this note all signed in the presence of each other and there was no agreement or understanding on the subject of liability among them, then Saunders signing last on the paper, with the words "surety to the above" added to his name, was strong evidence, we think, that he did not intend to be considered as a co-surety, but only a guarantor of the paper to the bank. We are of the opinion that the judge erred in

charging the jury that the defendant, under the state of facts as existed before him, was a co-surety and bound to contribute. There must be a new trial.

PER CURIAM. Judgment reversed.

(542)

DEN ON DEM. OF ZACHARIAH CANDLER v. ELI LUNSFORD ET AL.

State—Estoppel—Presumption of Grant.

1. The State is not bound by an estoppel, nor is a grantee from the State estopped to deny what the State from whom he claims is at liberty to assert.
2. A long, uninterrupted possession of land, as for thirty years or more, by persons claiming the land as their own, will justify the presumption of a grant, although no connection by a deed or other conveyance is proven to have existed between the persons so holding possession.
3. The cases of *Taylor v. Shufford*, 11 N. C., 116, and *Fitzrandolph v. Norman*, 4 N. C., 564, approved.

AFTER the new trial granted in this case, at December Term, 1838 (see *ante* page 18), it came on to be tried again at Buncombe, on the last circuit, before his Honor, *Judge Pearson,* when the case appeared to be as follows:

The lessor of the plaintiff proved the defendant to be in possession of a field on the east side of the French Broad River, and also of another on the west side of the same river, and then offered in evidence a grant to himself from the State, dated in 1829, including land on both sides of the river and taking in both fields. As to the land on the east side the defendant relied upon showing title out of the plaintiff's lessor, and produced a grant to one Blount, dated in 1794, which covered all the land on that side of the river. The lessor of the plaintiff then read in evidence a grant to the defendant, dated in 1834, for the land on the east side and insisted that the defendant was estopped by this grant from denying title in the State at the date of the plaintiff's lessor's grant, and the question was, whether the defendant was estopped from showing title out of the plaintiff's lessor by relying on Blount's grant.

His Honor was of opinion that the doctrine of estoppel did not apply for that when the grant issued to Candler, in 1829, at his suggestion that the land was vacant, the State was not estopped from denying this allegation, and of course the defendant who claimed under the State by the grant of 1834 was not estopped from denying a matter which his grantor was at liberty to deny.

As to the field on the west side of the river, the defendant (543) offered in evidence a grant to one Roberts, dated in 1793, and regular *mesne* conveyances to one Warren, one Baily, and then to himself. This grant and the *mesne* conveyances did not cover a part of the field, containing about two acres. But as to these two acres the defendant relied upon the presumption of a grant from long possession, and proved that for upwards of thirty-five years before the commencement of this action the field had been fenced in, and cultivated every year, by persons claiming it as theirs; that he himself had cultivated the land, claiming it as his own for fifteen years next before the commencement of the action; that Baily had cultivated it the ten years before, and that Warren had cultivated it ten years before Baily took possession; both Baily and Warren, while in possession, respectively claiming the land as their own. The counsel for the lessor of the plaintiff insisted that such possession was not sufficient to justify the presumption of a grant, without showing that the defendant claimed under Baily, and Baily under Warren, by some kind of conveyance.

His Honor charged that a long, uninterrupted possession, as for thirty years or more, by persons claiming the land as their own, would justify the jury in presuming a grant, although no connection by a deed or other conveyance was proven to have existed between the persons so holding possession. There was a verdict and judgment for the defendant, and the plaintiff's lessor appealed.

No counsel appeared for the plaintiff's lessor in this Court.
Hoke for the defendant.

RUFFIN, C. J. We think that neither exception can be sustained, but that the judgment must be affirmed.

The case of *Taylor v. Shufford,* 4 Hawks, 116, sanctions the principle of the common law that the sovereign cannot be estopped, as a rule of justice and policy, equally applicable to our institutions as to those of the mother country. The State was therefore at liberty to aver that at the time the patent to the lessors of the plaintiff emanated the land had been granted to Blount, and so may consequently the defendant. He cannot be bound to surrender to the plaintiff a possession which the defendant's grantor might have withheld from him.

Upon the other question, *Fitzrandolph v. Norman,* N. C. T. R., (544) 131, is the leading case, and decisive. Indeed it goes further than is necessary for the purposes of this case. Here it is impliedly admitted that the defendant came in under Bailey, and he under Warren; and the objection is that the connection between them is not shown by deed. An answer to the objection in that form is that from long possession a pre-

sumption arises of everything necessary to constitute a title in the possessor, and therefore if such *mesne* conveyances were necessary to authorize the presumption that a grant had issued to the defendant, or to someone under whom he claims, then such intermediate instruments would be presumed as well as the grant from the State. But the case cited rules that the presumption of a grant arises, although the occupation had been by different persons, and no privity could, by any means, be traced between the successive tenants, much less is it requisite to establish such privity by deed. It does not appear that the possession in this case of thirty-five years was not taken and held upon the same title or claim of title throughout, which we think affords a legal inference of a good title, as the foundation of such long possession.

PER CURIAM. Judgment affirmed.

Cited: Reed v. Earnhart, 32 N. C., 520; *Mallett v. Simpson,* 94 N. C., 43; *Wallace v. Maxwell,* 32 N. C., 112; *Aycock v. R. R.,* 89 N. C., 324; *S. v. Williams,* 94 N. C., 895; *Mason v. McLean,* 35 N. C., 264; *Melvin v. Waddell,* 75 N. C., 366; *Price v. Jackson,* 91 N. C., 14; *Cowles v. Hall,* 90 N. C., 333; *Pearson v. Simmons,* 98 N. C., 283; *Taylor v. Gooch,* 48 N. C., 469; *Asbury v. Fair,* 111 N. C., 257; *Hamilton v. Icard,* 114 N. C., 536; *Walden v. Ray,* 121 N. C., 238.

(545)

THE STATE v. THOMAS H. CHRISTMAS.

Homicide—Record.

1. Where the record of an indictment for murder set forth the indictment, the answer of the prisoner to the inquiry how he would acquit himself, the reply of the Attorney-General, the order for a jury to come, and then proceeded, "and afterwards in the said case, *State v. Thomas H. Christmas,* indictment, murder, the following jury being sworn and empanelled, to wit, etc., who say that the prisoner, Thomas H. Christmas, is guilty of the felony and murder in manner and form as charged in the bill of indictment": *It was held,* that the record showed, if not in express terms, yet by necessary implication and with the requisite certainty, that the jury was sworn to try the truth of the matters charged in the indictment.

2. In capital cases, though it is usual to make up an issue with the prisoner on his plea of not guilty, yet it is not necessary to do so. The issue is immaterial, for the trial is in the nature of an inquisition, in which the jury is charged to inquire of the truth of the accusation contained in the indictment.

3. It would probably not be error if the record were to set forth the verdict as a finding on the issue joined between the State and the prisoner, where the issue is joined on the truth of the indictment, but such is not the regular form of stating it.

4. In a court of supreme original jurisdiction the law always presumes, until the contrary appears, that the proceedings which the record of that court shows to have been had, were, as concerns form and manner, correctly done.

5. It is enough that the record in an indictment for murder be certain to a *certain intent in general.* It is not *necessary* that it should be certain to a *certain intent in every particular,* so as absolutely to exclude every possible conclusion, all argument, presumption, or inference against it.

THE prisoner was convicted of murder at Warren, on the last circuit, before his Honor, *Judge Saunders,* and upon his appeal the transcript of the record sent up sets forth the indictment as found at the Spring Term, 1839, of Warren Superior Court, and that the prisoner, upon its being read to him and it being demanded of him "how he will acquit himself of the premises above laid to his charge," says he is not guilty of the felony and murder in manner and form as in and by the said bill of indictment he stands charged; and therefore for good and evil he puts himself upon God and the country; and the Attorney-General, who in this behalf prosecutes for the State doth the like. There- (546) fore, let a jury, by whom the truth of the matter may be better known, come." The record then, after setting forth an affidavit of the prisoner for the continuance of his cause, the order of the court for its continuance, and the recognizances of several witnesses, both for the State and the defendant, to appear and give evidence at the next term, states that at the next term of said court an order was made for a special *venire,* and after giving the return of the sheriff thereto, proceeds, "and afterwards in the said case, *State v. Thomas H. Christmas,* indictment, murder, the following jury being sworn and empanelled, to wit" (naming them), "who say that the prisoner, Thomas H. Christmas, is guilty of the felony and murder in manner and form as charged in the indictment."

Badger for the prisoner.
The Attorney-General for the State.

GASTON, J. The counsel for the prisoner objects to the sufficiency of the record in this case to warrant the judgment which has been rendered upon it. The defect alleged is for that it does not appear upon the record that the jury, who returned the verdict finding the prisoner guilty of the felony and murder charged in the indictment, was sworn to try the matter put in issue by the prisoner's plea. We have considered the objection, and are of opinion that it cannot be sustained.

In our Bill of Rights it is declared that "no freeman shall be put to answer any criminal charge but by indictment, presentment, or impeach-

ment," and that "no freeman shall be convicted of any charge but by the unanimous verdict of good and lawful men, in open court, as heretofore used." Declaration of Rights, sections 7 and 8. These declarations have a plain reference to the provisions which the laws of England had devised for the protection of persons charged with criminal offenses, and which had been brought over by our ancestors and incorporated into our jurisprudence before the Revolution. An indictment is a written accusation by the State against the prisoner, preferred upon the oaths of twelve or more of his fellow citizens called a grand jury; and if the truth of
(547) that accusation be denied by the prisoner he cannot be convicted thereof, unless it be confirmed by the unanimous suffrages of twelve more of his fellow citizens as a petit jury. In capital cases, though it is usual to make up an issue with the prisoner on his plea of not guilty, yet it is not necessary so to do. The issue is immaterial, for the trial is in the nature of an inquisition, in which the jury is charged to inquire of the truth of the accusation contained in the indictment. 1 Chitty on Criminal Law, 481; *Queen v. Tutchin,* 6 Mod., 281; *Rex v. Oneby,* 2 Stra., 775; *Rex v. Royce,* 4 Bur., 2084-2085. As was properly said in argument in the *King v. Dowlin,* 5 Term Rep., 314, "the manner of calling upon the prisoner how he will acquit himself of the charge, the subsequent demand of the manner in which he will be tried, the oath of the jury to make true deliverance of the prisoner, whom they have in charge, the charge given to the jury when empanelled, and the oath administered to the witnesses, are all indicative of an inquisition, and not of an issue to be tried between parties." It would probably not be error if the record were to set forth the verdict as a finding on the issue joined between the State and the prisoner, where the issue is joined on the truth of the indictment, but certainly such is not the regular form of stating it. In the Appendix to the 4th vol. of Blackstone's Commentaries is given the record of an indictment and conviction of murder in which, after setting forth the indictment against the prisoner (Peter Hunt), his arraignment, his denial of the truth of the matters therein charged upon him, and thereof for good and evil putting himself upon the country, and that the clerk of the assizes, who prosecutes for the King in this behalf, doth the same, it sets forth an order for a jury to come "to recognize upon their oath whether the said Peter Hunt be guilty of the felony and murder in the indictment aforesaid above specified or not guilty"; and that the jurors of the said jury for this purpose by the said sheriff impanelled and returned, do come, and then proceeds thus: "who, being elected, tried and sworn to speak the truth of *and concerning the premises,* upon their oath say," etc., etc.

The objection then resolves itself into this, that the record does not show with requisite certainity that the jury was sworn to try the

truth of the matters charged in the indictment. Now the record (548) sets forth the indictment, the answer of the prisoner upon the inquiry how he will acquit himself of the premises in that indictment charged upon him, "that he is not guilty thereof, and therefor for good and evil puts himself upon the country"; and also, that "the Attorney-General, who in this behalf prosecutes for the State, doth the like"; and thereupon it is ordered, "let a jury, by whom the truth thereof may be the better known, come." Then, after stating other matters which ought not to have a place in the record, it proceeds, "and afterwards, in the said case, *State v. Thomas H. Christmas,* indictment, murder, the following jury being sworn and empanelled, to wit" (naming them) "who say that the prisoner, Thomas H. Christmas, is guilty of the felony and murder in manner and form as charged in the indictment." Now, it would seem to be a sufficient answer to the supposed uncertainty in regard to *the oath* administered to the jury, that this is a record of the proceedings, not of an inferior court properly so called, but of a court of supreme original jurisdiction, and that the law always presumes, until the contrary appears, that the proceedings which the record of that court shows to have been had, were, as concerns form and manner, correctly done. *State v. Kimbrough,* 2 Hawks, 431; *State v. Seaborn,* 4 Dev., 305. But it is not necessary to rely upon this answer. For however unclerical may be several of the terms to be found in this record, and however much to be regretted any deviation in a record of so grave a character, from the appropriate language to which long established forms have given a precise meaning—a deviation justly calling for a strict scrutiny into the import of the terms used—yet, on the record, such as it is, there is no rational ground for the alleged doubt. The indictment contains the accusation—the prisoner denies it—a jury is ordered to try the truth of it—that jury is sworn and returns a verdict directly responsive to the accusation. The record cannot be otherwise understood than as averring, if not in express terms, yet by necessary implication, that the jury so sworn was sworn to try what it was ordered to try—what alone was to be tried—what the jury did try—the truth of the accusation. It is enough that the record be certain to a *certain intent in general.* (549) It is not necessary that it should be certain to a *certain intent in every particular,* so as absolutely to exclude every possible conclusion, all argument, presumption or inference against it. The time was, in England, when it being entirely at the pleasure of the crown to grant or refuse a writ of error in any criminal case, subtle objections, like that now raised, were allowed to prevail, in order to carry into effect the presumed will of the crown to extend mercy to the prisoner. But it has long since been settled there and certainly is the law here that a judgment in a criminal case cannot be reversed without showing a substantial error.

This Court is of opinion that no error appears in the record of the proceedings below to warrant a reversal of the judgment there rendered. This decision must be certified to the Superior Court of Law for the County of Warren, with directions to proceed to judgment and sentence of death against the prisoner, Thomas H. Christmas, agreeably thereto and to the laws of the State.

PER CURIAM. Judgment to be affirmed.

Cited: State v. Collins, 30 N. C., 414; *State v. DeBerry,* 92 N. C., 802.

(550)

DEN ON DEM. OF LUKE HUGGINS v. JONATHAN KETCHUM.

Justice's Execution—Levy on Land—Ejectment—Sheriff's Deed.

1. The signature of a justice is absolutely necessary to an *alias*, as well as to an original execution on a justice's judgment. Hence, an entry of "execution renewed," without the signature of a justice, at the foot of a dormant justice's execution, gives no authority to the acts of an officer under it.

2. The levy of a justice's execution upon lands, under the Act of 1794, 1 Rev. Stat., ch. 62, sec. 16, need not, perhaps, be in the very words of the act; but a description containing *a part only of that prescribed in the act* must be taken to be insufficient in point of certainty thereby required, until it be shown as a fact that it identified the land levied on as effectually as it would have been identified by a description conforming to that given in the act. Hence, a levy upon "all the lands of the defendant lying on Queen's Creek," without any such evidence of identity, is not sufficiently specific to authorize the Court to make an order of sale, or if such an order be made, to support a sale under it.

3. The levy of a justice's execution upon "all the lands of the defendant lying on the headwaters of Ketchum's Pond, adjoining the lands of said Ketchum," is substantially, if not literally, a compliance with the requisitions of the Act of 1794.

4. If a justice's execution be levied upon land, and returned to court, and the land be sold under a *venditioni exponas*, issued upon an order made by the Court for that purpose, the lien has relation back to the time of the levy, so as to defeat a sale made afterwards by the defendant.

5. The case of *Lash v. Gibson*, 5 N. C., 266, approved.

6. Where an execution authorizes the sheriff to sell all the lands of the defendant lying on the head of a particular mill pond and adjoining the lands of a particular person, if the lands embraced in that description comprehend more tracts than one, a sale *en masse* will be supported in the absence of fraud on the part of the sheriff and purchaser.

7. The cases of *Wilson v. Twitty*, 10 N. C., 42, and *Thompson v. Hodges, Ibid*, 51, approved.

8. In an action of ejectment the quantity of land mentioned in the declarations need not correspond with that which the lessor of the plaintiff claims. He may declare for an indefinite number of tracts of land—and recover according to the quantity to which he proves title; especially when it appears that all the tracts adjoin each other and constitute, in fact, but one tract in the possession of the defendant.

9. If a sheriff sell land under an execution authorizing him to sell, his deed is good, and passes the title, although in his deed to the purchaser he make an erroneous recital of the power under which he sells. And that he sold under a particular execution must be presumed, until the contrary be shown, if he had that execution in his hands at the time, and sold the lands thereby directed to be sold.

10. The case of *Hatton v. Dew*, 7 N. C., 260, approved.

11. A description in a sheriff's deed of "all the right, title and estate which the said J. W." (the defendant) "has in the county of Onslow, on Queen's Creek, being all the land which the said J. W. owned on said creek," though far from being so particular as could be wished in a sheriff's deed, is not, it seems, so indefinite as to make the deed void on that account.

12. If a party claimed under a sheriff's sale, made by virtue of several district judgments and executions, and the judge instructed the jury that if the executions were in the hands of the sheriff at the time of the sale, he had authority to sell, and the jury thereupon found a general verdict for the plaintiff; and it afterwards appear that only one of the executions was sufficient to authorize the sale, but whether that authority extended to all the lands described in the sheriff's deed, and claimed by the party, or to a part of them only—or whether it extended to them at all—is not shown, a new trial will be granted.

THIS was an action of ejectment, brought to recover the possession of several tracts of land set forth in the declaration.

Upon the trial at Onslow, on the last circuit, before his Honor, *Judge Settle,* it appeared that the lands once belonged to James Wade, who, on 16 March, 1832, conveyed them by a deed, properly executed, to one John Lloyd, under whom the defendant claimed. The lessor of the plaintiff set up title under several judgments and executions against Wade—a sale by the sheriff under said executions, and a deed from the said sheriff to himself, dated 7 February, 1833. The first judgment produced by the plaintiff's lessor was in favor of the State Bank, obtained at August Term, 1832, of Onslow County Court, upon which an execution issued tested of that term, and afterwards an *alias* tested of November term. The second was a judgment in favor of the plaintiff's lessor himself, obtained at the November term of the said County Court, and an execution issued tested of that term. The third was a justice's judgment, in favor of Jesse Webb, given on 10 March, 1832, an execution issued thereon the 27th of the same month, and levied the same day on Wade's lands, which was returned to court and the justice's judgment affirmed at the ensuing

(552) November term, and a *venditioni exponas* issued tested of that term. The fourth was a justice's judgment in favor of John Watson, granted 26 November, 1830, an execution issued thereon 27 November, 1830, at the foot of which there was an entry in the following words: "March 1, 1832, execution renewed," without the name of any magistrate signed to it. On this paper was endorsed by a constable "March 7, 1832—this execution levied on all the lands of James Wade, lying on the head of Queen's creek, on the west side of said creek." The papers were then returned to the County Court at its May term, from which a notice issued to the defendant; and at November term ensuing, the justice's judgment was affirmed, and a *venditioni exponas* issued tested of that term. The fifth was also a justice's judgment in favor of James Riggs, granted 11 February, 1832, on which an execution issued March 10, 1832, which was the same day "levied on all the lands of James Wade, lying on Queen's creek," and returned to May term ensuing of the court. A notice to the defendant was issued from that term, and at the November term following the justice's judgment was affirmed and a *venditioni exponas* was issued tested of that term. The sixth was also a justice's judgment in favor of Elijah Riggs, granted in July, 1831, on which an execution issued August 23, 1831, which was renewed January 16, 1832, and on 17 February, 1832, was "levied on all the lands of James Wade, lying on the head of Ketchum's mill pond, joining the lands of said Ketchum," and returned to the county court at its May term, 1832, from which a notice issued to the defendant, and at the November term following the justice's judgment was affirmed, and a *venditioni exponas* issued tested of that term. The sheriff's deed, after reciting the execution in favor of the State Bank against James Wade, and that by virtue thereof he had levied upon the lands thereinafter "more particularly described of the goods and chattels, lands and tenements of James Wade," proceeded as follows, "and on the 4th day of February instant, sold the same to Luke Huggins, he being the highest bidder, at and for the price of $20.25; and also other *fi. fas., ven-*
(553) *ditioni exponas.* Now, know all men by these presents, that I, Peter Harrell, sheriff as aforesaid, by virtue of and in obedience to, the aforesaid writ of *fieri facias,* and by authority of my said office, for and in consideration of the said sum of twenty dollars and twenty-five cents, to me in hand paid by the said Luke Huggins, at and before the sealing of these presents, the receipt whereof is hereby acknowledged, have bargained and sold, aliened, set over and confirmed, and I do hereby bargain, sell, alien, set over and confirm unto the said Luke Huggins, his heirs and assigns forever, all the right, title and estate which the said James Wade has in and to a certain piece of land lying and being in the county of Onslow, on Queen's Creek, being all the lands which the

said Wade owned on said creek," etc. After the lessor of the plaintiff had produced and read in evidence the judgments, executions and deed above mentioned he called a witness to prove that at the commencement of this action the defendant was living on the land in dispute. The witness testified that the defendant's houses and clearing were exclusively upon the parcel of one hundred acres first described in the declaration, but that the pines were boxed upon and throughout the several other parcels as described, and that all the boxes were tended or cultivated for turpentine by Ketchum at the time of bringing the action and for two years prior thereto. This witness also proved that all the parcels of land described in the declaration were adjoining to each other, and were lying upon the waters of Queen's Creek in Onslow County; and that there was no other possession of any part of said lands than that held by the defendant.

The recovery was objected to on the part of the defendant, because:

1st. The levy of a constable on land did not bind the same, and a sale by the defendant in execution was good notwithstanding.

2ndly. The descriptions of the land in the levies were too indefinite and vague to pass the estate.

3rdly. The sale was fraudulent and void, by reason of the sheriff's setting up too many separate parcels at the same time.

4thly. Too many parcels of land were united in the same declaration, and no recovery could be had.

5thly. The defendant was proved to be in possession of only (554) one of the messuages, viz.: that on which he lived, and the plaintiff was not entitled to recover beyond that.

6thly. The sheriff's deed did not recite the executions by virtue of which the lands were sold, and the description of the land in the sheriff's deed was too indefinite.

These objections were overruled by his Honor, and the jury were instructed to inquire whether the several writs of *venditioni exponas* and *fieri facias,* which were produced and read on the trial, were in the hands of the sheriff at the time of the sale; and if they were, that he had authority to sell. The jury were further instructed that if they believed from the evidence that the defendant, Ketchum, dwelt upon one of several contiguous parcels of land, and cultivated the others for turpentine in the usual way, as testified to by the witness, he was in possession of all, and the plaintiff's lessor was in this action entitled to recover all.

The jury returned a general verdict in favor of the lessor of the plaintiff, and the defendant moved for a new trial upon the ground of misdirection by the court, which being refused, and judgment given, he appealed.

J. H. Bryan for defendant.
J. W. Bryan for the lessor of the plaintiff.

DANIEL, J. The lands described in the declaration formerly belonged to James Wade. He, on 16 March, 1832, conveyed said lands to Lloyd, by a deed properly proved and registered. The defendant claims under Lloyd. The lessor of the plaintiff claims title by virtue of several judgments and executions against Wade—a sale and sheriff's deed to himself. The two county court executions, *The Bank v. Wade* and *Huggins v. Wade* and the justices' execution, *Jesse Webb v. Wade,* are each tested after the date of the deed to Lloyd; therefore they may be laid out of the question, as the plaintiff can derive no title under them. The plaintiff produced also a justice's judgment, *Jno. Watson v. Wade,* and an execution signed by the justice, tested on 27 November, 1830. At the foot of the said execution there is this entry, "March 1st, 1832, execution (555) renewed." There is no justice's name signed to this attempted renewal of the execution. We think that the signature of a justice is absolutely necessary to an *alias,* as well as to the original execution, on a justice's judgment. The levy of the constable, therefore, under this *entry,* was without authority and void. The original execution at the end of three months became defunct—the act of Assembly directing it to be returned in three months from the date thereof. We think that the levy and sale, under this judgment, execution and proceedings thereupon gave the plaintiff no title.

The lessor then produced a justice's judgment, obtained by *James Riggs v. Wade,* and an execution on the same tested 10 March, 1832, and on the same day the constable made this return thereon, "March 10th, 1832, this execution levied on all of the lands of James Wade lying on Queen's Creek." There was notice issued to Wade, which was served in the time prescribed by law, an order of sale by the county court, and a *venditioni exponas.* We are, however, of the opinion that the constable's levy on this execution must be regarded *prima facie* insufficient to sustain the *venditioni.* The law requires that for want of goods and chattels to satisfy the execution, then the officer shall levy on lands and tenements, setting forth on the execution what lands and tenements he has levied on, "where situate, on what water course, and whose land it is adjoining." In *Borden v. Smith,* 3 Dev. & Bat., 34, we have said when an execution upon a justice's judgment is levied upon land, and returned to the county court, it is essential to the validity of the order, which the court is authorized to make, to sell the land levied on, that the land should be particularly described; and a levy generally upon the defendant's *"lands,"* without further specification or description, will not support such order nor the sale made under it.

Queen's Creek may run through the whole extent of the county; Wade may have had many tracts of land, and at different places on this creek. Such a description recited in the *venditioni* does not inform the sheriff what lands he is to sell. The sale was at the courthouse, the people probably would not know from this description where the lands lay. The neighborhood, the quantity, the quality and every other circumstance that a prudent bidder would like to know before (556) he parted with his money, would seem to be wanting. By such a levy a defendant might be deprived of valuable lands for a mere trifle—it is too much like guesswork. We do not mean to say that the levy must be in the very words of the act of Assembly; but that a description containing a *part only of that prescribed in the act* must be taken to be insufficient in point of the certainty thereby required until it be shown, as a fact, that it identified the land levied on as effectually as it would have been identified by a description conforming to that prescribed in the act. As no such evidence is stated to have been offered in this case, we hold that the judge erred in instructing the jury that *this venditioni* conveyed a valid authority to sell. It is true that Wade might have moved the county court to stay the order of sale for the uncertainty in the levy. But we do not think that his omitting to make such a motion cures the defect in the levy.

The lessor produced also a justice's judgment in favor of *Elijah Riggs v. James Wade,* with an execution on the same, tested 23 August, 1831; execution renewed 16 January, 1832, and signed by the justice. The officer returned on this execution as follows: "February 17th, 1832, this execution levied on all the lands of James Wade lying on the head of Ketchum's mill-pond, adjoining the lands of said Ketchum." Here we may say that the act of Assembly was substantially, nay literally, complied with except in the omission of Ketchum's Christian name, and this was unnecessary as he is described as the same Ketchum whose mill-pond had been before mentioned. All the proceedings up to the sheriff's sale under this levy were agreeable to law. Under this *venditioni* the sheriff was authorized to sell all the lands of Wade lying on the head of Ketchum's mill-pond, adjoining the lands of the said Ketchum. And if Huggins bought, and the sheriff conveyed these lands under that *venditioni,* a good title passed thereby. There were several objections made to the plaintiff's recovery. *First.* That the constable's levy did not bind the land. Answer: We are of the opinion that the levy under Elijah Riggs's execution did bind the land; and if that land was sold under the *venditioni exponas,* the lien had relation back to the time when the levy was made, so as to defeat the sale made afterwards by Wade. *Lash v. Gibson,* 1 Murp., 266. *Second objec-* (557) *tion.* The description of the land in the levy is too indefinite and vague. Answer: The description in the levy under Elijah Riggs's exe-

cution is almost in the very words of the act of Assembly, substantially corresponds with it, and therefore is not too vague. *Third objection.* The sale was fraudulent and void by reason of the sheriff's setting up too many parcels of land at the same time. Answer: The sheriff had authority to sell "all the lands of Wade lying on the head of Ketchum's mill-pond, adjoining the lands of the said Ketchum." If the lands embraced in that description comprehended more tracts or parcels of land than one, a sale *en masse* by the sheriff will still be supported, because it is warranted by his execution, and no fraud is shown either in the sheriff or the purchaser. *Den ex dem. Wilson v. Twitty,* 3 Hawks, 44; *Den ex dem. Thompson v. Hodges,* 3 Hawks, 51. *Fourth objection.* Too many parcels of land are united in the same declaration, and no recovery can be had. Answer: The quantity of the land declared upon need not correspond with that which the plaintiff claims. He may declare for an indefinite number of messuages, and he will recover according to the quantity to which he proves title. 2 Leigh's N. P., 886; Adams on Eject. We see no force in this objection, especially as it appears that all these tracts adjoined each other and constituted in fact but one tract in the possession of the defendant. *Fifth objection.* The defendant was proved to be in the possession of only one of the messuages, viz., that on which he lived, and the plaintiff was not entitled to recover beyond that. Answer: The defendant had cultivated the other tracts of land for turpentine, in the usual way, for two years. The witnesses proved that he was in this way in possession of all the land. We think this possession was all that was necessary for the plaintiff to prove in this action. *Sixth objection.* The sheriff's deed does not recite the executions by virtue of which the lands were sold, and the description of the land in the sheriff's deed is too indefinite. Answer: As to the first branch of this objection, the sheriff, in his deed, after specially reciting the bank execution, goes on to say that he sold by virtue of this, "and also of other *fieri facias* and *venditioni exponas.*"

If a sheriff sell under an execution authorizing him to sell, (558) although in his deed to the purchaser he make an erroneous recital of the power under which he sells, yet his deed is good and passes the title. *Den ex dem. Hatton v. Dew,* 3 Murph., 260. The recital is not an essential part of this deed; it affirms no fact, and will not amount to an estoppel. This deed, however, does recite that the sheriff sold under *venditioni exponases.* That he sold under Elijah Riggs's *venditioni* must be presumed, we think, until the contrary be shown, if he had that execution in his hands at the time, and sold the lands thereby directed to be sold. The second branch of this objection is that the description of the land in the sheriff's deed is too vague and

uncertain. The words of the deed are: "I do hereby bargain and sell unto Luke Huggins, his heirs and assigns, all the right, title and estate which the said James Wade has in and to a certain piece of land lying and being in the county of Onslow, on Queen's Creek, being all the land which the said Wade owned on said creek; to have and to hold," etc. The description of the land in a deed is certainly of great importance. As to which, it is evident that nothing can be described but by some general denomination applied to the individual subject, by the addition of its proper name, or of some peculiar circumstances of locality, quantity, quality, possession or title. Burton on Real Property, 81. In this deed there are peculiar circumstances of both locality and title; it is all the right and title in and to a certain piece of land of James Wade, lying on Queen's Creek in Onslow County, being *all* the land said Wade owned on said creek. That is certain which can be rendered certain. We must say, however, that this description is far from being as particular as we could wish to see in sheriffs' deeds. The jury have found that all the lands described in the declaration are covered by *this deed;* we, however, think that only the land mentioned in the levy under Elijah Riggs's execution could have been rightfully sold by the sheriff or conveyed to the purchaser. Now, whether that land be in fact the same with the land described in the plaintiff's declaration, or be a part thereof only, or be in fact land situate elsewhere and no part of it, does not appear. And as we think that the judge erred in holding that all the *venditionis* exhibited in evidence were sufficient in law, and it may be that the verdict establishing the plaintiff's title to the land contained in the declaration was founded upon the other *venditionis,* we must reverse the judgment and (559) direct the court below to award a *venire de novo.*

PER CURIAM. Judgment reversed.

Cited: Gifford v. Alexander, 84 N. C., 333; *Smith v. Low,* 24 N. C., 460; *Blanchard v. Blanchard,* 25 N. C., 108; *Morrison v. Love,* 26 N. C., 41; *Chasteen v. Phillips,* 49 N. C., 461; *Grier v. Rhyne,* 67 N. C., 340; *Hilliard v. Phillips,* 81 N. C., 105; *Farrior v. Houston,* 100 N. C., 373; *Presnell v. Landers,* 40 N. C., 256; *Gilliam v. Bird,* 30 N. C., 286; *Jones v. Austin,* 32 N. C., 21; *McCanless v. Flinchum,* 98 N. C., 365.

JOHN OSBORN v. ENOCH H. CUNNINGHAM.

Joint Obligors—Contribution.

If two joint obligors be sued, and one of them give bail, such bail cannot, upon being compelled to pay the debt by proceedings against him as such, sustain an action against the other obligor for money paid to his use, there being no privity between the bail of one obligor and his co-obligor.

ASSUMPSIT for money paid by the plaintiff for the use of the defendant, tried at BUNCOMBE on the last circuit, before his Honor, *Pearson, J.*

The plaintiff read in evidence a note under seal for about $300, signed by the defendant and one Patton as joint obligors; and then proved that after one-half of the note had been paid a writ was issued against Patton and the defendant for the balance, and the plaintiff became the bail of Patton in that suit; that judgment was rendered against Patton and the defendant; that Patton left the country, and thereupon proceedings were regularly taken against the plaintiff as his bail; upon which judgment was rendered against him for $162, which he was compelled by execution to pay. This action was brought to recover the amount so paid from the defendant, the co-obligor. The defend-
(560) ant offered to prove that he had paid one-half of the debt before the creditor brought suit; but his Honor was of opinion that the plaintiff had not made out a case to entitle him to recover, for that there was not such a privity existing between the plaintiff, as the bail of Patton, and the defendant, as the co-obligor of the latter, as would sustain an action at law for money which he had been compelled to pay as bail. Upon this intimation, the plaintiff submitted to a nonsuit and appealed.

No counsel appeared for plaintiff in this Court.
Clingman for defendant.

DANIEL, J. The plaintiff declared in assumpsit for money paid to the use of the defendant, at his request, and the inquiry is whether the law would, in a case like this, imply a request. It is settled law that if one pays the debt of another without his request, express or implied, he cannot recover in an action for money *paid;* for the supposed debtor may have a good reason to resist the payment of the money. *Stokes v. Lewis,* 1 T. R., 20; 2 Saund., 264; Leigh's N. P., 70. The plaintiff became bail only for Patton, at his request, and for his personal benefit. In consequence whereof he has been by process of law compelled to pay the whole debt, for which the creditor had recovered a joint judgment against Patton and the defendant on their joint obligation. Had Pat-

ton, merely from his relation of co-obligor, any agency or authority to request the plaintiff to pay the joint debt, so as to subject the defendant to this action for money paid to his use? We can find no authority for such a position. The law will certainly imply a request to pay on behalf of Patton, who was the principal in the bail bond, but not on behalf of the defendant, who was not a privy, but is a mere stranger to that transaction. It seems to us that the opinion of the judge was correct, and therefore the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Carter v. Black, 561, *post; Foley v. Robards,* 25 N. C., 178; *Jackson v. Hampton,* 32 N. C., 582; *Hanner v. Douglas,* 57 N. C., 266.

(561)

MITCHELL CARTER v. PLEASANT BLACK.

Guarantor—Surety—Contribution.

Where a single bill was executed by a principal and surety, and afterwards another person, at the instance of the agent of the holder, but without the knowledge and assent of the makers, guaranteed the bond by endorsing upon it "this is a good bond," and signing his name: *It was held,* that he could not, upon being compelled to pay the bond, recover from the surety as for money paid to his use, because he was not a regular endorser, and having become a guarantor without any express request from the makers, the law would imply no request, and the payment of the bond under compulsion was of his own seeking.

THIS was an action of *assumpsit,* in which the plaintiff declared in the several money counts. Plea—*the general issue;* and on the trial at Rockingham, on the last circuit, before his Honor, *Judge Bailey,* the jury found the following special verdict, to wit: "That Pendleton Jones executed his bond to Thomas Smith, with the defendant, his security, in the town of Madison, in this State, on 4 November, 1837, payable on 15 January, 1838, for the sum of $700; that said Smith resided in the county of Wythe, Virginia, and took with him the said bond to his residence, and offered the same to the sheriff of Wythe County, in part satisfaction of two executions which were then in his hands against said Smith, in favor of one Thomas J. Boyd, which the plaintiff refused to receive without the name of some responsible person who lived in the same county; that the sheriff of Wythe County made known this fact to Carter, the plaintiff, who stated that to accommodate Smith he would join in said paper, as he knew there was no danger—*that Black*

was good; that the plaintiff then made this endorsement on said bond, to wit: *This is a good bond* (signed) Mitchell Carter; which bond was then assigned by Smith to Boyd, and received by Boyd in part satisfaction of the executions in his favor. They further find that said bond was lost or destroyed, and that the same was paid by the plaintiff to Boyd under an execution on 11 February, 1839, against the plaintiff Carter; and that the plaintiff commenced this suit without calling on the defendant for payment or giving him notice thereof.

(562) "The jury further find that by the laws of Virginia, bonds and notes are negotiable and transferable by endorsement, and that at the time of the endorsement by the plaintiff, the defendant was not present and knew nothing of it, and that there was no express request by the defendant to make such endorsement.

"The jury further find that if the law upon this statement of facts be with the plaintiff, they find all the issues in favor of the plaintiff, and assess his damages to eight hundred and ten dollars and seventy-one cents, of which sum seven hundred and seventy-seven dollars is principal money."

His Honor being of opinion, upon this special verdict, that the plaintiff was not entitled to recover, gave judgment of nonsuit, from which the plaintiff appealed.

J. T. Morehead for plaintiff.
No counsel appeared for defendant in this Court.

DANIEL, J. In the case of *Osborne v. Cunningham,* decided at this term, we have said that *assumpsit* for money paid will not lie where one person pays the debt of another without his request, express or implied. In the case before us, the jury have found that there was no express request. The question then is, Will the law imply a request? The counsel for the plaintiff assimilates the case to that of an endorser on a bill of exchange or promissory note, who has paid all and taken up the paper, or who has paid part; he may maintain *assumpsit* for money paid to the use of the acceptor of the bill or drawer of the note. *Pownall v. Ferrand,* 13 Engl. C. L., 230. The answer to this argument is that the endorser of a bill or note is considered in law a surety. A bill is an undertaking by the acceptor, and a note by the drawer, to pay the sum named at all events; and each subsequent party, by his endorsement, undertakes to pay it upon the default of any prior party. Hence, by the nature of these instruments, each subsequent party is a surety for every prior one. Theobald on Prnicipal and Surety, 180; Fell on Guarantees, 203. But the plaintiff was not a regular endorser—he was a mere volunteer, or placed his name on the bond only at the instance

of the agent of the then holder. As to compulsion of law in (563) paying the debt, it was a compulsion of the plaintiff's own seeking, which arose out of his own voluntary act, and the case is not like *Exall v. Partridge,* 8 T. R., 308, when the money was paid by the party under compulsion of law, to redeem his property from a distress not of his own creation. *Cumming v. Forrester,* 1 Maul. & Selw., 494. The defendant has derived no benefit from the act of the plaintiff; the bond is not extinguished, and although said to be lost, a court of law cannot take an indemnity from the plaintiff. We think, in this case, the law does not imply a request to pay, and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Carter v. Jones, 40 N. C., 199.

WILLIAM WHITE v. GEORGE WHITE.

Parol Sale of Slaves—Good Between Parties.

A parol sale and delivery of a slave, made by the tenant for life and remainderman is valid; for the Act of 1784, 1 Rev. Stat., ch. 37, sec. 19, does not prevent a parol conveyance of slaves from being good between the parties thereto; but if it did, the Act of 1792, 1 Rev. Stat., ch. 37, sec. 19. declares *bona fide* sales of slaves, accompanied by delivery, good without a bill of sale, and the Act of 1819, 1 Rev. Stat., ch. 50, sec. 8, to avoid parol contracts for the sale of lands and slaves, does not affect the question, as that act applies to executory contracts only, and not to contracts executed.

DETINUE for two slaves, Lucy and Baccus, tried at Iredell on the last circuit before his Honor, *Judge Dick.*

The plaintiff claimed the slaves in question under the will of his father, John White, deceased, who bequeathed the woman Lucy to his wife for life, and after her death to the plaintiff. For the plaintiff it was proved that Lucy and Baccus were in the defendant's possession, and that the action had been brought within less than three years from the death of the testator's widow; and further, that Baccus was a child of Lucy, born after the defendant had taken her into possession.

For the defendant, it was then proved that the testator was in- (564) debted, in his lifetime, to one Robert Simonton, and for the purpose of securing the debt mortgaged to him the woman Lucy and another girl; and that after the testator's death his widow and the plaintiff, to discharge the said debt, sold and delivered Lucy to Simonton, from whom the defendant afterwards purchased her.

His Honor charged the jury that if they believed from the evidence that the testator's widow and the plaintiff together sold and delivered the woman Lucy to Simonton, the title passed to Simonton, although there was no bill of sale, and that the plaintiff was not entitled to recover. The plaintiff, in submission to this opinion, suffered a nonsuit and appealed.

Badger for plaintiff.
Boyden for defendant.

GASTON, J. We assent entirely to the opinion expressed in the court below. On common-law principles we see no ground upon which the plaintiff can invalidate the sale made by himself and the tenant for life. It is not affected by the act of 1784, 1 Rev. St., ch. 37, sec. 19, because under that act a parol conveyance of slaves is good between the parties thereto. If it were not, the act of 1792, 1 Rev. St., ch. 37, sec. 19, declares *bona fide* sales of slaves, accompanied by delivery, good without a bill of sale. The act of 1819, to avoid parol contracts for the sale of lands and slaves, did not go into operation until 1 January, 1821; and if it had been in operation before the sale in question, it would not have applied thereto, for executed contracts are not embraced within its purview. *Choat v. Wright,* 2 Dev., 289; *Mushat v. Brevard,* 4 Dev., 73.

PER CURIAM. Judgment affirmed.

(565)

MILTON BROWN v. GIDEON F. MORRIS.

Excessive Damages—New Trial—Appeal.

1. The Superior Courts may grant a new trial on the ground of excessive damages, but that is a matter exclusively within their jurisdiction and cannot be revised on appeal.
2. A refusal of the judge to give a more specific instruction asked by a party, and to which he is entitled, may constitute error, but a *mere* omission to do so, when not asked, does not.
3. The cases of *Hairston v. Young,* 14 N. C., 55; *Simpson v. Blount, Ibid,* 34, and *Torrence v. Graham,* 18 N. C., 284, approved.

THIS was an action of assumpsit, in which the plaintiff declared that in consideration of the sum of one hundred dollars, paid by him to the defendant, the latter undertook and promised to put him in possession of a certain plantation with the improvements, then occupied by one Dobbs, a Cherokee Indian, who was about to emigrate to the west, and

to procure for him a certificate from Benjamin F. Curry, the United States agent for superintending the emigration of the Cherokee Indians, and alleged as a breach that the defendant had failed to procure this certificate. Plea—*the general issue.*

Upon the trial at Macon, on the last circuit, before his Honor, *Judge Pearson,* after the plaintiff had proved the contract, the defendant proved that when Dobbs left the country he, the defendant, purchased from him his improvement or "good will," as it was called; that some few weeks afterwards he applied to the Indian agent for a certificate; but the agent declined giving it to him, observing that "he had in a manner quit giving certificates, and that as the Indian was gone, it was unnecessary"; that he notified the plaintiff of this fact, and offered to put him into possession; but the plaintiff declined taking possession without a certificate, saying that if he was disposed to run the risk, he might take possession of any other Indian improvement without paying for it, but that he would not do so; and as the certificate could not be procured, he insisted on having his money back. The defendant proved also that Dobbs's improvement had continued vacant and unoccupied until the State of North Carolina took possession of the country.

The plaintiff then introduced evidence to show the nature and (566) advantages of the certificates which the Indian agent, both before and after this transaction, was in the habit of giving, though it did not appear that there was any act of Congress or regulation in any of the departments of the Government of the United States in relation to them.

His Honor charged the jury "that if the evidence satisfied them that the defendant had undertaken to procure the certificate, and had failed to do so, the plaintiff was entitled to a verdict; that the amount of damages was a question for them; that the law implied that some damage was sustained by the breach of any contract; but unless the evidence satisfied them that the plaintiff had sustained real damage, it was their duty to find merely nominal damages; that the burden of proof lay upon the plaintiff, and it was for him to show the amount of damage to the satisfaction of the jury; otherwise they should, in such cases, find but a penny." The jury found a verdict for the plaintiff, and assessed his damages to fifty dollars. The defendant thereupon moved for a new trial, because the jury had found damages to the amount of $50, when the evidence only justified a verdict for nominal damages. This motion was overruled; and the defendant then submitted another motion for a new trial, because the court had not instructed the jury that there was no evidence to justify a verdict for more than nominal damages. This motion being also overruled and judgment pronounced, the defendant appealed.

No counsel appeared for defendant in this Court.
Clingman for plaintiff.

GASTON, J. On examination of the record in this case, we perceive no ground for reversing the judgment rendered below.

It is not in our power to revise the verdict of the jury on the question of damages. The Superior Court may grant a new trial on the ground of excessive damages, but that is a matter exclusively within their jurisdiction. *Young v. Hairston,* 3 Dev., 55.

(567) If we were to concede to the defendant that upon the evidence the plaintiff had a right to nominal damages only, there is no error in the charge of the judge, for, certainly as far as it goes, it is as favorable as the defendant could have asked. If he had required a more specific instruction to which in law he was entitled, and the court had declined to give it, he might then have assigned the refusal as error. A refusal may constitute error, but *mere* omission does not. *Simpson v. Blount,* 3 Dev., 34; *Torrence v. Graham,* 1 Dev. & Bat., 284. The judgment is affirmed with costs.

PER CURIAM. Judgment affirmed.

Cited: Terry v. R. R., 91 N. C., 242; *S. v. Bailey,* 100 N. C., 534; *Willey v. R. R.,* 96 N. C., 411; *McKinnon v. Morrison,* 104 N. C., 363; *Goodson v. Mullen,* 92 N. C., 212; *Emry v. R. R.,* 109 N. C., 602; *Edwards v. Phifer,* 120 N. C., 406; *Benton v. R. R.,* 122 N. C., 1010.

THOMAS S. DEAVER v. JOSEPH M. RICE, ADMR. OF JOHN A. SORRELL.

Landlord's Lien on Crop.

1. A landlord has no lien in this State on the crop of his tenant for his rent, though it may be reserved in kind, or in a part of the crop. Whether such agreement is contained in, or is out of, the lease, the lessor stands upon no better footing than the other creditors of the lessee.

2. Upon a lease for a year, the lessee acquires an estate in possession in severalty during the term, so that the crop growing or standing on the land is entirely his property; and if an execution in favor of a third person be issued against the tenant during the year, it will bind the crop from his *teste,* so that he cannot afterwards sell it to another, or assign it, or any part of it, to his landlord in payment of his rent.

THIS was an action trespass *vi et armis,* tried at Buncombe, on the last circuit, before his Honor, *Judge Pearson,* when the case appeared to be as follows:

The plaintiff leased a tract of land to one Ruth for the term of one year, to wit, the year 1836; and the lessee, instead of a money rent, agreed to give the lessor one-third of the grain made on (568) the land, if he worked it well; if not, then five hundred bushels of corn. The lessee entered and made a crop on the land. At July Term, 1836, of Buncombe County Court, a judgment was obtained against the lessee, and an execution issued tested of the same term; and in October following, the sheriff levied the same on a field of corn standing on the demised premises, as the lessee's property, and sold the same, when the defendant's intestate became the purchaser. Before this levy and sale, to wit, in the month of August in the same year, the lessor and lessee had come to an agreement that the lessor should take the corn standing in this field for his rent. The defendant's intestate, after his purchase, entered into the field, gathered the corn and carried away two-thirds of it, for which the plaintiff brought this action.

His Honor charged the jury, first, that when the rent was reserved in kind, or in a part of the crop, the law gave the landlord a lien upon the crop in preference to all other creditors. Secondly, that the allotment to the plaintiff of the corn in this particular field, if done *bona fide,* was valid, and vested the title to the same in the plaintiff, the lessor, notwithstanding the *teste* of the execution was before the said agreement. There was a verdict and judgment for the plaintiff, and the defendant appealed.

Clingman for defendant.
No counsel appeared for the plaintiff in this Court.

DANIEL, J., after stating the case as above, proceeded as follows: As to the first branch of the judge's charge, we must confess that we are unacquainted with any law of this State which gives to the landlord a lien on the crop of his tenant where the rent, instead of money, is agreed by the parties to be paid in kind or in a part of the crop. The lessor, whether such an agreement is contained in or is out of the lease, stands upon no better footing than the other creditors of the lessee; he has no lien or any other particular privileges that we are aware of. The English law of distress and sale for rent by the landlord has never been in use and practice in this State. Such an agreement is but a chose in action. Secondly, we are of the opinion that Ruth, by virtue (569) of the lease to him, had an estate in possession in severalty during the term, and the plaintiff had the reversion. The crop growing or standing on the land was entirely the lessee's property at the *teste* of the execution. This case is not like that of *S. v. Jones,* 2 Dev. & Bat., 360. In that case, the owner of the land had never made a lease, and

the entire property in the staves was in the owner of the land on which grew the timber out of which the staves were made. Here there was a lease, and the term and the entire crop on the land was in the lessee. The plaintiff's claim, either for the one-third of the grain which should be made on the land, or the corn standing in the particular field, rested only in agreement or contract. There being no partition or separation of any portion to the plaintiff out of the general mass of the crop before the *teste* of the execution, the whole crop belonged in law to the lessee at that period, and the execution bound the property in the hands of Ruth, and all others claiming under him, from the *teste*. *Den on dem. of Stamps v. Irwin,* 2 Hawks, 232; *Gilkey v. Dickerson,* 2 Hawks, 341; *Bickerdike v. Arnold,* 3 Hawks, 296. The plaintiff claims under Ruth, by an agreement made after the *teste* of the execution. The plaintiff, although the landlord, was bound by the execution against his tenant.

We are of the opinion that the judge erred in his charge to the jury on both points raised in the cause.

The judgment must be set aside and a new trial granted.

PER CURIAM. Judgment reversed.

Cited: Ross v. Swaringer, 31 N. C., 483; *Biggs v. Ferrell,* 34 N. C., 3; *Harrison v. Ricks,* 71 N. C., 11; *Haywood v. Rogers,* 73 N. C., 321; *Howland v. Forlaw,* 108 N. C., 569.

Dist.: Gordon v. Armstrong, 27 N. C., 410; *Kornegay v. Collier,* 65 N. C., 72.

NOTE.—This is otherwise now by statute, The Code, sec. 1754.

(570)

ALFRED HAFNER v. JOHN IRWIN ET AL.

Deed—Construction.

1. Where the whole interest in property is conveyed to one person in the premises of a deed, but in the *habendum* is limited to another, the latter is repugnant to the former and void, and the property is vested in the grantee named in the premises, who may consequently maintain an action for it in his own name.

2. If the name of a grantee appear first in the *habendum* of a deed it will be good, provided there was not another grantee named in the premises, or if there were, provided the estate given by the *habendum* to the new grantee was not immediate, but by way of remainder.

THIS was an action of *trover,* brought by the plaintiff to recover of the defendants damages for the conversion of certain articles mentioned in a deed in trust, executed by one Thomas Dwight.

On the trial at Mecklenburg, on the last circuit, before his Honor, *Judge Dick,* the deed in trust was produced and proved. It commenced in the following terms: "Know all men by these presents that I, Thomas Dwight, of the county of Mecklenburg, State of North Carolina, of the one part, and Alfred Hafner, of the other part, witnesseth: That the said Thomas Dwight, for and in consideration of ten shillings to him in hand paid, and also in further consideration of the benefit and trust hereinafter mentioned, have bargained and sold, and delivered unto the said Alfred Hafner, his heirs, executors, etc., the following property": And after enumerating many articles, all of personal property, it continued: "To have and to hold, unto the said M. W. Curry, his heirs and assigns forever, in trust and confidence for the purpose now mentioned," etc., and was signed and sealed by the said Dwight and the plaintiff Hafner.

His Honor was of opinion that the plaintiff could not, under this deed, sustain the action in his own name, and he was accordingly nonsuited, and appealed.

Barringer, Boyden, and Hoke for plaintiff.
No counsel appeared for defendant in this Court.

DANIEL, J. The authorities cited by the plaintiff's counsel (571) show clearly that the judge erred when he decided the plaintiff could not sustain an action of trover in his own name to recover the value of the articles mentioned in the deed, if they were converted by the defendants. Dwight, in the premises of the deed, bargained and sold the property to the plaintiff, his heirs, executors, etc. However, in the same deed, the habendum is to M. W. Curry, his heirs and assigns, in trust, etc. All the parts of a deed which precede the habendum, taken together, are called the premises, of which it is said the office is rightly to name the grantor and grantee, and to comprehend the certainty of the thing granted. But though the grantee should first be named in the habendum, the grant to him will yet be good, provided there was not another grantee named in the premises. Co. Lit., 26, b. note; or if there were, provided the estate given by the habendum to the new grantee was not immediate, but by way of remainder. The habendum part of a deed was originally used to determine the interest granted or to lessen, enlarge, explain or qualify the premises. But it cannot perform the office of divesting an estate already vested by the deed, for it is void if it be repugnant to the estate granted in the premises. 2 Bla. Com., 298; *Goodtitle v. Gibbs,* 5 Barn. & Cress., 709; 4 Kents' Com., 468. *Chancellor Kent* remarks that in modern conveyancing the habendum clause in deeds has degenerated into a mere useless form, for the premises contain the names of the parties and the

specification of the thing granted, and the deed becomes effectual without any habendum. In the case before us, the whole interest in the property is granted and conveyed to the plaintiff in the premises of the deed. The same interest being afterwards limited in the habendum to Curry, makes that part of the deed repugnant to the premises, and therefore void. The judgment of nonsuit must be set aside, and a new trial granted.

PER CURIAM. Judgment reversed.

Cited: Midgett v. Brooks, 34 N. C., 148; *Blackwell v. Blackwell,* 124 N. C., 271.

(572)

ALEXANDER DONALDSON v. JOHN BENTON.

Bank Notes—Legal Tender—Parol Evidence.

1. Bank notes are not a lawful tender in fulfillment of a contract to pay money.
2. Parol evidence is not admissible to vary, explain or contradict an agreement in writing.

THIS was an action of assumpsit, brought to recover damages for a breach of contract in not delivering hogs. The plaintiff alleged, upon the trial at Buncombe, on the last circuit, before his Honor, *Judge Pearson,* that he had purchased of the defendant a drove of two hundred and sixty hogs, for which he was to pay at the rate of $6.12½ gross, the hogs to be weighed and delivered in Asheville, but the price, except $100, which was paid at the time of the contract, not to be paid until he should sell the hogs in Columbia, S. C., and that the defendant had failed to deliver the hogs in Asheville. The plaintiff, in support of his case, offered in evidence a receipt for the $100, in the following words:

Received of Alexander Donaldson one hundred dollars in part pay of two hundred and sixty hogs, to be delivered at six dollars and twelve and one-half cents gross. This 16th of November, 1836.

(Signed) ALEX'R. DONALDSON.
JOHN BENTON.

Test: C. W. LATHAM.

And a paper-writing, under seal, purporting to be articles of agreement, in the words following, to wit:

Articles of agreement made and entered into this day: Whereas Alexander Donaldson binds himself, his heirs and assigns to pay or cause to be paid to John Benton six dollars and twelve and one-half

cents gross, at Asheville, N. C., for two hundred and sixty hogs, when delivered. Witness my hand and seal, this 16th of November, 1836.

(Signed) JOHN BENTON. (Seal.)
ALEX. DONALDSON. (Seal.)

Test: C. W. LATHAM.

Both the receipt and the articles of agreement were executed (573) at the time when the contract was made, and the plaintiff kept the receipt and the defendant the articles of agreement.

His Honor intimated an opinion that the action should have been covenant, but reserved the point and permitted the plaintiff to proceed; and he then proved that the defendant had the hogs in Asheville at the time agreed on; that he requested the defendant to have them weighed and delivered; in reply to which the defendant asked him if he was ready to pay the money. The plaintiff replied, "Our agreement was that the money was to be paid in Columbia, when I sold the hogs, and I was to pay your expenses to go there and receive it." The defendant then said, "I must have the money here; if I go to Columbia, I take the hogs there as my own." The plaintiff then tendered the defendant the money in North Carolina bank notes, but he refused to take bank notes, except Kentucky bills or specie, saying that North Carolina notes would not do for him in Kentucky. The plaintiff was unable to procure specie or Kentucky bills, and the defendant drove the hogs to the South and sold them.

His Honor then intimated an opinion that the plaintiff had not made out his case, for that the "defendant had a right to require specie or Kentucky bills, in Asheville, at the time the hogs were to be delivered, and was not obliged to accept the North Carolina bills; that the evidence tending to show that the money was not to be paid until the hogs were taken to Columbia and sold was not admissible to vary, explain or contradict the agreement in writing." Upon these intimations the plaintiff submitted to a nonsuit and appealed.

No counsel appeared for the plaintiff in this Court.
Clingman for the defendant.

GASTON, J. It cannot be contended that bank notes are a lawful tender, and it is equally plain that parol evidence is not admissible to contradict the written agreement. The opinion of the judge is so obviously right upon both these points—each of which is fatal to the plaintiff's recovery—that it necessarily follows that the judgment must be affirmed with costs. (574)

PER CURIAM. Judgment affirmed.

Cited: Thomas v. Lines, 83 N. C., 197; *Elliot v. Whedbee,* 94 N. C., 119.

DEN ON DEM. OF GEORGE ZOLLICOFFER ET AL. v. JULIUS H. ZOLLICOFFER.

Construction of Will.

1. Where a testator devised a certain tract of land to his eldest son, and the balance of his lands to his widow and other sons, and bequeathed his slaves to his widow, all his sons and his daughter, and in a subsequent clause directed as follows: "At the death of my said wife, all the land and negroes that may fall to her shall return to J. Z." (one of his sons), "and in case of the death of either of my aforesaid children without a lawful heir begotten of his or her body, that then his or her part shall be equally divided among the survivors": *It was held*, that upon the death of J. Z. without children, subsequent to the death of the widow, all the lands which he acquired under his father's will, both that part which was given to him immediately and that which was limited to him after the death of his mother, went over to his surviving brothers and sister, and that the limitation was not too remote.
2. The case of *Jones v. Spaight*, 4 N. C., 157, approved.
3. Since the Act of 1784 (see 1 Rev. Stat., ch. 43, sec. 1), for converting estates tail into estates in fee simple, executory limitations of land and chattels are to be construed alike, upon the presumed intention of the testator that in each case the estate should go over on the same event.

THIS was an action of ejectment tried at Halifax, on the last circuit, before his Honor, *Judge Saunders,* when the jury found a verdict for the lessor of the plaintiff by the consent of the parties, subject to the opinion of the Court upon the following case reserved, to wit:

"George Zollicoffer, by his will, made the 2d of February, 1799, after devising some part of his lands to his eldest son, devises in these words: 'Thirdly, my will and desire is that all the rest of my land except that which is heretofore named shall be divided into four equal lots, (575) and my beloved wife, Ann Zollicoffer, have the privilege of taking her first choice of the said lots, and then that my three sons, George Zollicoffer, James Zollicoffer and Julius Hieronimus Zollicoffer, draw for the remaining three lots by seniority.' By the next clause, the testator directs a division of his negroes, etc., amongst his wife and children, the before-named sons and John Jacob Zollicoffer and a daughter, and then follows this clause: 'At the death of my said wife, all the land and negroes that may fall to her shall return to James Zollicoffer, and in case of the death of either of my afore-named children without a lawful heir begotten of his or her body, that then his or her part shall be equally divided among the survivors.' After the death of the testator the lands were divided according to the clause of the will first above mentioned, and the premises described in the declaration were chosen by the widow as her lot. In February, 1833, the widow

died; and on 6 April, 1836, James Zollicoffer died, without leaving issue, but leaving the lessors of the plaintiff and the defendant, his brothers and sister, him surviving. After the death of the widow, and before the death of James, to wit, on 19 February, 1833, the said premises were sold by the sheriff under executions issued upon judgments obtained against the said James, and were bought by the defendant and duly conveyed to him. If, upon the foregoing facts, the defendant is seized of the whole, then judgment to be entered for him; but if the lessors of the plaintiff are entitled to undivided fourth parts, then judgment to be entered for them." His Honor being of opinion, upon the above case, for the lessors of the plaintiff, gave judgment for them, and the defendant appealed.

Badger and B. F. Moore for defendant.
Iredell for the lessors of plaintiff.

RUFFIN, C. J. The defendant contends that upon the death of the mother the whole estate in the premises vested absolutely in James for two reasons: The one, that the testator did not intend to include the premises in the limitation over to the survivors; the other, that if he did so intend, the limitation over is too remote. (576)

The expression, "his or her part," is broad enough in its obvious signification to cover everything bestowed on each child by the will, and must be so understood, unless controlled by the words or apparent intent of other parts of the instrument. We have looked through it and do not find anything to restrain the operation of the expression to any particular portion of "the part" of the testator's estate given to his children respectively; but, on the contrary, it seems to have been used in an unrestricted sense. The testator had four sons and one daughter. By the three first clauses of his will he disposes of his real estate, giving a particular tract to his eldest son, and the residue to his wife and three other sons, equally to be divided between them. Then the fourth clause, in the first place, gives the negroes and all the other personal estate to the wife and the five children, to be divided equally between them; and in the next place, gives to James, upon the death of his mother, the land and negroes given to her. Then in the same clause is immediately added, as it were by way of proviso to the whole, that upon the death of either of *the children,* his or her *part* shall go to the survivors. This ends the instrument, and shows that no positive equality between the children was intended, as the daughter, for instance, comes in for a share of the land of a brother dying childless, although the will gives her no original share of land to which the brothers would succeed upon her death. Besides, following, as this provision does, so

immediately after the gift of the remainder to James, there would have been some plain indication of the intention to exclude that remainder from its operation, if such an intention had existed.

Upon the second point, our opinion is also against the defendant. We do not, indeed, recollect that any will has been before the Court in which real estate was given over to "a survivor," upon the death of the first taker, without issue or heir of the body. But although there may have been no direct determination as to the effect of that phrase, we have a principle established by adjudication upon cogent reasoning which covers this case and sustains the limitation. It is ad-
(577) mitted that in England these words would undoubtedly create an estate tail, and therefore import an indefinite failure of issue. But they there receive a different construction in dispositions of personalty, and the term "survivor" ties up the failure of issue to the life of one then in being. *Hughes v. Sayer,* 1 Pr. Wms., 534; *Nichols v. Skinner,* Prec. in Chan., 528. Now, in *Jones v. Spaight,* 1 Car. Law Rep., 544, it was held contrary to the rule, as it may be called, of *Forth & Chapman,* that a devise over of land upon the death of the first taker, "without leaving issue," was good. It was so held, because the reason for taking those words in an artificial and technical sense, in regard to land, did not exist here since the abolition of entails, more than in regard to chattels. Therefore, in a devise of land, we must receive them in their natural sense, as they had before been received in both countries in personal bequests. The principle of *Jones v. Spaight* is that since 1784, executory limitations of land and chattels are to be construed alike, upon the presumption that the intention of the testator is that in each case the estate should go over on the same event; and as the limitation over of chattels on that event is sustained, so ought that of realty also. That principle is decisive of this case.

It may also be noticed, that although in this State there has been no case turning on the word "survivor," yet the point is not new in this country. In New York it is settled that "leaving," "survivor," and the like, are to be understood alike when applied to both kinds of property, and that for the same reasons which were assigned in *Jones v. Spaight. Fosdick v. Cornell,* 1 John Rep., 439; *Anderson v. Jackson,* 16 John. Rep., 381.

PER CURIAM. Judgment affirmed.

Cited: Threadgill v. Ingram, 23 N. C., 579; *Spruill v. Moore,* 40 N. C., 287; *Ward v. Jones, id.,* 406; *King v. Utley,* 85 N. C., 61.

(578)

REBECCA NORWOOD v. ALEXANDER F. MARROW ET AL.

Deed in Trust—Usury—Dower—Estoppel—Insanity.

1. A deed for land, executed by a husband in trust to secure a usurior debt, is void as against his widow's claim to dower, and she is not bound to await the action of the heirs to regain the possession from one holding adversely under the deed.

2. One claiming under a husband is estopped from showing title out of the husband and in a third person, to defeat the wife's claim of dower, nor can he, for such purpose, avail himself of a conveyance obtained from such third person subsequently to the commencement of the suit and his plea thereto.

3. A deed in trust, executed by a husband, but not proved and registered until after his death, operates, nevertheless, by relation to the time of its execution to defeat the widow's claim of dower; for the Act of 1829, ch. 20 (1 Rev. Stat., ch. 37, sec. 24), which prescribes that deeds in trust shall not operate against creditors and purchasers but from their registration, does not apply to the widow's claim of dower, she being, with respect to such claim, neither a creditor or purchaser.

4. A trustee who has acted by selling the trust property, and has retained his commission for so doing, may be a witness in support of the deed in trust, if he has conveyed the property without covenants or responsibility.

5. The declarations of a party connected with his conduct, the next day after the execution of a deed, are admissible in evidence, not for the purpose of establishing the truth of the things declared, but to show from them that the party was then insane, in order that the jury may thence infer, if they should think such inference fair and proper, that he was so at the moment when the deed was executed; and this particularly when a ground has been laid for the introduction of the testimony by showing that the party was at times insane previous to the execution of the deed.

6. The case of the *State v. Scott*, 8 N. C., 24, commented upon and distinguished from this case.

7. The attention of this Court, upon an appeal, is more properly given to such errors as are allgd by the party who appeals. But where the case states all the facts in relation to a question decided against the appellee, which, if decided for him, would render the errors of which the appellant complains immaterial, then the Court will consider such question, because, if that was improperly decided, the verdict and judgment ought not to be disturbed, as upon the whole case they are right.

8. The case of *Shober v. Hauser*, *ante*, 222, approved.

9. For feudal reasons, a widow holds her dower of the heir or of the person in whom is the reversion of the land assigned for dower. But in the point of title her estate is considered as derived from and a continuation of that of the husband; and although between the death of the husband and the assignment of dower a seizing of the heir or of another

person intervenes, yet upon the assignment she is in by relation from the death of the husband.

10. She does not require the assistance of the heir; but brings her action against any person who has the freehold, whether that be the heir or any other. She may sue a disseizor, abator or intruder, and hence these persons, although holding the freehold by wrong, may assign her dower, and thereby bind those who have the right.

11. If a husband make a voidable alienation, and do not avoid it during his life, there can be no title of dower, because he had not the seizin at his death. But if the deed be void, the seizin remained in the husband, and the right of dower attached thereto.

12. Where both parties claim under the same person, the title of that person is not to be disputed between them, unless one of them can show a better title in himself.

13. A deed executed by a husband, but not registered until after his death, operates by relation from the time of its execution to bar the wife's claim of dower.

THE plaintiff filed her petition in the Court of Pleas and Quarter Sessions for the county of Granville, alleging that her late husband, William A. Norwood, had died seized in fee simple of a certain tract of land situate in the said county of Granville, and praying that she might have dower assigned in the same. To this petition Alexander F. Marrow, the terre-tenant, and the heirs at law of the said William A. Norwood were made parties defendants, of whom Marrow, the terre-tenant, alone answered. He denied the seizin of the husband at the time of his death; whereupon an issue was made up, to be submitted to a jury, whether William A. Norwood, the late husband of the petitioner, was seized at the time of his death of the tract of land mentioned in the petition? After a verdict in favor of the petitioner in the county court, the defendant Marrow appealed to the Superior Court, in which, on the last circuit, before his Honor, *Judge Bailey,* the issue came on to be tried, when it was admitted by the defendant Marrow that before and up to 28 September, 1835, William A. Norwood was seized and possessed in fee simple of the premises; and in order to show title and seizin out of him, the defendant gave in evidence the following deeds, to wit: 1. A deed of 28 April, 1835, from said Norwood
(580) to one Jabez Duty, as a trustee, to secure and pay a debt therein mentioned as due to James R. Duty. 2. A deed from said Norwood to Richard Sneed, Robert Jenkins and Edward Norwood, dated 23 February, 1836, in trust for the payment of his debts. 3. A deed from said Sneed, Jenkins and Edward Norwood to the defendant Marrow, dated 10 March, 1836. 4. A deed from the said Jabez Duty to the said Marrow, dated 8 March, 1839. It was admitted by the petitioner that the deeds aforesaid covered and purported to convey the premises

in question, but she alleged that the deeds to Jabez Duty and to Sneed and others were void; the first, because the debt which that deed was made to secure was affected with usury; and the second, because the said William A. Norwood at the time of its execution was *non compos mentis*. In regard to the first, she called as a witness the said James R. Duty, who proved that, previous to the execution of that deed, the said Norwood was indebted to him in several sums of money, in some one or more of which was included interest at a greater than the legal rate of 6 per centum, and that the said debts were reduced into one, and the deed taken to secure it.

In regard to the second, the petitioner called several witnesses who stated that for some time previous to its execution William A. Norwood had been greatly addicted to drinking, and was habitually intemperate, and that his mind was thereby impaired; and his family physician stated that some two or three months previous to the execution he had received a severe blow on the head, which had affected his mind; that since that time he had given himself up to drinking; that for some time before the deed was executed his mind, when he awoke in the morning, was much wanting in energy, and incapable of business; but that after taking a moderate portion of stimulus his powers rallied and he became fully possessed of his understanding, and continued capable of transacting business unless (which was generally the case, and was the case the evening before the deed was executed) he continued to drink, in which event he became in the afternoon incapable of business again from intoxication. Upon cross-examination, this witness stated that he saw Norwood the morning the deed was executed and just before its execution, and that he was then in possession of his (581) reason and capable of transacting business.

The petitioner's counsel then offered to call witnesses to prove the said Norwood's "declarations connected with his conduct" the day succeeding that on which the deed was executed, in order that the jury might, from these, with his previous conduct, etc., infer that he was *non compos* on the day of the execution of the deed. To this evidence the defendant's counsel objected, and the court sustained the objection and excluded the testimony.

The defendant then called the two subscribing witnesses to the deed, who testified that they had been long and intimately acquainted with William A. Norwood; that he had been, for some months previous to the execution, much addicted to intoxication, but that, except when drunk, his mind was quite adequate to the proper transaction of business; that when the deed was executed he was not drunk, but fully possessed of his understanding; that the deed was read to him, and he fully understood its purpose before its execution.

The defendant then called Richard Sneed, one of the trustees named in the deed. To this witness the petitioner's counsel objected as incompetent on the score of interest; and the witness, in answer to questions put by the petitioner's counsel, stated that he had accepted and acted under the deed—sold and conveyed the property, and paid the debts, having, with the other trustees, first retained and applied to his own use the commissions given by the deed; and thereupon the counsel insisted that though the witness had not joined in any warranty or covenant against encumbrances to the defendant Marrow, yet, by accepting the trust, and acting in its execution, he had rendered himself liable to actions, and was interested to support the deed. His Honor overruled the objection and allowed the witness to be examined. This witness testified that he had long been a neighbor of and well acquainted with the said Norwood; that Norwood had been for some time very much involved in debt, though possessed of considerable real and per-
(582) sonal estate; that some weeks before the deed was made he was asked by Norwood to act as his agent, with Robert Jenkins, his brother-in-law, and Edward Norwood, his son, for selling his property, or as much of it as would satisfy his debts; that it was the wish of both himself and his wife (the petitioner) that the tract of land in controversy should first be sold in order, if possible, to save the negroes; that in consequence of this application the witness, with Jenkins and Edward Norwood, had, before the execution of the deed, contracted with the defendant Marrow for the sale of the land; that it was then concluded to substitute a deed of trust for a power of attorney; upon which the witness drew the deed of 23 February, 1836, according to the instructions of William A. Norwood, who fully understood its provisions, which were well known to and approved of by his family, including his wife, the petitioner, and Edward, his son; and that the said William A. Norwood executed it while in the full possession of his faculties; that a chief object of the deed was to relieve the land of the encumbrance of the debt to Duty, secured by the deed of 28 September, 1835; and that on the day after the execution of the deed of 23 February the defendant Marrow, in the presence of all the trustees therein named, paid and discharged the Duty debt, paid the residue of the purchase-money to the trustees, and was put into possession of the premises. Robert Jenkins was then called by the defendant, and after being objected to by the petitioner's counsel for the same reasons which they had urged against the admissibility of Sneed, was admitted, and gave testimony of the same import as that given by Sneed.

The petitioner's counsel then asked the judge to instruct the jury that if the evidence given by James R. Duty respecting the deed of 28 September, 1835, was true, that deed was absolutely void as against the

petitioner, notwithstanding the facts deposed by Sneed and Jenkins should be true also; which instruction the judge gave as prayed for.

The petitioner's counsel then having proved that William A. Norwood died on 28 February, 1836, before the probate of the deed of 23 February, which was on 11 March, and its registration, which was on 2 April following, insisted that the widow was, as to her (583) right of dower, a creditor within the meaning of the first section of the act of 1829, ch. 20; 1 Rev. Stat., ch. 37, sec. 24; and prayed his Honor to instruct the jury that although the said deed was executed by the said William A. Norwood when in full possession of his mental capacity, so as to pass the title and seizin out of him as against himself and his heirs from the execution thereof, yet that, as against the petitioner, the same took effect only from its registration; and that being after the death of the said Norwood, he died seized thereof, so as to entitle the petitioner to dower, which instruction his Honor refused to give. There was a verdict and judgment for the defendant, and the petitioner, after an ineffectual motion for a new trial, appealed.

W. A. Graham and Battle for petitioner.
Badger for defendant.

RUFFIN, C. J. The issue, as joined in the record, is in the most general form that is admissible: Whether the late husband of the petitioner was at his death seized or possessed of the land in which the dower is claimed? But upon the trial the defendant offered in evidence two deeds in particular, made by the husband, and insisted that one or the other of them transferred the fee and seizin from the husband; admitting at the same time, if that was not the effect of those deeds, that the plaintiff's husband did die seized.

The court held that one of those deeds, that to Duty, was void as against the petitioner, and that she was entitled to a verdict upon the issue, notwithstanding that deed. This point having been thus ruled in favor of the petitioner, would not ordinarily be a subject for reconsideration in this Court, as our attention is more properly given to such errors as are alleged by the party who appeals. But in the present instance the case embraces all the facts in relation to that deed as well as to the other, upon the idea that if that deed to Duty be legally a bar to the petitioner, the errors in respect to the second deed, if there be any, become immaterial; and consequently that the verdict and judgment ought not to be disturbed, as upon the whole case they are right. *Atkinson v. Clarke,* 3 Dev. Rep., 171. There cannot, (584) therefore, be a *venire de novo,* unless the decision upon that deed be right, and also the decision upon some of the points made respecting

the other deed be wrong. It is become thence the duty of this Court to examine the deed of 28 September, 1835.

We are of opinion that the determination of his Honor upon the trial, in respect to the first conveyance, is well founded. In *Shober v. Hauser, ante,* 91, it was held, upon full deliberation, that an instrument of this kind, affected with usury, is void against the bargainor. It did not, therefore, divest the seizin of the husband; but upon his death the land, but for the other deed, would have descended to the heir. It is said, however, that a stranger cannot impeach the deed on that ground, and that the bargainor, or his heir alone, can take advantage of it; and it is thence inferred that it is not competent to the widow to allege this objection, but that she must await the action of the heir to regain the possession from one holding adversely upon a claim under this deed. But we deem that inference unfounded, and that the contrary is the law. By the statute, the widow is dowable of all land of which her husband died seized. If the seizin remained in the husband, after he executed the deed, on account of its being void, then he did die seized, and her title to dower was perfect. Indeed, the very terms in which the issue between these parties is couched show that the material inquiry is whether the husband died seized; if he did, that is decisive of the wife's right. Nor is it true that the wife gets her dower necessarily through the heir. She claims paramount the heir. It is true, indeed, that she cannot enter until assignment made; and that in point of tenure, for feudal reasons, she holds of the heir or of the person in whom is the reversion of the land assigned for dower. But, in point of title, her estate does not arise or take effect out of the ownership of the heir or other person making the assignment, but is considered a continuation of that of the husband; and although between the death of the husband and the assignment of dower a seizin of the heir or another person intervenes, yet upon the assignment she is in by relation from
(585) the death of the husband, for "the law adjudgeth no *mesne* seizin between the husband and wife." Perkins, s. 424; Co. Lit., 241. She does not require the assistance of the heir, but brings her action against any person who has the freehold, whether that be the heir or any other. Co. Lit., 38. She may sue a disseizor, abator or intruder; and hence those persons, although having the freehold by wrong, may assign her dower, and thereby bind those who have the right. Co. Lit., 35 a, 357 b. That this must be so is evident when it is recollected that at common law the wife was entitled to dower in all land of which her husband was seized at any time during the coverture; and that his conveyance did not defeat her right. Consequently she was entitled when the heir had nothing in the land; and therefore she was obliged to assert the right for herself. It is true, that is not so in this State

except in cases of conveyances in fraud, or devises in prejudice, of the wife, because dower is only of land of which the husband died seized; and if he was seized for the purpose of dower, he was also for that of descent. Still the laches of the heir cannot hurt the widow, but she may recover against him who has the freehold, whether derived or usurped from the heir. If the husband had made a voidable alienation, and had not avoided it during his life, there would be no title of dower, because he had not the seizin at his death. But if the deed be void, the seizin remained in the husband, and the right of dower attached thereto. *Machel v. Clarke,* 2 Ld. Ray., 778; Salk., 619; 11 Mod., 19; *Blitheman v. Blitheman,* Cro. Eliz., 279.

If our opinion were different on the point that has been considered, we should yet hold that deed not to be a bar in this action, because it is not competent to the defendant, on this issue, to show a title out of the plaintiff's husband and in a third person. It is so settled in New York. *Hitchcock v. Carpenter,* 9 John. Rep., 344; *Hitchcock v. Harrington,* 6 John. Rep., 290; *Collins v. Torry,* 7 John. Rep., 278. It must follow as one of the numerous examples of the rule long established in this Court, that where both parties claim under the same person the title of that person is not to be disputed between them, unless one of them can show a better title in himself. *Love v. Gates, ante,* 498, (586) at the present term. That the defendant did not show in this case, for the release from Duty to the defendant was subsequent to this suit, and also to the defendant's plea. Had the widow continued in possession, and had been sued in ejectment by the present defendant, she could not have set up a title in Duty to defeat the subsequent deed under which Marrow claims, but would have been bound by the estoppel which bound the husband. *Buffalow v. Newsom,* 1 Dev. Rep., 208. Estoppels being mutual, the defendant must also be precluded from setting up that title against the widow; and as the defendant did not plead that deed, the plaintiff could not reply the estoppel, and so may avail herself of it on the evidence.

The deed to Duty being thus out of the plaintiff's way, the case depends upon the sufficiency of the objections applicable to the deed of February, 1836.

One of these objections is that as the deed was not registered until after the husband died, it left the seizin in him at his death, and thereto the title of dower attached. But it has been established doctrine from an early period that by relation a bargain and sale after enrollment operates as well for the advantage and disadvantage of the wife as of the husband and his heir. Thus, if a bargain and sale be made to a man, and he dies, and then the deed is enrolled, his wife ought to be endowed; for the fee is in the bargainee by relation, and all the consequences of a

seizin in fee from the date of the deed must follow. Gilb. Uses, 292; *Vaughan v. Atkins,* 5 Bur., 2765. On the other hand, although the title of dower arose to the plaintiff upon the death of her husband, yet by the subsequent registration of the deed it became in its legal operation an alienation in his lifetime, and therefore before the title of the wife accrued. Shepherd's Touchstone states this case: If A bargain and sell his land to B in fee and then marry C and die, and C be endowed, and afterwards the deed is enrolled, the dower of the woman shall be taken away by relation, as was held in *Baron Trevill's case,* 22 Eliz. Touch., 226; Cro. Car., 217, 569.

It is further objected that as this is a deed of trust there is, by the words of the act of 1829, ch. 20; 1 Rev. Stat., ch. 37, sec. 24, no
(587) relation back, and that the deed does not pass any property but from the registration. But this is only true in respect of creditors and purchasers; and the wife is neither a creditor nor a purchaser in our opinion. There is no contract between husband and wife for curtesy or dower. The interest the one gets in the property of the other the law gives for the encouragement of matrimony. We have so held in respect to the husband's right to his wife's chattels. *Logan v. Simmons,* 1 Dev. & Bat., 13. All the old authorities say that the tenant by curtesy is *in* the *post,* that is, by operation of law. Co. Lit., 30 b, note 7. They are not so well agreed about the wife; some supposing that she is *in* by the husband or in the *per* by force of the marriage agreement; and others that she, like the husband, takes by force of the general law. Co. Lit., 30 b, note 7; 239 a; 7 Rep., 73. Perhaps the doubt arose from the several kinds of dower, for those *ad ostium ecclesiæ* and *ex assensu patris* arose out of an agreement of a nature similar to that for jointure in modern times. But it is difficult to distinguish dower at the common law and curtesy as to their origin. But however the argument may be pursued upon the abstruse point of the old law, how the wife is *in,* technically speaking, it is certain that such as her estate is, the law makes it without any act of the husband, and even against his will. She claims therefore under the statute which defines her right of dower, and has made no contract with the husband which constitutes her a purchaser or a creditor.

Another exception is to the admission of Sneed and the other trustee as witnesses. They were called by the defendant to prove the capacity of the bargainor, and thereby support the deed under which they acted, and have claimed and retained a commission. We do not perceive any interest of those persons in this suit, although they probably harbor a strong bias on the point to which they testify. They are not to have a commission on what may be recovered in this suit; but they have already acted and been paid, and have conveyed without covenants or responsi-

bility. They have therefore no interest in the cause, nor can the verdict and judgment be given in evidence for them, and those are now the tests of competency. It is said they may be compelled to (588) refund the money now in their hands, if Marrow loses the land by reason of the invalidity of the deed. It is not certain they would be obliged to refund in the event supposed. But if it be admitted, still this verdict would not be evidence against them of the want of capacity in their bargainor, but it would be necessary to establish the fact by other proof. Our opinion, therefore, is that those were competent witnesses.

Upon the remaining point, we must say that it seems to us the evidence offered of the bargainor's declarations, connected with his conduct the next day, was relevant and proper. When the inquiry is whether a particular malady, mental or corporeal, existed at a particular time, its existence previously and just up to the period, and its existence also just afterwards, furnished together the strongest presumption that the disease was seated in the system at the given period. It is the practice on every circuit to give such evidence in actions on warranties of soundness. It cannot, then, be denied that the plaintiff might prove her husband's defect of intellect the next day after he made the deed. The only question is as to the mode of proof. We think the proper mode must be by showing such facts as are ordinarily regarded as *indicia* of a sound or of a disordered or decayed reason. These are the appearance, the deportment, the conversation, and the acts of the person. It would have been more satisfactory if the exception had set forth the particular language and conduct of the husband which it was proposed to prove. For, certainly, he might say and do many things that would not be competent. If he said that he had no recollection of making the deed, that he was drunk and had been imposed on, or the like, we should think that his Honor properly excluded evidence of the declarations; for, if admitted, that would be to impeach a deed by subsequent declarations, as importing truth in themselves, instead of laying before the jury the conversations of the person upon subjects generally, and not on this particular transaction only, as denoting not imposition merely, but, with other things, as denoting a want of understanding to make a bargain. From the nature of the investigation before the jury any (589) wild, incoherent, or irrational opinions, narrations, imaginations or contracts, or the acts or behavior of the party, generally, must of necessity be considered. But only such can be heard as indicate that at the time of making them the person was insane and not those which purport to be assertions of the person that he was not sane at the time of doing a certain act. It is true, even madness is sometimes simulated,

and many a common man may be unable to detect the imposition. But it is not more difficult to do so after the transaction than at or before it; and at each period the judgment is formed upon the same species of evidence. From the risk of deception by the person whose interest it may be to stultify himself, and from the inability of many men to appreciate properly what passes before them, as evidence of sanity or insanity, the evidence of the kind we are speaking of may frequently be entitled to but little weight. Perhaps that might have been the case here; for, from the nature of this person's case the evidence of his state next day would have but faintly reflected back on his condition at the execution of the deed, unless the evidence related to corresponding hours of each day, and unless the quantum of stimulus and the period of taking it should also turn out to be alike on both days. But the weight must necessarily be estimated by the jury. We do not think that such evidence is so entirely without weight, or so suspicious that none ought to be heard. On the contrary, if a witness was, for example, with the person all the second day, and described his treatment to be such as ought to have roused his dormant faculties on that day, if it did on that previous, and yet should be believed when he stated that it had no such effect, but that the party was throughout lethargic, stupid, or delirious; it could not be denied that either the veracity or the judgment of those who testified to his state when he made the deed would be materially discredited.

Against this we are not aware of anything, unless it be the case of *the State v. Scott,* 1 Hawks, 24. We own that our minds are not satisfied with the reasoning in the opinion; and indeed we are not certain that it is correctly understood by us. But this may be distinguished (590) from that case; and therefore in coming to the decision we have we do not overrule Scott's case. In the first place, although the exception there stated, that the prisoner offered his declarations "in connection with his conduct," yet *Judge Henderson's* opinion clearly treats the question as if it concerned declarations by themselves; which he said a majority of the court thought were not evidence unless they accompanied acts, though his inclination was the other way. Perhaps, therefore, the decision may be attributed to the Courts' not adverting to the circumstance that evidence of conduct as well as of words was offered. But there is another difference between the cases. There, no ground was laid for any suspicion of previous insanity; so that the subsequent exhibition of it for but a day, might have been rejected upon a presumption that it must be simulated. Here, the object is to show that the same marks of an enfeebled mind existed afterwards as unquestionably had, during portions at least of each day, for a considerable period before the execution of the deed. We think that such evidence must be received,

because evidence of that description is all that the nature of the case admits of, and therefore that the judgment must be reversed and another trial had.

PER CURIAM. Judgment reversed.

Cited: McGee v. McGee, 26 N. C., 109; *Costin v. Baxter,* 29 N. C., 114; *Copeland v. Sauls,* 46 N. C., 73; *Spivey v. Jones,* 82 N. C., 181; *Barnett v. Barnett,* 54 N. C., 225; *Harding v. Barrett,* 51 N. C., 162; *Love v. McLure,* 99 N. C., 295; *Edwards v. Dickinson,* 102 N. C., 523; *Black v. Justice,* 86 N. C., 513; *Brown v. Morisey,* 124 N. C., 294, 298; *Mitchell v. Corpening, id.,* 477.

(591)

JOSEPH S. JONES v. THOMAS J. JUDKINS.

Purchaser Under Junior Execution—Judgment.

1. When several executions, issuing from different competent courts, are in the hands of different officers, then, to prevent conflicts, if the officer holding the junior execution seizes property by virtue of it, the property so seized is not subject to the execution in the hands of the other officer, although first tested; and consequently a purchaser under the junior execution is, in such case, protected against the execution of a prior teste.

2. A justice's judgment, apparently regular, cannot be collaterally impeached by evidence that the constable by whom the warrant purported to have been executed, was a man of general bad character, and not to be trusted in anything he might say or do, or by any other parol evidence to show that the warrant had not in fact been served. It is a judicial proceeding which is conclusive, unless upon some other proceedings directly to avoid it.

3. At common law the goods of a party against whom a writ of *fi. fa.* issued were bound from the teste of the writ so as to prevent his selling or assigning them.

4. But, subject to this restriction, the property of the goods is not altered, but continues in the defendant till the execution is executed.

5. If, therefore, the property is levied on and sold under a junior execution, the vendee gets a good title; and the party having the first execution cannot seize them by virtue of his writ first tested.

6. The party, however, who has the execution of the first *teste* may have his remedy against the sheriff, whose duty it was to execute that writ first which was first tested.

7. If the sheriff has only levied under the younger execution, and before sale an elder execution in point of *teste* came to his hands, he may and ought to apply the property to the satisfaction of the execution bearing the first *teste.*

TROVER for a horse, tried at Warren, on the last circuit, before his Honor *Judge Saunders.*

The plaintiff, who was the sheriff of Warren County, claimed title to the horse by virtue of a levy, under three *fi. fa's.* in his hands against one Thomas H. Christmas, whose property the horse then was. Two of these *fi. fas.* purported to be issued by the clerk of Warren County court, 23 January, 1839, and were endorsed by the sheriff "to hand the 23rd of Jan'y., 1839." The other purported to be issued the day following, and was endorsed "to hand" on that day; and all were levied upon
(592) Christmas's property, including the horse in question. These executions were all tested of the November term, 1838, of Warren County court, and were returnable to the ensuing February term, 1839. The plaintiff offered evidence of the delivery of the *fi. fas.* to him by the clerk, and of his levying upon the horse either on the 23d or 24th of January. The defendant claimed the horse as a purchaser at a constable's sale; and offered in evidence a warrant against Christmas, dated 22 January, 1839, and a judgment and execution thereon, dated 23 January, 1839, endorsed by the constable, "levied on the horse" the same day. The defendant proved further, by the magistrate, that the warrant, judgment and execution were truly dated. He also proved the constable's sale and his purchase of the horse. The plaintiff insisted that his levy was in fact prior to that of the constable, and he offered, for the purpose of showing that the endorsement by the constable was false, to prove that the constable was a man of bad character, not to be trusted in any thing he might say or do; and further, that the warrant had not been served on Christmas, and that he had no notice of it. This evidence was rejected by the court.

His Honor charged the jury that "they were to inquire whether the sheriff in fact levied upon the horse, and when (explaining to them what constituted a levy); also, whether the constable in fact levied his execution, and when—that the endorsements made by the officers were only *prima facie* evidence of those facts being true; and that they should find their verdict as they might be satisfied as to who made the first levy." There was a verdict and judgment for the defendant, and the plaintiff appealed.

No counsel appeared for the plaintiff in this Court.
Battle for the defendant.

DANIEL, J. At common law the goods of the party against whom a writ of *fieri facias* issued, were bound from the *teste* of the writ, by which is meant that the writ bound the property as against the party

himself, and all claiming by assignment from or by representation under him; so that a sale by a defendant of his goods *bona fide,* excepting in market overt, did not protect them from a *fieri facias* (593) tested before, although not issued or delivered to the sheriff until after the sale. *Payne v. Drewe,* 4 East., 523; Cro. Eliz., 174; Cro. Jac., 451; 1 Sid., 271. Subject to the foregoing restrictions the property of the goods is not altered, but continues in the defendant till the execution is executed. *Lowthel v. Tomkins,* 2 Eq. Cas. Abr., 381; *Payne v. Drewe,* 4 East., 540. If, therefore, the property is levied on and sold under a junior execution, the vendee gets a good title, and the party having the first execution cannot seize them by virtue of his writ first tested; *Smallcomb v. Buckingham,* 1 Ld. Ray'd., 252; 1 Salk., 320; Comyns, 35; if he could, no person would bid at sheriff's sales. The party who has the execution of the first test, may have his remedy against the sheriff, whose duty it was to execute that writ first, which was first tested. If the sheriff has only levied under the younger execution, and before the sale an elder execution in point of *teste* comes to his hands, he may, and ought, to apply the property to the satisfaction of the execution bearing the first *teste. Green v. Johnston,* 2 Hawks, 309; *Jones v. Atherton,* 7 Taunt., 56. The above remarks apply to the case where several executions of different dates come to the hands of one officer. But when several executions, issuing from different competent courts are in the hands of different officers (as in the case before us,) then, to prevent conflicts, if the officer holding the junior execution seizes property by virtue of it, the property so seized is not subject to the execution in the hands of the other officer, although first tested. *Lord Ellenborough,* in delivering the opinion of the court in *Payne v. Drewe,* held that where there are several authorities equally competent to bind the goods of a party, when executed by the proper officer, that they shall be considered as effectually and for all purposes bound by the authority which first actually attaches upon them in point of execution, and under which an execution shall be first executed. We think that a levy attaches upon the goods in point of execution. The jury, under the charge of the court upon that point, found that the constable made the first levy. We are of the opinion that the sale by him gave the purchaser a good title.

When we say that the property of the goods, notwithstanding (594) the *teste* of the execution, is not altered, but remains in the defendant until the execution executed, we are not to be understood as saying that the sheriff, after he has made a levy, has not such a special property in the goods as will enable him to maintain trespass or trover against any person who may take them out of his possession: for he may, as he is answerable to the plaintiff to the value of the goods. *Wilbraham v. Snow,* 2 Saund., 47; Watson on Sheriffs, 191.

We are of the opinion that the judgment on the warrant against Christmas could not be collaterally impeached by evidence that the constable was a man of general bad character, or any other parol evidence. It is a judicial proceeding which is conclusive, unless upon some other proceeding directly to avoid it.

PER CURIAM. Judgment affirmed.

Cited: Burke v. Elliot, 26 N. C., 358; *Spillman v. Williams,* 91 N. C., 489; *Alexander v. Springs,* 27 N. C., 480; *Dobson v. Prather,* 41 N. C., 35; *Watt v. Johnson,* 49 N. C., 195; *McDaniel v. Nethercut,* 53 N. C., 99; *Isler v. Moore,* 67 N. C., 76; *Phillips v. Johnson,* 77 N. C., 228; *Penland v. Leatherwood,* 101 N. C., 514; *Horton v. McCall,* 66 N. C., 162; *Grant v. Hughes,* 82 N. C., 217; *Alsop v. Moseley,* 104 N. C., 63.

THE GOVERNOR, TO THE USE OF GREEN R. LEISNER, v. JOHN LEE ET AL.

Constable's Bond—Liability of Sureties

Where claims are put into the hands of a constable for collection during one official year, and remain in his hands uncollected during the succeeding year for which he is reappointed, a failure to collect during the latter is a breach of his official bond for that year, for which a recovery may be had against him and his sureties, though he may have committed a breach in the preceding year, for which the party injured might have sued him and his sureties for that year.

(595) THIS was an action of debt, upon a bond executed by the defendant Lee, as constable, and by the other defendants as his sureties, in January, 1833. The breach assigned was, a failure by the officer to collect a note on one Kinion, for about $57, and another note on one Casey, for about $39. The defendant pleaded *conditions performed and not broken;* and on the trial at Buncombe, on the last circuit, before his Honor *Judge Pearson,* it was in evidence that Lee acted as a constable for the year 1832, and was reappointed in January, 1833, and also acted for that year; that on 13 July, 1832, Leisner placed the two notes above mentioned in his hands for collection. It was admitted that Kinnon and Casey were solvent during the whole time, and that Lee had neglected and failed to collect the money, except about $8, which he collected and paid over to Leisner in the fall of 1833, soon after which he left the county. The defendants, who were the sureties upon the bond of 1833, insisted that they were not liable, and that the action should have been brought on the bond of 1832, but his Honor held that if the money

was not collected in 1832, and the notes were in Lee's hands after his appointment in January, 1833, the sureties for 1833 were liable for his failing to collect. Under this charge of his Honor the plaintiff had a verdict for the balance of the notes and interest, and judgment being given thereon, the defendants appealed.

No counsel appeared for either party in this Court.

GASTON, J. We see no cause to doubt the correctness of the opinion expressed by the judge on the trial. The sureties of the constable for the year 1833 were liable for any breach of his official duty committed during that year. If the notes put into his hands for collection before were afterwards and during that year still with him for collection, a culpable neglect then to collect them was a breach of duty, whether preceding breaches had or had not been committed. If preceding breaches had been committed, the person injured might have prosecuted the parties liable therefor, if he chose. But there was no obligation on him to do so. If the debtors had, before the year 1833, become insol- (596) vent, this would have been a proper matter of defense for the sureties on the bond of 1833. Of the advantage of this defense they have not been deprived. The case, indeed, negatives the existence of it; for it states that the debtors remained solvent during that year, and in the fall of the year a part was collected from them by the constable, which was properly deducted by the jury in their estimate of damages.

PER CURIAM. Judgment affirmed.

Cited: Miller v. Davis, 29 N. C., 200.

JOHN LINN v. JOHN McCLELLAND.

Sureties—Contribution—Previous Suit a Demand.

1. A previous suit for the same cause of action in which the plaintiff has been nonsuited is both a notice and a demand of his claim.
2. It is not necessary, to enable one co-surety to have contribution from another, that the former should pay the debt under the compulsion of a suit.
3. *It seems* that a surety who has paid the debt of his principal, upon the default of the latter, may recover of his co-surety, though the principal was solvent when the surety paid the money; provided the principal subsequently became insolvent before the surety received payment, or had a

reasonable time to prosecute a suit against him to judgment. Such surety certainly may recover where the insolvency of the principal existed from the day the money was paid to that on which the suit was brought against the co-surety.

THIS was an action of assumpsit, brought by the plaintiff to recover one-half of a certain sum of money which he alleged that he had paid as a co-surety with the defendant, for one Samuel Jones. Upon the trial, at DAVIE, on the last circuit, before his Honor, *Judge Dick,* it appeared that in November, 1832, Samuel Jones, as principal, and the plaintiff and defendant, as his sureties, executed a note for $427, payable on 6 February, 1833, to William H. Horah, cashier of the State Bank
(597) of North Carolina; that the note was not discharged at maturity, and in the spring of 1833 was placed in the hands of Richard H. Alexander, an attorney, for collection; and that the plaintiff paid off the note to Mr. Alexander without suit. It appeared further that the plaintiff brought an action of assumpsit against the defendant to recover one-half of the amount so paid by him, and that after the suit had been put to issue, and pended for some time, the plaintiff suffered a nonsuit, and afterwards, within twelve months, brought this suit. The defendant contended that the plaintiff was not entitled to recover: 1st, because he had not been compelled to pay the note under a judgment and execution, but had paid it voluntarily and without a recovery had against him.

2dly. Because he had not given the defendant notice that he had discharged the said debt, before this action was brought.

3dly. Because Samuel Jones, the principal, was not insolvent at the time when the plaintiff paid off the note.

His Honor charged the jury that before the plaintiff could recover he must prove to their satisfaction that Samuel Jones, the principal, was insolvent at the time when the plaintiff discharged the note, and that he remained insolvent up to the time at which this action was commenced; and that the plaintiff had given notice to the defendant that he had paid the debt of their principal; and that if they were satisfied of these facts, it was not necessary for the plaintiff to show, in order to entitle him to recover of the defendant, his co-surety, that he had paid the money upon a suit brought and recovery had against him; for that as soon as he ascertained that his principal was insolvent he had a right to pay the debt without suit, and go against his co-surety for contribution. His Honor instructed the jury, further, that the former suit brought by the plaintiff for the same cause of action was sufficient notice to the defendant. There was a verdict and judgment for the plaintiff, and the defendant appealed.

D. F. Caldwell for the defendant.

No counsel appeared for the plaintiff in this Court.

RUFFIN, C. J. The judgment ought not, we think, to be reversed for any of the causes set forth in the exceptions.

A previous suit for the same cause of action is, undoubtedly, (598) both a notice and a demand of the plaintiff's claim.

Although the statute uses the term "compelled," yet in our opinion it is not necessary, to enable one co-surety to have contribution from another, that the former should pay the debt under the compulsion of a judgment and execution. The word is rendered appropriate by the known repugnance of a surety to pay the debt of his principal, if it can be avoided. Therefore he may be said to be compelled by his contract and the default of his principal. The Legislature could not have meant to require a litigation so needless; for it is to be remembered that the insolvency of the principal is presupposed, and indeed the objection does not even require that he should be sued, but only the surety.

When the principal makes default the surety is not obliged to incur the expense of a suit, but may, of his own accord, do that to which he might be coerced by action; and if he cannot obtain indemnity from the principal by reason of his insolvency, he may justly and legally claim contribution from one who assumed jointly with him the responsibility of suretyship.

The defendant has no reason to complain of the instructions as to the period at which the insolvency must have arisen, and during which it must continue, in order to give the action between the sureties. We indeed are not aware of any authority or reason why the action will not lie, although the principal was solvent when the surety paid the money; provided he subsequently became insolvent before the surety received payment, or had a reasonable time to prosecute a suit against him to judgment. The object of the act was to do away the necessity of going into a court of equity, and therefore, whenever the facts occur which constitute the merits of the case of that party who paid the money, the legal jurisdiction for his relief also arises. In this case, however, the insolvency existed from the day the surety paid the debt to that on which he brought suit; which must certainly be sufficient.

PER CURIAM. Judgment affirmed.

Cited: Fagan v. Williamson, 53 N. C., 435; *Nixon v. Long,* 33 N. C., 430; *Bryan v. Hack,* 57 N. C., 324.

(599)

THE GOVERNOR, TO THE USE OF WILLIAM LANNING, v. NATHANIEL HARRISON.

Sheriff's Bond—Schedule Under Levy.

1. Upon a schedule filed by one taken under a *ca. sa.*, and desirous to avail himself of the benefit of the act for the relief of insolvent debtors, it is not competent for the court to order, nor for the clerk to issue, a writ to the sheriff commanding him to sell the scheduled property, or so much thereof as will satisfy the plaintiff's debt and costs and have the same ready at the next term, to render "to the court, or to the parties entitled to receive the same"; and it is consequently no breach of the sheriff's bond for him to fail or neglect executing such writ.
2. The property and debts contained in such schedule vest in the sheriff, as assignee to sell, collect, and pay into court for the benefit of all the creditors; and the proper course to enforce the performance of the sheriff's duties in relation thereto is to have a rule of court on the sheriff to sell the property and collect the debts so assigned, and bring the money into court, and to attach him for a contempt if the rule be not complied with.
3. A breach assigned "for a general misfeasance in office" in a suit on a sheriff's bond is too general and broad, and the court will not permit any evidence to be given upon it.

THIS was an action of debt upon the bond given by the defendant, as sheriff of the county of Buncombe. The bond was in the usual form, and the breaches thereof assigned by the plaintiff were: First, that the sheriff had collected and failed to pay over the amount of a judgment in favor of the plaintiff against one Thomas E. Justice, by the sale of property surrendered in a schedule filed by said Justice, after he had been arrested on a *ca. sa.* Secondly, that the sheriff neglected and refused to make the plaintiff's judgment out of the property surrendered by the said Justice, and to account for it. Thirdly, "for a general misfeasance in office."

Upon the trial at Buncombe, on the fall circuit of 1838, before his Honor, *Judge Dick,* the case was as follows: The plaintiff had obtained a judgment in the county court of Buncombe against Thomas E. Justice, and issued a *ca. sa.* returnable to July term, 1833. The sheriff arrested Justice on 22 May, 1833, and took bond and security under the
(600) insolvent debtor's act, for his appearance at the said July term, 1833. On 19 June ensuing his arrest, Justice filed in the clerk's office a schedule of all his property, and at the following term, in July, 1833, swore to the truth of the schedule, took the insolvent's oath, and was discharged under the act for the relief of insolvent debtors. But after Justice had filed his schedule in the clerk's office the deputy sheriff and a constable levied divers executions, issued by a justice of the peace against him, upon the property mentioned in the said schedule. A writ issued from July term, 1833, directed to the sheriff, which, after reciting

that a schedule had been made by Justice, in consequence of a *ca. sa.* issued against him by Lanning, for the sum of $74.58 debt, and 35 cents cost, returnable to July term, 1838, and reciting the property contained in the schedule, concluded in these words:

"You are commanded to sell the same according to law, or so much thereof as will make a sum sufficient to satisfy the foregoing several sums of money, and other endorsed cost and your fees for so doing; and the moneys so had, have you before our next court of pleas and quarter sessions on the fourth Monday in August next, then and there to render the same to the said court, or to the parties entitled to receive the same."

The sheriff, by his said deputy, sold the scheduled property; and among the rest the equity of redemption in a slave which Justice had before mortgaged. But, instead of bringing the money into court, he paid it over to the owners of the executions aforesaid, which had been issued by a justice of the peace, and for costs. His Honor charged the jury that the plaintiff was entitled to recover, on the first breach assigned, the money raised by the sale of the equitable interest of the slave held in mortgage. He said that the officers who held the justice's execution could not levy on the equity of redemption in personal property. The plaintiff, under this charge, had a verdict and judgment for the full amount of his demand, and the defendant appealed.

No counsel appeared for either party in this Court.

DANIEL, J., after stating the case as above, proceeded as fol- (601) lows: When a debtor is in custody, or who is arrested on a *ca. sa.*, wishes to have the benefit of the insolvent act, he shall, for the benefit of his creditors, file a schedule of his property with the clerk of the court, at least ten days before the sitting of the court at which he proposes to avail himself of the bent. 1 Rev. Stat., ch. 58, sec. 12. All the property and debts contained in such schedule shall vest in the sheriff of the county where such schedule shall be filed. The sheriff shall sell the property and collect the debts, and upon oath pay the same into court where the schedule was filed, to be distributed. Sec. 14. The sheriff thus becomes the legal assignee of all the property, debts and effects of the insolvent, for the purpose of collection and paying into court. It is unnecessary now to inquire whether, when the insolvent is discharged, the sheriff's title as assignee begins upon, and relates back to, the day when the insolvent filed his schedule in the clerk's office. When the funds are collected by the sheriff and paid into court, the court shall appoint two commissioners to examine the claims of all and singular the creditors, as well those at whose suit the insolvent was committed as of all others. And they shall make distribution among each and every of the creditors

who shall prove their debts, in proportion to their respective demands. And the clerk shall pay such moneys into the hands of the two commissioners, for the purposes aforesaid. Section 15. Thus it appears that an adjudication or order that the sheriff should sell the property in the schedule to satisfy the plaintiff's demand would have been in direct hostility to the law, for the plaintiff had no other interest in that property than such as was common to all the creditors of the insolvent. No such adjudication was made, and the writ issued by the clerk to enforce such supposed adjudication was wholly without authority. We are at a loss, therefore, to see how it was possible to maintain either of the two breaches assigned, either that the sheriff had collected a judgment of the plaintiff or had neglected to collect such a judgment. The true course of proceeding would have been to have a rule of court on the sheriff to sell the property so assigned, and bring the money into
(602) court, and to attach him, if the rule were not complied with.

As to the breach assigned, in such general and broad terms, as the *third breach* in this case is, the court could not receive any evidence. The defendant could not know how to defend himself. However, the charge of the judge was applicable only to the first breach assigned. For the reasons given, we think it was erroneous, and therefore that the judgment must be reversed and a new trial awarded.

PER CURIAM. Judgment reversed.

JOSEPH BETTS v. ALBERT FRANKLIN.

Fraud—Certiorari.

1. A writ of *certiorari* ought not to be allowed to enable a person to take advantage of a matter occurring subsequently to the first trial, much less to create a defense by some act to be done posterior to issuing the writ of *certiorari*. Hence, where the parties to a *ca. sa.* bond, conditioned to appear in the County Court to take the benefit of the act for the relief of insolvent debtors, were called, and, failing to appear, judgment was entered against them and their sureties: *It was held*, that the sureties were not, upon the allegation of having been prevented by the fraud of the plaintiff's agent from making a surrender of their principals in discharge of themselves, entitled to the writ of *certiorari* to enable them to make it in the Superior Court.

2. The fraud, in such case, may perhaps authorize the court in which the judgment was given to afford relief. At all events, it is the proper subject of jurisdiction of that court, which considers things done that might and ought to have been done. The relief is on the equity, and not the law, side of the court.

3. A *certiorari* has been properly allowed where the judgment in the County Court was by default, and upon it the judgment has been set aside and the defendant allowed to plead. But that can never be done unless the party show two things: First, an excuse for the *laches* in not pleading; and, secondly, a good defense existing at the time when he ought to have pleaded.

AT THE November Term, 1837, of WAKE County Court, Albert Franklin and William Mainor were called out upon a bond which they had executed, conditioned for their appearance at that term, to (603) take the benefit of the act for the relief of insolvent debtors; and failing to appear, a judgment was entered up against them and their sureties, Abel Mainor and Green C. Franklin, for the amount of the debt and costs. And thereupon an execution issued against them which was returned to the ensuing term in February, 1838, endorsed by the sheriff with a levy upon the lands of Albert and Green C. Franklin; and upon the said return, a writ of *venditioni exponas* was issued to the sheriff, commanding him to sell the said lands. In the ensuing May, before the return of the said writ, Green C. Franklin applied to one of the judges of the Superior Courts for writs of *certiorari* and *supersedeas,* upon the allegations stated in his petition, that William Mainor, one of the defendants in the *ca. sa.* bond, was confined in the jail of Wake County during the whole of the term at which he was called out, and that Albert Franklin, the other defendant in said bond, attended court during the whole of said term; that the sureties intended to surrender them in court in discharge of themselves, and would have done so but for the reason that they were told by the constable who took the bond that they were discharged, by the fact of one of their principals being confined in jail and the other being in attendance on the court; that the sureties had been deceived by the constable, who was the agent of the plaintiff, and that they would be great sufferers unless they could have an opportunity of surrendering their said principals in discharge of themselves. Upon this application, the judge granted the writs as prayed for; and at the Fall Term, 1838, of the Superior Court for Wake County, it was, on motion, ordered that this cause should be placed on the trial docket, and stand for trial at the next term; and thereupon the defendants, Green C. Franklin and Abel Mainor, brought into court the bodies of Albert Franklin and William Mainor and surrendered them in open court, in discharge of themselves as sureties or bail in the *ca. sa.* bond given in said case; and they were prayed into the custody of the sheriff by the plaintiff. At the ensuing term, to wit, Spring Term, 1839, of said court, the defendants, Green C. Franklin and Abel Mainor, pleaded a surrender of their said principals in (604) discharge of themselves as bail, and that the surrender was made at the preceding term; to which plea the plaintiff demurred. His

Honor, *Judge Bailey,* sustained the demurrer, and gave a judgment for the plaintiff, from which the defendants appealed.

No counsel appeared for the defendants in this Court.
Badger for the plaintiff.

RUFFIN, C. J. This is not a proceeding to reverse the judgment of the County Court for any error of the court. Upon the face of the record everything was properly done. The parties were called and failed to appear, and the judgment on the bond followed of course. The grievance is that the creditors deceived or surprised the sureties so as to prevent them from producing the principals in discharge of themselves. We believe the writ of *certiorari* has not hitherto been used in a case like this, and we cannot approve of this novel application of the remedy.

Besides correcting errors of law of inferior tribunals in cases in which a writ of error will not lie, a *certiorari* has been allowed as a substitute for an appeal of which a party has been deprived, or which was lost by accident or surprise. The effect of it is to set aside the former judgment, or verdict and judgment, and order a new trial in the Superior Court. But it is manifest that the trial in the Superior Court ought to involve the same questions of fact only, which were made or might have been made in the inferior court, and that the writ ought not to be allowed to enable a person to take advantage of matter occurring subsequent to the first trial, much less to create a defense by some act to be done posterior to issuing the writ of *certiorari.* It is true, a *certiorari* has been allowed, and properly, where the judgment in the County Court was by default; and upon it, the judgment has been set aside and the defendant allowed to plead. But that can never be done unless the party show two things: first, an excuse for the laches in not pleading; and secondly, a good defense. Now the inquiry is, to (605) what time that defense must refer. It is obvious that it must have existed at the time the defendant was called on to plead in the original suit, since his claim to this remedy is that he was prevented from then pleading it, and that he ought, therefore, to be permitted now to do so as of apt time.

The case before us is entirely different. The applicant does not allege a surrender of the principals; but, on the contrary, admits that there was not. There was, therefore, no defense at law or legal bar at the time judgment was rendered in the County Court. He says he would have made the surrender if the other party had not induced him to believe it was not necessary. That fraud is, as a plea in the Superior Court, no bar to the creditor's demand on the bond. There was no at-

tempt in this case to place it on the record as the defense. On the contrary, the sureties came forward to make in the Superior Court an original surrender of the principals, and insist on that as the bar. Now, *that* could not have been a defense in the County Court, as it arose since the judgment there, and therefore the *certiorari* ought not to have been granted merely to enable the applicant to make and bring forward that matter. The truth is, that the whole ground of the application is that the party was surprised out of a defense he might have made in the County Court; which defense, from its nature, is entirely gone at law because it was not there made. That surprise may perhaps authorize the court in which the judgment was given to afford relief. At all events, it is the proper subject of jurisdiction of that court, which considers things done that might and ought to have been done. The relief is on the equity and not the law side of the court.

The party, upon his own showing, was therefore not entitled to a *certiorari;* but it issued improvidently, and ought for that reason to have been dismissed. That direction must accordingly be given to the Superior Court, with the further one, to issue a *procedendo* to the County Court, that execution may issue on the judgment there. This will of course not interfere with the appropriate judgment in the Superior Court on the bond, if any, given for the prosecution of the *certiorari.* The appellants must pay the costs in this Court.

PER CURIAM. *Certiorari* to be dismissed.

Cited: Watts v. Bogle, 26 N. C., 333; *Kelsey v. Jervis,* 30 N. C., 452; *Lanceford v. McPherson,* 48 N. C., 177; *Buis v. Arnold,* 53 N. C., 233; *Baker v. Halstead,* 44 N. C., 44; *Pritchard v. Sanderson,* 92 N. C., 42.

Dist.: Sharp v. McElwee, 53 N. C., 117.

(606)

BENJAMIN H. CHARLES, ADMR. OF THOMAS MORRIS,
v. AARON ELLIOTT.

Detinue—Possession.

1. The gist of the action of detinue is the wrongful detainer at the date of the writ, and not the original taking of the chattel. It is generally, therefore, incumbent on the plaintiff in this action to show an actual possession or a general controlling power over the chattel, by the defendant, at the date of the writ. And if the defendant had not the actual possession at the time when the writ was sued out, it cannot be said that the defendant is *in law* liable to the action, but only that he is liable if, upon the evidence, the jury should infer that he had a general controlling power over the possession at that time.

2. If one having a right to the possession of chattels make a demand therefor, which is refused, and thereupon, and before the writ is sued out, the defendant part with the possession, the action of detinue may be maintained; for the transfer of possession after demand is treated as an act done in elusion of the plaintiff's action.

THIS was an action of detinue, brought to recover a slave by the name of Rippon, and tried at PASQUOTANK, on the last circuit, before his Honor, *Judge Nash,* upon the pleas of *non detinet* and the statute of limitations.

The plaintiff showed that in January, 1839, he demanded the slave of the defendant, who refused to deliver him; that in March following, the plaintiff administered on the estate of Thomas Morris (who had been dead for some years), and immediately thereafter, as Morris's administrator, sued out this writ. It appeared that the slave in question was the property of his intestate, Thomas Morris; that the defendant and one David White were trustees of a Quaker society, and that the
(607) slave had been claimed by the defendant as the property of the society, under a deed given by Thomas Morris, which deed was void in law. The defendant had the possession up to February, 1839, when he sent the slave to White, to protect him from the attempts of the plaintiff to take forcible possession. White sent the slave out of the State without the knowledge or consent of the defendant; but afterwards informed the defendant of it, who made no objection to the sending away of the slave. The plaintiff contended that the possession of White, and also of the person into whose possession White put the slave, was, in law, the possession of the defendant.

His Honor instructed the jury that if the slave was sent to White to prevent the plaintiff from taking forcible possession of him, and White sent him out of the State without the previous knowledge and consent of the defendant, then the plaintiff could not maintain this action. The jury, by their verdict, found that the defendant did not detain the slave, and of course did not respond to the other issue. The defendant had a judgment upon the verdict and the plaintiff appealed.

No counsel appeared for the plaintiff in this Court.
J. H. Bryan for the defendant.

DANIEL, J., after stating the case as above, proceeded as follows: The gist of the action of detinue is the wrongful detainer at the date of the writ, and not the original taking of the chattel. 3 Bla. Com., 152; Co. Lit., 286b. It is generally, therefore, incumbent on a plaintiff in this action, after showing that he has an absolute or special property, and also a right to the immediate possession, also to show an actual possession or a general controlling power over the chattel by the defendant at

the date of the writ. *Anderson v. Passman,* 7 Car. and Pay., 193; Leigh's N. P., 782. If, however, one having a right to the possession of property make a demand therefor, which is refused, and thereupon and before the writ is sued out, the defendant part with the possession, then this action may be maintained; for the transfer of possession after demand is treated as an act done in elusion of the plain- (608) tiff's action. In this case it is not pretended that when the demand was made the plaintiff had any right to the slave. The action, therefore, must be regarded as one brought without a demand, and of course subject to the operation of the general rule. According to the case the defendant did not have the actual possession when the writ was sued out, and therefore the plaintiff could not rightfully require of the judge to charge that the defendant was in law liable to his action. If he had asked of the court to instruct the jury that the defendant was liable if upon the evidence they inferred that he had a general controlling power over the possession, it can scarcely be questioned but that this request would have been complied with; for the instruction actually given seems tantamount to it. He cannot be received to complain that the instruction was not more specific, when he did not ask that it should be. We do not see any error in the charge of the judge, and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Foscue v. Eubank, 32 N. C., 425; *Webb v. Taylor,* 80 N. C., 306.

(609)

DEN ON DEM. OF JOHN WILLIAMS, ET UXOR ET AL., v. MILES PEAL.

Deed by Administrator.

1. If the deed of an administrator for land, which his intestate had given a bond to convey upon the payment of the purchase money, contain an acknowledgment of payment to him of the price, it will operate as a release, and the plenary evidence of such payment. But a recital in it that it appeared that payment had been made to his intestate is no more than a declaration of his belief of a fact, and *per se* is not evidence at all against the heirs of such intestate, who claim not under the administrator, but directly from the intestate.

2. Where a case agreed sets forth that a vendee took possession of the land soon after the execution of a bond to make him title upon his paying the purchase money, and held uninterruptedly for twenty years; that the vendor lived nearly three years after the purchase money became due; that after his death the administrator set up no demand for the purchase money, but on the contrary executed a conveyance of the land; that one of the heirs acquiesced in the possession held under that conveyance for four years after he came of age; the court cannot say that the purchase

money was paid, and the conveyance therefore valid; but such circumstances are proper to be left to the jury, to infer the fact of such payment, if they should so think, and thereupon to find a verdict for the defendant.

3. If a case agreed do not state a *fact*, but sets forth only evidence tending to show the fact, it is incompetent for the court to infer the fact from any evidence which does not, in law, establish it, or to direct the jury so to infer it.

THIS was an action of ejectment, submitted to his Honor, *Judge Saunders,* at MARTIN, on the last circuit, upon the following facts as a case agreed:

The land in dispute was once the property of John Bennett, who, on 25 December, 1816, executed a bond whereby he bound himself to make and execute a deed for the said land to George Pollard, upon the said George paying him seven hundred and fifty dollars in cash on the 20th day of January then next ensuing; and thereupon Bennett gave up the possession of the land to Pollard, who entered and retained possession till Bennett's death, in September, 1819. At the December Term, 1819, of Martin County Court, Jesse Pierce took out letters of administration upon the estate of John Bennett; and on 13 June, 1820, executed (610) a deed for the said land to the said George Pollard, wherein it was recited that John Bennett, the intestate, had received the purchase money for the land in his lifetime. The *feme* lessors of the plaintiff were the children of John Bennett, and at his death were infants of tender years; and of whom the eldest intermarried with the lessor, John Williams, after she became of full age, and at the time of bringing the suit was twenty-five years old. The other *feme* lessor was under age, both at the time of her marriage and at the institution of the suit. The lessors of the plaintiff claimed as the heirs at law of John Bennett; and the defendant claimed under George Pollard, by a regular chain of conveyances, and a continued possession from 25 December, 1816, up to the time of the trial. There was no evidence of the payment of the purchase money, except the recital in the administrator's deed. Both Pollard and Pierce, the administrator, had been dead several years.

His Honor being of opinion with the defendant, the lessors of the plaintiff submitted to a judgment of nonsuit and appealed.

No counsel appeared for either party in this Court.

GASTON, J. In our judgment the facts admitted were not sufficient to warrant the opinion entertained by his Honor. It sufficiently appears, indeed, that the right of entry of one of the lessors of the plaintiff was barred by long continued adverse possession, but the other lessor having been under the disability of infancy ever since that adverse possession commenced, her right of entry yet remains, unless a valid title in the

land passed by the conveyance of the administrator of her father to George Pollard. The deed purports to have been executed under the authority given by an act of the General Assembly to administrators to execute deeds of conveyance for lands which have been sold by their intestates, and for making title to which bonds have been given. (See 1 Rev. St., ch. 46, sec. 28.) The act confers a special authority, and the deed is valid or invalid, accordingly as the administrator has or has not pursued that authority. One of the provisions in the act is that an administrator shall not be authorized to execute a conveyance previous to the full payment of the purchase money, if by the bond payment thereof is required before making title. The bond in this (611) case does so require; and if in fact payment was made of the purchase money before the conveyance of the administrator, he has pursued his authority; but if it were not made he has not pursued it. Now, the case on which his Honor declared that the law was for the defendant does not state the *fact* of payment, but sets forth only evidence tending to show the fact; and as it is the province of the court with us *merely* to declare the law, it is incompetent for the court either to infer the fact from any evidence which does not in law establish it, or to direct the jury so to infer it.

If the deed of the administrator had contained an acknowledgment of payment to him of the purchase money, it would have operated as a release, and have been plenary evidence of such payment. But a recital in it that it appeared that payment had been made to his intestate is no more than a declaration of his belief of a fact, and *per se* is not evidence at all against the lessors of the plaintiff, who claim not under him, but directly from their father.

The facts set forth in the agreed case, that possession was taken by the vendee upon the execution of the bond, and held uninterruptedly for twenty years; that the vendor lived nearly three years after the purchase money became due; that after his death the administrator, whose duty it was to collect the money if it then remained unpaid, set up no demand therefor, but on the contrary executed a conveyance of the land; that one of the lessors has acquiesced in the possession held under that conveyance for four years after she came of age, may at this day, when more positive proof of the alleged payment is difficult to be obtained, satisfy a jury that in fact the payment was made. And if it does, it will justify a verdict for the defendant. But, if upon all the evidence in the case, they come to the conclusion that payment was not made, it will be their duty to find for the plaintiff, as to one moiety at least of the demised premises.

It is therefore the opinion of the Court that the judgment rendered in the Superior Court must be reversed, and a *venire de novo* awarded.

PER CURIAM. Judgment reversed.

(612)

MARY MORRISON ET AL. v. ROBERT MCELRATH, ADMR. OF JOHN MCDOWELL ET AL.

Appeal from Interlocutory Judgment.

1. Upon an appeal from an interlocutory judgment in the Superior Court, allowed under the Act of 1831, 1 Rev. Stat., ch. 4, sec. 23, the Supreme Court cannot receive a suggestion of the diminution of the record, and thereon take steps for bringing up the proofs, or in any respect altering the form in which the case is sent up; and if the judge of the Superior Court send up points which he has decided without also sending up his finding of the facts on which those points arise, or sending the evidence, at least, on which he grounds his opinion, the Supreme Court will be unable to decide the matter of law raised on the record, and consequently cannot take jurisdiction of the case, but will dismiss the appeal as having been improvidently granted.
2. It is not error to refuse to dismiss a cause on motion for want of parties, though it may be error to decree finally without them.
3. After the death of all the executors of an estate, and at the end of forty years, a presumption of satisfaction or abandonment of a legacy becomes cogent, unless it be repelled by the time of the payment of the legacy, the age of the legatee, the practice of some particular imposition or other sufficient circumstances.

THE plaintiffs filed their petition in the Superior Court of Law of BURKE, in March, 1829, and therein stated that James Morrison died in the year ....., having first made his will, and therein appointed John McDowell, William Morrison, and Elizabeth Morrison the executors and executrix, who all proved the will after the death of the testator, and undertook its execution; that William died in 1810, having first made his will, and thereof appointed John Morrison the executor, who proved it, and undertook its execution; that John Morrison died in 1826, having made his will, of which the defendant, Francis Morrison, was the executor; that John McDowell died in 1823, intestate, and that administration of his estate was granted to the defendant, Robert McElrath; that Elizabeth Morrison died in 1828, having made a will, and therein appointed the petitioners the executrixes, who made probate thereof, and undertook its execution. The petition then stated "that, agreeably to the will of their father, James Morrison, a considerable amount (613) of personal property was to have been sold by the executors and distributed amongst his five children, the two petitioners and their three sisters; that a suit was brought by two of the sisters and their husbands (who were named) against the said executors and executrix Elizabeth in their limetimes, and kept pending for a long time in this court, and was finally decreed upon, at the last spring term, in favor of the plaintiffs therein; that an investigation into the manage-

ment of the estate was fully had in said case, during the lives of the executors and executrix; and that it appeared therein that Elizabeth Morrison and William Morrison, or John, or Francis, never had any of the said estate in their hands, respectively, but that John McDowell took it into his hands, and never paid it over."

The petition then stated that the petitioners were not parties to the former suit; that they were then poor and ignorant of their rights, and afraid of law, and were still poor. The prayer was for process against Francis Morrison as executor of James Morrison, and Robert McElrath as administrator of John McDowell, and for an account of the estate of the petitioners' father, and for payment of what might be found due to them for their legacies.

The answer of Francis Morrison denied that he had, or that his immediate testator, John Morrison, or his testator, William Morrison, had any assets of the first testator, James Morrison, and that this defendant had no knowledge of the petitioners' claim, but that he always understood that John McDowell took the sole management of the estate of James Morrison.

The answer of McElrath was made in September, 1829, and stated that James Morrison died near forty years before, leaving a will, in which he appointed the executors named in the petition; that the parties had lived from the death of the testator within a few miles of each other, and that in all that time the plaintiffs had asserted no claim. This defendant stated that he had not any knowledge of the estate of James Morrison, except that he had often heard his intestate, McDowell, say that he had paid over all the estate that had come to his hands; that some years before the death of his intestate, his (614) dwelling-house was burned, and all his receipts and papers of every kind were consumed. The answer insisted on the want of necessary parties, and also on the great length of time since the death of the plaintiffs' father, as a bar; and averred that the defendant believed that nothing was due to the plaintiffs, but that the claim was unjust.

The cause pended until May, 1837, but what proceedings were in the meanwhile had in it does not at all appear. The record of that term is as follows:

"This cause coming on to be heard upon the petition and answers, exhibits filed and proofs taken in the cause, and upon the argument of counsel:

"A motion of defendant's counsel to dismiss the petition for want of proper parties is overruled. A motion of defendant's counsel to dismiss on the ground of length of time before the petition filed is also overruled.

"The court doth declare that there is no presumption or proof of payment to bar the petitioners' rights; that the defendant's intestate has not fully accounted for and paid the legacies due the petitioners under the will of their father, James Morrison, deceased, and therefore it is ordered that an account, etc., be taken"—in the usual manner.

From that decree, his Honor, *Judge Pearson,* before whom the cause was heard, allowed the defendant McElrath an appeal.

D. F. Caldwell for the defendant.
Clingman for the plaintiffs.

RUFFIN, C. J., having stated the case as above, proceeded as follows: In a case of this kind this Court cannot receive a suggestion of the diminution of the record, and thereon take steps for bringing up the proofs, or in any respect altering the form in which the case is sent to us. The act of Assembly declares the allowance of an appeal from an interlocutory judgment or decree to be in the discretion of the court below, and consequently directs the judge to have certified to this Court only so much of the proceedings as he shall think necessary to (615) present the question to be considered here. If, however, his Honor sends up to this Court points which he has decided, without also sending his finding of the facts on which those points arise, or sending the evidence, at least, on which he grounds his opinion, it is manifest that this Court can give to the judge of the Superior Court no answer on which we could advise him to act in the cause before him.

Upon the case being again brought up by appeal from the final decree, the Court might be placed in an awkward situation by finding that, conformably to the certificate sent down, a decree had been entered not at all suitable to the facts of the case, or contrary to the evidence. To enable us to act usefully to the parties, or in aid of the judge below, we must have before us everything that was material to the matter of law decided, which was before the court below, as a ground of the decree. Without so much, this Court cannot say whether the decree was right or wrong, and therefore ought not to direct it to stand or to be annulled.

Upon the first point decided in this case we could say, indeed, that it is not error to refuse to dismiss on motion, for want of parties, though it may be error to decree finally without them. In the meantime, parties may be made. We cannot determine whether other parties ought to be made here or not, for the will is not sent to us, nor any sufficient statement of its contents set forth in the pleadings. No doubt it was one of the exhibits in the cause to which the decree alludes.

Upon the other point, the materials for forming an opinion are yet more defective. The petition, which is most meager in its charges, does not state the period of the death of the testator, but leaves it blank.

The answer says that it was forty years before suit brought; but in a case where the decree says it was founded on proofs besides the pleadings, we cannot take the answer for true in that respect nor in that of the loss of the executor's house and papers by fire. If those allegations be true, we may safely say that after the death of all three executors, and at the end of forty years, a presumption of satisfaction or abandonment becomes cogent, unless it be repelled by the time of payment of the legacies, the age of the legatees, the practice of some (616) particular imposition, or other sufficient circumstances. In such a case, we should think, that for any matter stated in this petition by way of excusing the delay, there was little doubt that the claim comes too late. But we cannot venture to pronounce that or any other opinion for the guidance of the Superior Court, for we should be taking a complete leap in the dark if we did.

The result is that for want of the evidence, or a sufficient statement of the facts of the case, the Court is unable to decide the matter of law raised on the record, and consequently cannot take jurisdiction of the case. To avoid this, we have allowed the case to stand for several terms, in the expectation that a fuller transcript or a statement would have been filed by consent. But, being disappointed in this, the appeal must be dismissed as having been improvidently granted, and this certified to the Superior Court. Neither party recovers costs, but the defendant must pay the office fees.

PER CURIAM. Appeal dismissed.

SAMUEL R. FLOYD v. JACOB THOMPSON.

Construction of Bequest.

A bequest of slaves to the testator's daughter "for her use and benefit during her natural life, and then to descend to the heirs of her body, if any; if not any heirs, then to her lawful heirs," gives to her the whole and absolute interest in the slaves.

(The case of *Ham v. Ham*, 21 N. C., 598, approved.)

THIS was an action of detinue for a slave in which, upon the plea of *non detinet* and issue thereupon, there was a verdict for the plaintiff, subject to the opinion of the court on a case agreed, presenting the following facts: Charles Thompson gave by his will, in 1821, sundry slaves to his wife for her life, and at her death to seven of his children, among whom was a daughter who married the present plaintiff. In a subsequent clause the testator used these words:

"But to my daughters such part as I have here particularly (617) devised, and such share as shall fall to them according to the meaning and intention of my will aforesaid, I do hereby declare

it as my intention *that they have the use and benefit thereof during their natural life, and then to descend to the heirs of their bodies, if any; if not any heirs, then to their lawful heirs.*"

The widow enjoyed the slaves during her life, and after her death a division was made among the remaindermen by themselves and the executors; and the slave, the subject of the present action, was allotted as the share of the plaintiff's wife, and taken into possession by the plaintiff. The wife afterwards died, having had only one child, which died before her; and thereupon the other children of the testator claimed the slave, and the defendant took possession under their title. Upon this case his Honor, *Judge Toomer,* at ROBESON, on the last circuit, gave judgment for the plaintiff, and the defendant appealed.

No counsel appeared for either party in this Court.

RUFFIN, C. J., after stating the case as above, proceeded as follows: The only point in the cause has so recently been before the Court, in the case of *Ham v. Ham,* 1 Dev. & Bat. Eq. Cas., 598, that it is unnecessary to refer in support of the judgment to any other authority. We then looked into all the cases in the books within our reach and felt obliged to hold that in such dispositions of personal chattels as this, the entire property vests in the first taker. When there is a gift of personalty to one and his heirs, or to one for life and then to the heirs of his body, or to his heirs generally, although the term "heirs" is inappropriate as a word of limitation of such property, yet the Court is obliged to receive it in that sense, because it cannot be rejected altogether, and because no other certain or probable meaning can be given to it. There are no means of ascertaining whether the testator meant the chattel to go over to the heirs, properly speaking, or to the executor, or to the children, descendants or next of kin, or if either of the two latter, in what
(618) proportions the persons composing those classes should take, that is to say, in families, or *per capita,* or as under the statute of distribution. With this uncertainty as to the objects of the testator's bounty, and as to the extent of their interests, the words cannot be regarded as designating definitively any particular persons, or as doing more than denoting that they are to take, whoever they may be, in succession from, and not merely after, the first taker. If the subject here had been land, the daughter would unquestionably have the fee; and we think less than the entire property in the slave will not satisfy the words, if they are to be retained, and the Court is not at liberty to blot them out. The judgment must therefore be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Donnell v. Mateer, 41 N. C., 9; *Worrell v. Vinson,* 50 N. C., 94; *King v. Utley,* 85 N. C., 61; *Leathers v. Gray,* 101 N. C., 164.

ESTHER WIGGS ET AL. v. ALEXANDER SAUNDERS ET AL.

Construction of Deed.

Where in a deed of covenant to stand seized from an uncle to his nephew, T. S., the donor used these words, "I give and grant, after the decease of my wife, two tracts of land lying, etc., to be possessed by him in fee simple, after the decease of my said wife, upon condition that he, the said T. S., shall then immediately, or as soon after a reasonable time as may be, settle the same and continue on the said premises during his natural life, so that the said premises shall not be sold or alienated during the lifetime of him, the said T. S. Also, I give and grant to my said nephew, T. S., one negro fellow named, etc., to him and his heirs and assigns forever": *It was held*, that the words "to him, his heirs and assigns forever," applied only to the limitation of the slave, and that the nephew took but a life estate in the lands for want of the words of inheritance, "to him and his heirs."

ALEXANDER FRAZER, being the owner in fee of two several tracts of land, on 21 October, 1816, executed a deed to his nephew, Thomas Saunders, in the following words: (619)

"Know all men by these presents, that I, Alexander Frazer, of, etc., for divers good causes and considerations me hereunto moving, but more especially for the good will and affection which I have and bear unto my beloved nephew, Thomas Saunders, the son of my sister, Peggy, do hereby give and grant, after the decease of my wife, Sally Frazer, two tracts or parcels of land lying and being, etc., to be possessed by him in fee simple, after the decease of my said wife, Sally Frazer, upon condition that he, the said Thomas Saunders, shall then immediately, or as soon after a reasonable time as may be, settle the same and continue on the said premises during his natural life, so that the said premises shall not be sold or alienated during the lifetime of him, the said Thomas. Also I give and grant to my said nephew, Thomas Saunders, one negro fellow Ned, and one girl named little Nelly, to him and to his heirs and assigns forever."

Alexander Frazer died in the month of November, 1816, intestate, leaving his sisters, Esther Wiggs and Barshaba Young, and his nephew, Thomas Saunders, the only child of his deceased sister, Peggy Saunders, his heirs at law; and in the year 1837, after the death of the donor's widow, Thomas Saunders died intestate, leaving three infant children his heirs at law. After the death of the said Thomas Saunders, to wit, at Spring Term, 1839, of FRANKLIN Superior Court of law, the said Esther Wiggs and the children and heirs at law of the said Barshaba Young, who had died intestate since the death of her brother, Alexander Frazer, filed their petition against the heirs at law of the said Thomas Saunders, alleging the foregoing facts, and contending that the deed

from Alexander Frazer to his nephew, Thomas Saunders, conveyed only a life estate in the lands therein mentioned, and that upon the death of the said Thomas, the reversion in the said lands descended to the plaintiffs and defendants, as tenants in common; and thereupon prayed a partition thereof. The defendants, by their guardian, filed an answer in which they insisted that the deed to their father conveyed to him an estate in fee simple in the lands mentiond in the petition, and
(620) that consequently they were the sole owners thereof. Upon the hearing of the cause, the court declared that Alexander Frazer had conveyed only a life estate in the lands to Thomas Saunders, and that he died seized in fee simple of the reversion, which descended to the plaintiffs and defendants, his heirs at law, as tenants in common, and thereupon ordered a partition between them, which having been made, and the report of the commissioners returned, and a judgment of confirmation pronounced by his Honor, *Judge Saunders,* on the last circuit, the defendants appealed.

The case was submitted without argument by

W. H. Haywood for plaintiffs.
Badger and Iredell for defendants.

GASTON, J. The only question in this case is whether the deed from Alexander Frazer to Thomas Saunders passed a greater estate in the land than for the life of the donee. The consideration of the deed is natural affection, and it may operate as a covenant to stand seized under the statute of uses. The operative words are, "I do give and grant, after the decease of my wife, two tracts of land (describing them) to be possessed by him in fee simple after the death of my wife, upon condition that he, the said Thomas, shall then immediately, or as soon after a reasonable time as may be, settle the same and continue on the premises during his natural life, so that the said premises shall not be sold or alienated during the life of him, the said Thomas." Did the law permit us to indulge conjectures upon these inartificial words of limitation, we should probably hold that the purpose of the deed was to transfer an estate to the donee and his heirs forever, subject to the condition of residence on the land and non-alienation thereof during his life. But we have not this license. The law, in its solicitude to prevent uncertainty, the mother of contention and confusion, has been so precise as to prescribe in conveyances *inter vivos* certain words for the creation of an estate of inheritance, so appropriated that they cannot be expressed by any other words or by any periphrasis or circumlocution.

Co. Lit., 9a. In a grant or feoffment to an individual, the word
(621) "heirs" was by the common law necessary to make a fee or in-

heritance; and although before the statute of uses an use in fee simple might have been raised without these words, because the use was guided solely by the intent of the parties, yet since that statute the word "heirs" is held as indispensable to raise a legal fee in deeds operating under the statute, as it was in feoffments and grants at common law. Co. Lit., 10-a; 1 Repts., 100-b; *Shelley's case.* The terms of limitation here employed are then manifestly insufficient to create an estate of inheritance. The next sentence of the deed is in these words: "Also, I give and grant to my said nephew, Thomas Saunders, one negro fellow Ned, and one negro girl named little Nelly, to him, his heirs and assigns forever." If the limitation expressed in this sentence can be applied to all the subjects of gift contained in the deed—to the lands before attempted to be limited as well as to the negroes given in the sentence itself—the defective limitation of the lands would be cured thereby, and a fee simple therein held to pass. But this cannot be done without violence to the grammatical and obvious construction of the terms employed. The clause is distinct and independent, commences with new words of donation, names new subjects of gift, and declares the extent of the interest therein granted. The limitation is as much restricted to the things mentioned in the sentence as these are subjected to the words of donation and grant with which the sentence begins. The donor had before declared, but unfortunately not with legal precision, the nature of the interest conveyed by him in the lands—an interest subject to a specified condition. To the gift of the negroes, intended by him to be unconditional, he annexed a different limitation. We cannot transfer the limitation of the latter so as to enlarge or modify the limitation of the former.

We see no error in the judgment below, and it must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Armfield v. Walker, 27 N. C., 582; *Stell v. Barham,* 87 N. C., 67; *Allen v. Baskerville,* 123 N. C., 127.

(622)

THE GOVERNOR, TO THE USE OF DEMPSEY S. EASON, v. DAVID SUTTON ET AL.

Action on Constable's Bond—Payment of Money Into Court.

1. Where, upon an action on a constable's bond, in which the breaches assigned were a failure to pay over money collected by the officer, and a failure to collect sundry notes and accounts placed in his hands for collection, the defendant paid a certain sum into court, according to a list

of notes and accounts which he had prepared: *It was held*, that the money was paid into court generally, and that while it admitted a cause of action on each breach, it left the defendant at liberty to show that the whole amount due upon all those breaches did not exceed what he had paid, and that although the list was *prima facie* evidence against him—and perhaps his sureties—of all that it admitted, it did not preclude him or them from showing that there were mistakes in it.

2. The law in regard to the practice of paying money into court, with its limitations and restrictions, stated by DANIEL, J.

THIS was an action of debt upon a constable's bond in which the breaches assigned were a failure to pay over moneys collected by the officer, and a failure to collect sundry notes and accounts placed in his hands for collection. The defendants pleaded the *general issue—tender and refusal and money paid into court to the amount of $91.29.*

On the trial at PITT, on the last circuit, before his Honor, *Judge Saunders,* the plaintiff offered in evidence a paper, prepared by the witness, which contained a list of debts amounting to the above sum of $91.29, and which the witness said he had prepared by the direction of the defendant, the constable, who gave him the money, and requested him to tender the amount to the plaintiff. This he did, and the plaintiff refused to receive it; whereupon the defendant directed him to pay it into court, which he did. This was after the suit was commenced, but before the cause was put to issue. The plaintiff then offered in evidence the receipt of the constable for one or two other claims which he proved to be good, to the amount of $5.57. The defendant was then allowed to show, subject to the opinion of the court, that one of the claims mentioned in the list, amounting to $16.95, had been returned to the plaintiff and actually received by him before suit. (623) If this evidence were admissible, and the defendant was to be credited by the amount, then it was admitted that the sum paid into court would more than cover principal, interest, and cost at the time of paying it in, and judgment of nonsuit was to be entered; but if inadmissible, then a judgment was to be entered for the plaintiff for the sum of $5.57 and cost.

His Honor held that if the defendant admit the claim of the plaintiff he must tender the amount admitted to be due, before action brought, and plead it; or he may pay into court the amount admitted to be due after action brought, with the costs, and then the plaintiff proceeds at his peril. That the party is allowed, as a matter of course, to pay money into court, if before plea pleaded, but after plea only on leave of the court. 2 Archb. Prac., ch. 9, pp. 199, 200; 13 East Rep., 551. If the defendant pay money into court, and the plaintiff then proceeds, the practice is to have the amount thus paid stricken out of the plaintiff's declaration, and then, unless the plaintiff recovers something fur-

ther, he of course fails in his action. 13 East, 551. That according to this rule, upon the defendant's paying the $91.29, and the plaintiff's refusing to receive it, that sum must be stricken out of the declaration, which of course would have covered the debts enumerated in the list, as made out by the witness. That having applied the money to particular debts, the defendant cannot be allowed to change that application and apply a part to other debts. Having these views, his Honor gave judgment for the plaintiff, and the defendants appealed.

Iredell and J. H. Bryan for plaintiff.
The Attorney-General for defendants.

DANIEL, J. The general rule is that money may be paid into court when the action is brought for a sum certain, or capable of being ascertained by computation; but not in an action for general damages. *Kallett v. E. I. Company,* 2 Burr. Reps., 1120; *Salt v. Salt,* 8 T. R., 47; 1 Saund. Rep., 33. A defendant who has neglected to make a tender before the date of the writ may relieve himself by paying the debt into court after an action brought, together with the costs of the (624) action up to that time. After he has pleaded, he must obtain the leave of the court to pay money in; and in case the plaintiff refuse to accept the money, he proceeds at his peril, insomuch that if, at the trial, the jury shall not give him a sum exceeding the money paid into court, he will be obliged to pay the cost of the action; though he is still entitled to take the money out of court, as well in this case as in a plea of tender. For the defendant in both cases admits that the plaintiff has a cause of action to the amount of the money paid into court. 1 Saund., 33; Leigh's N. P., 171. If the money is paid into court generally, it is applicable to the whole declaration, and admits that something is due on each count; it admits the contract and breach, but it does not admit the amount of the breach there stated. *Stoveld v. Brewin,* 2 Barn. & A., 116. If a defendant wishes to apply money paid into court to a particular count, care should be taken to have it paid in on the particular count, or it will be applicable to all the counts. *Hardin v. Spicer,* 1 Camp., 337, and the note. Where there are several counts for several causes of action, or several breaches are assigned in covenant, the defendant may pay into court an entire sum, in full satisfaction of all the counts or breaches. Leigh's N. P., 173, who cites *Marshall v. Whiteside,* 1 Meeson and Wilsby, 188. We take the law to be the same, where there are several breaches assigned upon the condition of a bond, under the Statute 8 and 9 Will. III. For each breach assigned is as a separate count in a declaration; and if the sums claimed on the several *breaches* can be ascertained by computation, then money paid into court

generally is applicable to each and every breach. In this case, the money was paid into court generally. While, therefore, it admitted a cause of action upon each breach, it left the defendant perfectly at liberty to show that the whole amount due upon all those breaches did not exceed what he had paid. The list made out by the clerk of the County Court was but a memorandum to aid the constable in ascertaining the amount which he probably owed. Being made according to his directions, it was *prima facie* evidence against him, and perhaps his sureties, of all that it admitted; but it did not preclude him or them from showing there were mistakes in it. We see, therefore, no (625) satisfactory reason for rejecting the testimony offered by the defendants, and, therefore, the judgment below must be reversed; and, according to the agreement of the parties, there must be judgment of nonsuit.

PER CURIAM. Judgment reversed.

Cited: Johnson v. Crawford, 61 N. C., 345.

BENJAMIN TYLER v. CHARLES B. MORRIS.

Writ of Error Coram Nobis.

1. A writ of error *coram nobis* is not a writ of wright. Before it is allowed there must be an affidavit of some error *in fact*, by which, in case the fact to be assigned for error is true, the plaintiff's right of action will be destroyed; and it is a matter of discretion with the court before which the application is made whether upon the affidavits to grant the writ or not, which cannot be revised by this Court upon an appeal.

2. The court, upon an application for a writ of error *coram nobis* does not decide *the fact* assigned for error *definitively.*

3. If the writ be granted, the other party, when brought in, may plead and take issue upon the fact, which must be tried by a jury, and not by the court.

4. A writ of error *coram nobis* is not in itself a *supersedeas;* it is so or not according to circumstances, and therefore execution cannot be sued out after the allowance of a writ of error without the leave of the court, and whether the *supersedeas* shall issue after the allowance of such writ must depend on circumstances to be adjudged of by the court.

THE defendant Morris made a motion in the Superior Court of law for the county of NEW HANOVER, on the last circuit, before his Honor, *Judge Toomer,* for a writ of error *coram nobis,* to reverse a judgment obtained in the said court by the plaintiff Tyler against him for error

in *fact,* viz.: that Tyler was dead at the time the judgment was rendered; and also for a *supersedeas* to the execution issued thereon. The attorney who obtained the judgment for Tyler was in court and resisted the motion, denying that Tyler was dead. His Honor refused the motion, giving as a reason that it did not appear to the court (626) from the affidavits that Tyler was dead. From this decision the defendant appealed.

No counsel appeared for the defendant in this Court.
Badger for plaintiff.

DANIEL, J., after stating the case as above, proceeded as follows: A writ of error *coram nobis* is not a writ of right. Before it is allowed there must be an affidavit of some error in *fact;* by which, in case the fact to be assigned for error is true, the plaintiff's right of action will be destroyed. *Birch v. Triste,* 8 East, 415. The court, in this case, was of the opinion that the affidavits did not lay a sufficient foundation to authorize it to grant the writ. This opinion of the court was one of discretion upon the facts disclosed in the affidavits. As the affidavits did disclose probable grounds that Tyler was dead at the time the judgment was rendered, we think that the court might have allowed the writ of error, although it refused the *supersedeas.* For the question whether Tyler was dead or not at the time of the rendition of the judgment was not one for the court to decide *definitively.* If the writ had been granted upon the error assigned, the administrator of Tyler, when properly brought in, might have plead that Tyler was alive at the rendition of the judgment, and so have taken issue upon the *fact* assigned for error. This issue must have been tried by a jury and not by the court. 1 Archb. Prac. K. B., 276 to 281. A writ of error *coram nobis* is not a *supersedeas* in itself; it is or is not according to circumstances; and therefore execution cannot be sued out after the allowance of the writ of error without the leave of the court. I Archb. Prac., 277. And whether a *supersedeas* shall issue after the allowance of a writ of error, for error in *fact,* must depend on circumstances, to be adjudged of by the court. In this case the refusal of the Superior Court to grant the writ was founded in discretion arising upon the facts set forth in the affidavits. It has been repeatedly decided that the Supreme Court has not power to revise such a decision. The appeal, (627) therefore, must on this ground be dismissed.

PER CURIAM. Appeal dismissed.

Cited: Lynn v. Lowe, 88 N. C., 487.

HEZEKIAH G. SPRUILL, EXECUTOR OF BENJAMIN SPRUILL, v. DANIEL N. BATEMAN, ADMR. OF ZEBULON TARKINGTON ET AL.

Sheriff—Return on Writ Issued to His Successor.

A former sheriff has no authority to act under a writ directed to his successor, and therefore a writing purporting to be a return by the former sheriff, made upon such writ, is not, in law, a return, and of course not a part of the record in that suit. Nor is a receipt expressed to be in full upon such execution, given by one admited to be, but not appearing on the record to be, the real plaintiff, to the former sheriff, an acknowledgment of record to the satisfaction of the judgment. It is but evidence *in pais* of the fact of payment, which may therefore be met by other testimony to explain or disprove that fact.

THIS was a *scire facias* to revive a judgment and obtain an execution thereon. Pleas—*Nul tiel record—Payment and satisfaction—Accord and satisfaction.*

Upon the trial at CHOWAN, on the last circuit, before his Honor, *Judge Nash,* the plaintiff showed that there was such a record; whereupon the defendants produced a writ of *venditioni exponas* directed to "the sheriff of Tyrrell County," on which was an account of the sales of the property therein mentioned, purporting to have been made by "E. Mann, late sheriff," and a receipt given by Henry Alexander, who, it was admitted, was the real plaintiff, to E. Mann, "late sheriff," and expressed to be in full of the judgment; and the defendant contended that this was an acknowledgment of record of the satisfaction of the judgment; but it was insisted, on the other hand, that Alexander, the real plaintiff, could show that the receipt did not speak the truth, and that in fact the money had not been received by him, and he offered evidence to prove this. which was objected to by the defendant, but received by the court.

It appeared that executions had been regularly issued upon the
(628) judgment in question up to the time when the writ of *venditioni exponas* was issued, and that the property mentioned in the latter writ had been levied upon by E. Mann, who was then sheriff, but who had gone out of office before the *venditioni exponas* issued. There was a verdict and judgment for the plaintiff, and the defendant appealed.

No counsel appeared for the defendant in this Court.
J. H. Bryan for plaintiff.

GASTON, J. It was decided, in the case of *Tarkington v. Alexander,* 2 Dev. & Bat., 87, that a former sheriff has no authority to act under a writ directed to his successor, and that acts purporting to be done by him under such pretended authority are acts of usurpation. It seems to

us, therefore, very clear that the paper annexed to the writ of *venditioni exponas,* and purporting to be a return thereof by the late sheriff, was not in law a return, and of course not a part of the record in that suit. Nor, as it appears to us, was the receipt on the execution from Henry Alexander to E. Mann, the late sheriff, an acknowledgment of record by the plaintiff of satisfaction of the judgment. It does not appear of record that Alexander had an interest in or power over the judgment. The receipt does not purport to be a release to the defendants, nor an acknowledgment of satisfaction. It testifies to a transaction *in pais* between Alexander and Mann, that the latter has paid to the former the amount of the judgment. As against Alexander and the plaintiff, so far as it is shown that Alexander was authorized to act for the plaintiff, it is evidence of the fact, and therefore may be met by other testimony which explains or disproves that fact.

There was no error, therefore, as we think, in receiving such explanatory or repelling testimony, and the judgment below ought to be affirmed.

PER CURIAM. Judgment affirmed.

THE STATE v. HENRY S. HILL.

Homicide—Manslaughter—Self-Defense.

1. If a man assault another with malice prepense, even though he should be driven to the wall, and kill his adversary there to save his own life, he is guilty of murder.

2. Where two persons have formerly fought on malice, and are apparently reconciled, and fight again on a fresh quarrel, it shall not be intended that they were moved by the old grudge, unless it so appear from the circumstances of the affair.

3. When a man makes an assault, which is returned with a violence manifestly disproportionate to that of the assault, the character of the combat is essentially changed, and the assaulted becomes in his turn the assailant; and if the person who made the first assault, in the transport of passion thus excited, and without previous malice, kill his adversary, the proper inquiry as to the degree of his guilt is not whether he was possessed of deliberation or reflection, so as to be sensible of what he was then about to do, and intentionally did the act; but whether a sufficient time had elapsed after the violent assault upon him, and before he gave the mortal wound, for passion to subside and reason to reassume her sway; for if there had not, he would be guilty of manslaughter only.

4. If one began an affray, or even if he did not begin, but was assaulted in the first instance, and then a combat ensued, he could not *excuse himself* as for a killing in self-defense, unless he quitted the combat before the mortal blow was given, if the fierceness of his adversary permitted, and retreated as far as he might with safety, and had then killed his adversary, of necessity, to save his own life.

5. Words of reproach, or contemptuous gestures or the like offenses against decorum, are not a sufficient provocation to free a party killing from the guilt of murder, where he uses a deadly weapon, or manifests an intention to do great bodily harm. This rule, however, does not obtain where, because of such insufficient provocation, the parties became suddenly heated and engage in mortal combat, fighting upon equal terms.

THE prisoner was indicted for murder, at WAKE, on the last circuit, before his Honor, *Judge Saunders.*

On the trial several witnesses were examined, whose testimony was substantially as follows: The deceased and the prisoner had, for the last twelve months, been upon bad terms; had had several disputes, and on one occasion a rencounter, in which both parties drew their knives; the prisoner during the last summer had said that unless the deceased quit troubling him he would take his life; on the week before the
(630) affair the prisoner had procured a knife twelve inches in length, and said he expected yet to kill some person with it; on Saturday, 28 September, the prisoner went to the house of one Edwards, much intoxicated, and slept for some hours; on the same day the deceased went to the same place also, intoxicated. Something was said about shooting, and the deceased applied to the prisoner as well as to others to borrow money, which the prisoner refused. They were in a room to themselves when the deceased passed through another room, the prisoner following, and both having their knives drawn, which, however, they put up, not evincing, as the witness thought, any disposition to use them. Both parties shortly after this went out at the side door of the house, the deceased first, and the prisoner following after. Shortly afterwards the deceased was seen going into the house at the end door, when the prisoner caught hold of his waistcoat and pulled him back, and said, "Let us talk it over," to which the deceased made no reply that could be heard. The prisoner then struck him, upon which the deceased pulled out his knife, as one of the witnesses thought, open, and gave three cuts, one lightly across the prisoner's arm and the others pretty severely in the abdomen, the prisoner giving back and pushing the deceased from him. The prisoner then jumped off, pulled out his knife and opened it, exclaiming "Damn him, he has killed me, and I will kill him, if I can"; he then advanced five or six steps and gave a thrust with great force, which proved fatal—the deceased dying the next day. The whole transaction occurred in a few minutes. The witnesses differed as to the position of the deceased at the time he was stabbed; but all of them concurred in saying that he was standing still, and manifesting no inclination to pursue the prisoner or to renew the combat. The deceased was upwards of forty years of age, and a turbulent man; the prisoner was about twenty-three years of age, of equal manhood with the

deceased; and both were addicted to intoxication. The cause was submitted to the jury, on the Thursday of court, as a case either of excusable homicide, murder, or manslaughter. The jury being unable to agree, asked for further instructions as to the law, when his Honor gave the following in writing: (631)

"*Excusable Homicide.* If the prisoner brought on the affray by making the first attack, he was bound not only to have ceased the combat, but to have used every means in his power, short of taking away the life of the deceased, such as retreating, unless the attack on him had been so fierce that a retreat would have increased his danger.

"*Murder.* A killing with malice, without any just cause or excuse.

"First. If the prisoner *sought the provocation,* by giving the first blow, in order to afford him a pretense for wreaking his vengeance, *or* with the design of using his knife, it is a case of murder.

"Secondly. If the prisoner gave the first blow, and was then cut by the deceased, although he may have been agitated by resentment and anger, yet if the jury collect from what he said and did, when or just before he gave the mortal blow, that in fact he was possessed of deliberation and reflection, so as to be sensible of what he was then about to do, and intentionally *did* the act, it was a case of murder.

"*Manslaughter.* A killing without malice express or implied, and under the influence of passion or provocation.

"Should the jury think, according to the first proposition, that the prisoner did *not* seek the provocation with any view to revenge; *or,* according to the second, was not possessed of deliberation and reflection at the time he gave the blow, but acted under the influence of passion, excited by the provocation then received, it would be a case of manslaughter."

The jury returned a verdict of guilty, and sentence of death being pronounced upon the prisoner, he appealed.

C. Manly for the prisoner.
The Attorney-General for the State.

GASTON, J. From the case which has been stated by the judge who presided at the trial, and which constitutes a part of the record before us, it appears that it was not controverted but that the prisoner had committed the homicide wherewith he was charged, and that the only question was as to the degree of guilt which the law attached (632) to the fatal deed. Upon this question the jury doubted, and asked for specific instructions; and it was to enable them to come to a correct conclusion upon this question that the specific instructions set forth in the case were given. It is not for us to determine whether the

verdict was warranted by the evidence, but it is our duty to examine whether the law was correctly expounded.

In the investigation of this question it was necessary that the jury should, in the first place, ascertain whether the prisoner commenced the affray with a preconceived purpose to kill the deceased or to do him great bodily harm. For if he did, then there was nothing in the subsequent occurrences of the transaction which could free him from the guilt of murder. If the first assault was made with this purpose, the malice of that assault, notwithstanding the violence with which it was returned by the deceased, communicates its character to the last act of the prisoner. It is laid down as settled law that if a man assault another with malice prepense, even though he should be driven to the wall, and kill him there to save his own life, he is yet guilty of murder in respect of his first intent. Hawkins Book 1, ch. 11, sec. 18, and ch. 13, sec. 26. Of that part, therefore, of his Honor's instructions which in the case is called "the first proposition," and which declared as a conclusion of law that the prisoner was guilty of murder, if the jury were satisfied from the evidence that the assault was made by him in order to have a pretense to kill the deceased, or to cut him with the knife, the prisoner has no cause to complain. Such craft, indeed, would but the more strongly indicate the heart fatally bent on mischief.

There was certainly evidence well deserving to be weighed by the jury in coming to a correct conclusion upon this inquiry. But what was that conclusion we have not the means of knowing. They might have believed, notwithstanding the testimony as to antecedent quarrels, and the rencounter between the parties, and in relation to threats of vengeance by the prisoner, that the transaction which they were then examining sprang from the passions of the moment. For cer-
(633) tainly where two persons have formerly fought on malice, and are apparently reconciled, and fight again on a fresh quarrel, it shall not be intended that they were moved by the old grudge, unless it so appear from the circumstances of the affair. Hawkins B. 1, ch. 13, sec. 30. If, upon consideration of all the evidence, the jury came to the conclusion that the first assault of the prisoner was not of malice prepense, then the subsequent occurrences demanded their careful consideration, because upon these the prisoner's guilt might be extenuated into manslaughter or excused as a homicide in self-defense.

So much of the instructions given upon this view of the case as relate to excusable homicide is, in our opinion, not liable to exception. Even if the prisoner had not begun the affray, but had been assaulted in the first instance, and then a combat had ensued, he could not excuse himself as for a killing in self-defense unless he had quitted the combat before a mortal blow was given, if the fierceness of his adversary per-

mitted, and retreated as far as he might with safety, and had then killed his adversary of necessity to save his own life. But the remaining part of the instructions, and that part which *may* have had a decisive influence upon the verdict, is, in our judgment, erroneous. According to this, which is laid down as "the second proposition," the jury were instructed "that if the prisoner gave the first blow, and was then cut by the deceased, although he might have been agitated by excitement and anger, yet if they collected from what he said and did, when or just before he gave the mortal blow, that in fact he was possessed of deliberation and reflection, so as to be sensible of what he was then about to do, and did the act intentionally, it was murder." This proposition, as we understand it, and as we must believe it to have been understood by the jury, we are very confident cannot be sustained.

The proposition supposes that the first assault was made by the prisoner without malice, and that the fatal wound was given while under the influence of indignation and resentment, excited by the excessive violence with which he had been in turn assailed by the deceased; but it refuses to the prisoner the indulgence which the law accords to human infirmity suddenly provoked into passion, if such (634) passion left to him so much of deliberation and reflection as to enable him to know that he was about to take, and to intend to take, the life of his adversary. No doubt can be entertained, and it is manifest that none was entertained, by his Honor but that the excessive violence of the deceased, immediately following upon the first assault, constituted what the law deems a provocation sufficient to excite furious passion in men of ordinary tempers. The case does not state that the first blow given by the prisoner was such as to endanger life or to threaten great bodily harm, nor that it was immediately followed up by further efforts or attempts to injure the deceased. It must be taken to have been a battery of no very grievous kind, and it justified the deceased in resorting to so much force on his part as was reasonably required for his defense—and in estimating the quantum of force which might be rightfully thus used the law will not be scrupulously exact. But when an assault is returned with a violence manifestly disproportionate to that of the assault, the character of the combat is essentially changed, and the assaulted becomes in his turn the assailant. Such, according to the case, was the state of this affray when the mortal wound was given. To avenge a blow, the deceased attacked the prisoner with a knife—made three cuts at him—and gave him a severe wound in the abdomen. If instantly thereupon, in the transport of passion thus excited, and without previous malice, the prisoner killed the deceased, it would have been a clear case of manslaughter. Not because the law supposes that this passion made him unconscious of what he was about to do, and stripped

the act of killing of an intent to commit it, but because it presumes that passion disturbed the sway of reason, and made him regardless of her admonitions. It does not look upon him as temporarily deprived of intellect, and therefore not an accountable agent, but as one in whom the exercise of judgment is impeded by the violence of excitement, and accountable therefore as an *infirm* human being. We nowhere find that the passion which in law rebuts the imputation of malice must be so overpowering as for the time to shut out knowledge and destroy volition.

All the writers concur in representing this indulgence of the law (635) to be a condescension to the frailty of the human frame which, during the *furor brevis,* renders a man deaf to the voice of reason, so that *although the act done was intentional of death,* it was not the result of malignity of heart, but imputable to human infirmity.

The proper inquiry to have been submitted to the jury on this part of the case was whether a sufficient time had elapsed after the prisoner was stabbed, and before he gave the mortal wound, for passion to subside and reason reassume her dominion—for it is only during the temporary dethronement of reason by passion that this allowance is made for man's frailty. And in prosecuting this inquiry, every part of the conduct of the prisoner, as well words as acts tending to show deliberation and coolness on the one side, or continued anger and resentment on the other, was fit to be considered in order to conduct the jury to a proper result.

The Attorney-General, in his argument, referred to a class of cases which probably misled the judge in laying down the proposition before us—in which circumstances apparently unimportant, but indicative of deliberation, have been thought to establish malice and repel the plea of human infirmity. The explanation given by the text writers will show that the doctrine in these cases, although in some respects analogous to that which obtains in a killing upon legal provocation, is not identical with it. The general rule of law is that words of reproach or contemptuous gestures, or the like offenses against decorum, are not a sufficient provocation to free the party killing from the guilt of murder, where he useth a deadly weapon or manifests an intention to do great bodily harm. This rule, however, does not obtain where, because of such insufficient provocation, the parties become suddenly heated and engage immediately in mortal combat, fighting upon equal terms. But deliberate dueling, if death ensue, however fairly the combat may be conducted, is, in the eye of the law, murder. The punctilios of false honor the law regards as furnishing no excuse for homicide. He who deliberately seeketh the blood of another, in compliance with such punctilios, acts in open defiance of the laws of God and of the State, and with that wicked purpose which is termed malice aforethought.

While, therefore, because of presumed heat of blood the law (636) extenuates into manslaughter a killing upon such sudden rencounter, although proceeding upon an insufficient provocation, it withholds this indulgence when, from the circumstances of the case, it can be collected that, not heated blood but a settled purpose to vindicate offended honor, even unto slaying in defiance of law, was the actual motive which urged on to the combat.

In the conclusion of his instructions the judge informed the jury "that if they should believe, according to the second proposition, that the prisoner was not possessed of deliberation and reflection at the time he gave the mortal blow, but acted under the influence of passion excited by the provocation then received, it would be a case of manslaughter." It is manifest that if there was error in the proposition which we have been examining, this general instruction did not correct it, for the jury were expressly referred to that proposition for the legal meaning of "deliberation and reflection"; and according to that proposition there was deliberation and reflection, "if the prisoner was sensible of what he was about to do, and did the act intentionally."

Entertaining a full conviction that in this the jury were misdirected, we are of opinion that the verdict below ought to be set aside, and a *venire de novo* awarded. This decision must be certified to the Superior Court of Wake, with directions to proceed agreeably thereto and to the laws of the State.

PER. CURIAM. Judgment to be reversed.

Cited: S. v. Gentry, 47 N. C., 412; *S. v. Carter,* 76 N. C., 23; *S. v. Chavis,* 80 N. C., 357; *S. v. Barnwell, id.,* 470; *S. v. Kennedy,* 91 N. C., 578; *S. v. Hensley,* 94 N. C., 1035; *S. v. Whitson,* 111 N. C., 699; *S. v. Ham,* 116 N. C., 1046; *S. v. Medlin,* 126 N. C., 1130.

(637)

WILLIAM FRANCIS v. OTHO H. FELMIT.

Contract by Infant—Necessaries.

1. A contract made by an infant to work a certain specified time with a carpenter, upon the consideration of the latter's boarding and clothing him, and teaching him the trade, is not binding upon the infant, and he may, at any time, leave the service of the carpenter, provided he has not arrived at full age and confirmed the contract.

2. If an infant has been furnished with necessaries while working with a mechanic, to learn his trade, upon an action of assumpsit brought against the infant for the value of the necessaries, it is a good defense under the plea of *non assumpsit* that the defendant's services in work and labor were equal to or exceeded in value the necessaries furnished.

FRANCIS *v.* FELMIT.

THIS was an action of assumpsit, in which the plaintiff declared in two counts: first, for a breach of contract; secondly, for the value of instruction in the art and mystery of the carpenter's trade, and for a set of bench tools, and board and clothing furnished to the defendant. Pleas, *nonassumpsit* and *infancy*. Replication to the latter plea, that the instruction given and the board, clothing, etc., furnished were necessaries.

Upon the trial at HAYWOOD, on the last circuit, before his Honor, *Judge Pearson*, the plaintiff proved that he was a carpenter, and had made with the defendant the following agreement, to wit: the defendant was to work for the plaintiff at the carpenter's trade three years, and the plaintiff was to teach him the trade, to board him, and furnish him with $90 worth of clothes during the time, and at the end of the time was to give him a suit of clothes and a set of bench tools. He then proved that the defendant had worked for him but two years and four months of the time, and had refused to work the remaining eight months, and that the value of the defendant's work for those eight months was at the rate of $25 per month, which he sought to recover under the first count. The plaintiff proved further that during the two years and four months the defendant was with him he had instructed the defendant in the carpenter's trade, had boarded him, and furnished him with clothes to the value of $114, and a set of
(638) bench tools of the value of $15, which he sought to recover under the second count. The defendant proved that at the time he made the contract and set in to work with the plaintiff he was between seventeen and eighteen years of age; that his parents lived in the county, and, though poor, were able and willing to furnish him with his board and clothing. He also proved that he was a stout, able-bodied young man and did much work while he was with the plaintiff.

His Honor charged the jury that, admitting the plaintiff's evidence all to be true, he could not recover upon the first count if the defendant, at the time he entered into the contract and at the time he left the plaintiff's employment, were under the age of twenty-one years. That, in regard to the second count, it was true that infants could bind themselves for necessaries, as for board, clothes, and necessary instruction, and that if the value of the board and clothes furnished and the instruction given by the plaintiff to the defendant exceeded the value of the latter's services, the jury should find for the plaintiff, and allow him the excess; but if the evidence satisfied them that the defendant's services were equal to or exceeded in value the board, clothes, and instruction, the defendant would be entitled to their verdict. There was a verdict and judgment for the defendant, and the plaintiff appealed.

No counsel appeared for either party in this Court.

DANIEL, J. The action is assumpsit. The defendant pleaded *nonassumpsit* and *infancy*. The first count is founded on a breach of a special agreement, entered into by the defendant, to work and labor for the plaintiff for the term of three years, for the consideration therein expressed. We think that the plea of infancy was a good bar to any recovery on this count. Contracts entered into by a person within the age of twenty-one years are not binding unless they be for the supply of necessaries, or unless he has confirmed them after he has attained that age. The second count is on a *quantum meruit*, for necessaries furnished to the infant defendant. The plaintiff proved that he had furnished the defendant with necessaries. The defendant, under (639) the plea of *nonassumpsit*, was permitted by the court to give in evidence that he was an able-bodied young man, and that he worked and labored for the plaintiff, and in that way paid for the necessaries which had been furnished him. The judge charged the jury that if they were satisfied that the defendant's services were equal to or exceeded in value the necessaries furnished, they would find for him. We see no error in the admission of the evidence or in the charge of the judge. Under *nonassumpsit*, evidence of payment in work and labor, or in any other thing which shows that the demand had been *ex equo et bono* extinguished before the commencement of the action, is proper. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

(640)

ANN STINER v. JOHN V. CAWTHORN.

Appeal—Allotment of Dower.

1. If, upon an appeal by one alone of two or more parties to a judgment in the County Court, the Superior Court proceed in the cause and render a judgment therein against the appellant, and he thereupon appeal to the Supreme Court, the latter Court will not dismiss the appeal for want of jurisdiction to entertain it.

2. In a proceeding by petition, under the Act of 1784, 1 Rev. Stat., ch. 121, sec. 1, for dower, the suit for dower is at an end by the judgment of the court awarding dower. This is the only judgment to be rendered in that suit, and any proceeding to set aside the inquisition taken under our act—like the *scire facias*, or writ of error, or writ of admeasurement, or bill in equity, used to set aside the sheriff's assignment in England—is in the nature of a new suit.

3. The Act of 1784 has not indicated the remedy for an illegal or excessive allotment of dower; but the usages of our courts have defined it, to wit, that when the report of the jury is returned exceptions may be thereunto taken by anyone thereby aggrieved, and the court will set aside the allotment and order a new allotment, if sufficient cause be shown. And if a judgment be pronounced overruling such exceptions, the party may appeal, which will not disturb the judgment that the widow recover her dower, nor vacate anything that has been done in execution of that judgment; but will only carry up the proceeding instituted to set aside the inquisition of the jury.

4. Under the Act of 1784 the jury cannot assign to the widow the whole of her husband's real estate, upon the ground that the whole of it is necessary for her decent subsistence. The act gives her one-third of the real estate of which her husband died seized, in which is to be comprehended the mansion house and offices—or if the whole mansion and offices cannot be so taken in without injustice to the children, then such part or portion thereof as may be sufficient to afford her a decent subsistence. But the mansion house—or a part of the mansion house—is not to be allotted in addition to her third, but in part of her third; and if the whole be allotted to her by the jury, when her husband had no other real estate, the report will be set aside.

AT May Term, 1839, of WARREN County Court, Ann Stiner filed her petition, setting forth that her husband, Jacob Stiner, had died intestate, seized in fee of a lot of land in the town of Warrenton, and praying that she might have dower assigned therein. To this petition she (641) made parties defendants Henry T. Allen and Ann, his wife, and Eliza Dunnavant (which said Ann and Eliza were the heirs at law of her deceased husband), and also John V. Cawthorn, who claimed to hold the interest of Henry T. Allen in his wife's moiety, under a purchase at sheriff's sale. The defendants made no resistance to the claim of the petitioner; and thereupon the court, in conformity to the directions of the act of Assembly, awarded a writ to issue to the sheriff, commanding him to summon a jury of freeholders, who upon oath should allot to the petitioner one-third part of the lot aforesaid. At August Term, 1839, the sheriff returned the inquisition of the freeholders, setting forth that in obedience to the said writ they had allotted to the petitioner "all the said lot, with all the outhouses, buildings and appurtenances thereto belonging, the same being all the real estate whereof Jacob Stiner died seized." Thereupon the defendant Cawthorn excepted to the inquisition in these words: "The defendant, John V. Cawthorn, objects to the report of the jury in this case because the said jury, in the allotment of dower to the widow, hath given her the whole of the real estate of which her husband, Jacob Stiner, died seized and entitled to." But the court "confirmed the report and ordered the same to be recorded and registered," from which judgment the defendant Cawthorn appealed to the Superior Court, where the cause coming on

to be heard, on the last circuit, before his Honor, *Judge Saunders,* and it appearing to the court that the whole real estate of which the petitioner's husband died seized consisted of a very small unfinished house and lot in the town of Warrenton, the whole of which was necessary for the decent subsistence of the widow, "it was ordered that the exception taken by the defendant Cawthorn be overruled, and the allotment affirmed; that the said report and allotment be recorded, and that the petitioner hold according thereto."

From this judgment the defendant Cawthorn prayed an appeal to this Court, which was allowed him; and it was specially stated on the record "that the other defendants were satisfied with the judgment and refused to join in the appeal."

(642)

Badger for petitioner.
W. H. Haywood for defendant.

GASTON, J., after stating the case as above, proceeded as follows: It was moved here by the counsel for the petitioner to dismiss the appeal for the want of jurisdiction in this Court to revise the judgment rendered in the Superior Court. In support of this motion it was insisted that where a joint judgment is rendered against two or more defendants, one alone cannot appeal therefrom; that the cases of *Hicks v. Gilliam,* 4 Dev., 217, and *Dunn & McIlwaine v. Jones, ante,* 154, have established this to be the law in cases of appeals from the County to the Superior Court; and that there being the same reason, the same law must obtain in regard to appeals from the Superior to the Supreme Court. It seems to us that the positions asserted may be conceded, and yet the consequence contended for will not follow. Admit that the judgment in the County Court, from which Cawthorn appealed, was a joint judgment, and that the Superior Court acquired no jurisdiction of *the cause* because one defendant alone cannot appeal, yet the Superior Court did act thereupon and rendered a judgment therein, there being no other parties before it but the petitioner and Cawthorn; and from the judgment rendered in *that* court, either of the parties who were alone before it might appeal to this Court. The cases quoted were *decided here* upon the ground that this Court had jurisdiction of them. In both there was a joint judgment against two defendants in the County Court, and one only appealed to the Superior Court. In each there was a motion made to dismiss the appeal in the Superior Court for want of jurisdiction. In the one case, the motion was refused; the cause was tried, and a final judgment rendered for the plaintiff, from which the defendant in the Superior Court appealed. In the other, the motion to dismiss prevailed, and the defendant appealed therefrom. This Court took jurisdiction of

(643) both appeals, and in the exercise of that jurisdiction in the first case *reversed* the judgment of the Superior Court, and proceeding to declare what judgment should be rendered in the Superior Court, directed that court to dismiss the appeal and issue a *procedendo* to the County Court to award execution on the judgment there rendered; and in the second case *affirmed* the judgment of the Superior Court. The motion to dismiss the appeal is therefore overruled.

But it becomes necessary for the proper exercise of our jurisdiction to determine what was the subject-matter of the appeal from the County Court, and whether that appeal was regular. The legal remedy at common law to enforce an assignment of dower, where no part of it had been assigned, was by a writ of dower *unde nihil habet,* and the judgment for the demandant was that she "should recover seizin of a third part of the tenements demanded in severalty, by metes and bounds"; or if the judgment were rendered against tenants in common, "should recover seizin of a third part of the tenements demanded, in three parts to be divided." By that judgment, at common law, the suit was at an end, and an execution issued to enforce it, called a writ of *habere facias seisinam.* 2 Saund. Rep., note 44, c, d, e. In pursuance of that writ, the sheriff assigned dower on the land, and she might recover possession thereof by ejectment. Since the Statute of Merton, the widow might also have judgment for damages, and then the writs of seizin and of inquiry of damages were usually blended together in one writ. Where an excessive assignment was made by the sheriff, the heir might have a *scire facias* to obtain an assignment *de novo. Stoughton v. Leigh,* 1 Taun., 412. According to the opinions of some, he might have error, because of this appearing on the inquisition; while others have thought error would not lie, but a writ of admeasurement of dower, because the judgment and the award of execution were good. Styles, 276; Palmer, 266. Nay, courts of equity have entertained bills to be relieved against such assignments upon allegations of fraud and partiality. *Hoby v. Hoby,* 1 Ves., 218; *Sneyd v. Sneyd,* 1 Atk., 442. Our act of Assembly (see 1 Rev. Stat., ch. 121, sec. 1) regulating the mode of proceeding directs a petition to be filed, setting forth the widow's claim to dower, specifying the lands whereof her husband died seized, and pray-
(644) ing that her dower may be allotted; and enacts that thereupon the court shall issue their writ commanding the sheriff to summon twelve freeholders, who shall allot and set off to her one third part of the lands of which her husband died seized, and put her in possession of the same, which possession shall vest in her an estate for her natural life in the third part aforesaid. The act is entirely silent as to any further proceedings upon the return of the inquisition or report of the jury. In a proceeding by petition under this act, as in a writ of dower

at common law, the suit for dower is at *an end* by the judgment of the court awarding dower. This is the *only* judgment to be rendered in that suit; any proceeding to set aside the inquisition taken under our act of Assembly, like the *scire facias* or writ of error or writ of admeasurement, or bill in equity used to set aside the sheriff's assignment in England, is in the nature of a new suit. Our act has not indicated the remedy for an illegal or excessive allotment of dower, but the usages of our courts have defined it. In *Eagles v. Eagles,* 2 Hay., 181, it was decided that when the report of the jury is returned exceptions may be thereunto taken, and the court will set aside the allotment and order a new allotment if sufficient cause be shown. This practice has been extensively followed since, and must now be regarded as firmly fixed.

The appeal taken from the County Court is not therefore, as it seems to us, an appeal from the judgment in the suit for dower, but merely from the decision made upon the motion or application of Cawthorn, who had been one of the defendants in that suit to set aside the inquisition or report of the jury returned therein, by which he alleged himself to be aggrieved. We can see no sufficient reason why any one aggrieved by the report of the jury may not be received to make this application, and when it is *his* application only, he alone can regularly appeal from the decision upon it. The appeal does not disturb the judgment that the widow recover her dower, nor vacate anything that has been done in execution of that judgment. The appeal carries up the proceeding instituted for setting aside the inquisition, but it *leaves* the inquisition in full force until the judgment of the appellate court shall pass upon it.

Upon the main question involved in this controversy the Court feels no difficulty. In its opinion, the inquisition of the jury (645) cannot stand. The dower of a widow, of common right, never did extend to more than a third part of the lands and tenements of her husband, and our statutes have not, directly or indirectly, in any case, enlarged the right so as to comprehend more than a third. They declare that she shall be *entitled* to dower in the following manner, to wit, *one third part* of all the lands, etc., of which her husband died seized or possessed." The writ to be awarded is to allot to her "one third part of the lands, etc.," and the estate vested by the execution of the writ is declared to be an "estate for the term of her life in the third part of her husband's lands, etc." *Very plain* and *unequivocal* language must be found to warrant the supposed exception that where the whole of the husband's real estate is necessary for the decent subsistence of the widow, then the whole may be allotted. To our apprehension there is no language in the statute which justifies such an exception. At common law, the heir was not compellable to assign to the widow for her dower the mansion house or any part thereof, but he might assign her dower in other lands, in

allowance of the capital messuage. But if there were not any other lands of which she was dowable, and the heir assigned unto her a chamber in the capital messuage in the name of dower, and she agreed thereto, it was a good assignment. But she was not compellable to take the same, because it may be but trouble and vexation in a woman to have a chamber within the house of another man. See Perkins, sec. 406. Our act of 1784, 1 Rev. Stat., ch. 121, sec. 1, intended to give the widow the right to require, where it might be done consistently with the rights of the heirs, that the capital messuage should be assigned in part of her dower. Accordingly, after enacting that she shall have a *third,* it proceeds to state that *in that third* shall be comprehended the mansion house and offices; or if the whole cannot be so taken in without injustice to the children, then such part or portion thereof only as may be sufficient to afford her a decent residence. The mansion house, or a part of the mansion house, is not to be allotted in addition to her third, but in part of her third. Her claim is to a third *only* of her husband's
(646) real estate. In the assignment of that third, if she wishes it, the mansion house, or so much thereof as is suitable, shall be included, but she cannot have more than a third.

The particular circumstances set forth in the case, as influencing the judgment of the Superior Court would be entitled to great weight if this were a matter of *discretion;* but it is not. An inquisition allotting the *whole* of a man's lands under a writ to set off *one third part* thereof is, in our judgment, directly against law, and must be set aside.

It is the opinion of this Court that the judgment rendered in the Superior Court is erroneous and must be reversed, and that the exception taken by the defendant to the assignment of dower which was returned to the County Court is, in law, sufficient to set aside the same. This decision will be certified to the Superior Court, with directions to conform their judgment thereto and to issue their writ to the County Court to set aside the said assignment. The petitioner may then proceed to have a new assignment in the County Court according to law.

PER CURIAM. Judgment reversed.

Cited: McDaniel v. McDaniel, 25 N. C., 64; *Anders v. Anders,* 49 N. C., 245; *Lowery v. Lowery,* 64 N. C., 112; *Donnell v. Shields,* 30 N. C., 372; *Smith v. Cunningham, id.,* 461; *Jackson v. Hampton,* 32 N. C., 579; *Moore, ex parte,* 64 N. C., 91; *Welfare v. Welfare,* 108 N. C., 275.

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ELISHA WHARTON v. WILLIAM WOODBURN.

Liability of Firm for Acts of One Partner.

1. A responsibility incurred upon a request made by one professedly in behalf of himself and his copartner, in relation to their common business, but, *in truth*, for his individual benefit, is, in law, incurred at the request of both. Hence, where a person became surety to a bond, given to secure money borrowed by one partner professedly for the firm, and so understood by the lender and the surety, but, in truth, for the individual use of the borrower: *It was held*, that though the creditor could not recover the money from the firm, for want of authority in the partner to bind the firm by deed, yet the surety upon paying the bond, even voluntarily and without suit, might recover the amount from the firm.

2. Although one partner cannot bind his copartner by deed for a loan effected in the name of the firm, unless he have express authority by deed for that purpose, yet, in equity, if it can be shown that the loan was in behalf of both the partners, and that the security was by the contract intended to be one binding both the partners, but through mistake had been so executed as to bind one only, *it seems* that the creditor may have relief against both.

3. The contract between principal and surety—though it may be inferred from the nature of the security given to the creditor—is not contained therein nor evidenced thereby, but is a collateral contract, usually a parol one, which may therefore be shown by competent and satisfactory evidence.

4. If one of two partners purchase goods ostensibly for the partnership concern, but in truth for himself, or borrow money for the firm, but misapply it, the firm is bound.

THIS was an action of assumpsit, brought to recover from the defendant, the survivor of Watson W. Woodburn and William Woodburn, a sum of money, paid and expended by the plaintiff to their use and at their instance and request. It appeared in evidence on the trial at GUILFORD, on the last circuit, before his Honor, *Judge Bailey*, that Watson W. Woodburn, on 1 March, 1833, had borrowed from Peter Summers a sum of money, and to secure the payment of it had executed a bond in the name of Watson W. Woodburn & Co.; that the plaintiff had executed the same as a surety, and that the money not being paid by the principal or principals when it became due, the plaintiff had paid it as surety. The plaintiff alleged that at the time of this transaction Watson and William Woodburn, who were brothers, were (648) copartners in trade; that the money was borrowed in the name of both and for the benefit of both, and that the plaintiff became liable as surety at the request of both. On the part of the defendant it was insisted that at the time of the loan, Watson and William were not part-

ners in trade, although they shortly afterwards became partners under the firm and style of *William Woodburn & Co.;* moreover, that if they were then partners, the money was borrowed by Watson to raise *his part* of the capital stock of the firm, and that the plaintiff became surety in the bond for him and at his request only. The only evidence necessary to be stated was that of Ludwick Summers, who deposed that his father, Peter Summers, loaned to Watson W. Woodburn one thousand dollars on 1 March, 1833, and at the same time received from the said Watson therefor a bond signed by him in the name of Watson W. Woodburn & Co., and also by the plaintiff as surety; that Watson said that he and his brother were going into partnership, and that he wanted the money for the defendant, William, to take with him to the North to purchase goods, for that he, the said William, intended to start next morning in the stage. This witness stated further that in 1837 he had a conversation with the defendant, who said the bond was not signed as he thought, or as the witness told him it was; that he had received the money, but that *it was Watson's part of the stock.* This witness also proved the payment of the money by the plaintiff to the executors of Peter Summers in May, 1838, before the commencement of the suit; and that the said payment was made voluntarily or without compulsion or request.

His Honor left it to the jury, as a question of fact, whether, at the time of the transaction, an actual partnership existed between the brothers; and instructed them that if it did not, they must find a verdict for the defendant. The jury were also instructed that if the copartnership did then actually exist, but the money was borrowed for Watson only, and that was known, the plaintiff could not recover. But that if the partnership then existed, and it was borrowed professedly for the firm, and was so understood by the lender and the surety, then the plaintiff might recover, notwithstanding it was in fact desired to make
(649) up Watson's part of the capital. The jury returned a verdict for the plaintiff, and the defendant moved for a new trial for error in the latter part of the charge; which being refused and judgment given, he appealed.

Mendenhall for defendant.
J. T. Morehead for plaintiff.

GASTON, J., after stating the case, proceeded as follows: We understand the general rule of law to be that where a partnership is formed each partner is the accredited agent of the rest, whether they be active, nominal or dormant, and has authority as such to bind them either by simple contracts respecting the business of the firm or by negotiable instruments circulated in its behalf to any person dealing *bona fide.*

But it is also the law that one partner cannot bind his copartners by *deed* unless he have express authority by *deed* for that purpose. The bond, therefore, to Summers was not in law the bond of both the Woodburns, and upon it Summers could enforce payment only from Watson Woodburn. In equity, however, we apprehend that if it were shown that the contract for the loan was made in behalf of both the partners, and that the security was by the contract intended to be one binding both the partners, but through mistake had been so executed as to bind one only, Summers might have had relief against both. As the bond, however, was in law the obligation of the partner only who executed it, if nothing else appeared in this case than that the plaintiff executed it as surety, the only inference that could be rightfully drawn therefrom would be that he was the surety of the principal in the bond.

But it is to be recollected that the contract between the principal and surety—though it may be inferred from the nature of the security given to the creditor—is not contained therein, nor evidenced thereby, but is a collateral contract—usually a parol one, which may therefore be shown by any competent and satisfactory evidence. For instance, it could not be denied but that if the *plaintiff* had, at the request of both the Woodburns, borrowed money in his own name and on his sole re- (650) sponsibility, he could have regarded them as his principals, although neither of them was bound to the lender. And we understand that in this case it is not denied by the defendant's counsel that if the money had been borrowed for, and received by, both the Woodburns, the plaintiff—notwithstanding the insufficiency of the bond to bind the Woodburns to Summers—could hold them both as his principals. His engagement having been entered into at their request, they would be bound to indemnify him from loss thereby sustained. The question then seems narrowed to this—whether a responsibility incurred upon a request made by one professedly in behalf of himself and partners, in relation to their common business, but *in truth* for his individual benefit, is, in law, incurred at the request of both. We think it is. If one of two partners purchase goods ostensibly for the partnership concern, but in truth for himself, the firm is bound by his act—he is the agent of the firm in relation to its business; and third persons contracting with him as *that agent,* contract with the firm; so if he borrow money for the firm, but misapply it, the firm is bound. When credit is advanced at the request of such agent, in behalf of the alleged business of the co-partnership, it would seem that the contract therefor is as much made with the concern as when goods are purchased or money lent. It is also insisted that there was no evidence in the case justifying the instruction complained of. The evidence is certainly not very full or definite. We, however, have not the right to set aside a verdict because it is not upheld

by the weight of testimony; and we cannot say there was no evidence. The testimony of Ludwick Summers would seem to show that Watson Woodburn alleged that his negotiation was for the firm; and we think that the jury was well warranted in understanding him to represent that the partnership *had* been then formed, although the business under it was not to commence until his brother's return. The execution of the note in the name of Watson Woodburn & Co., after this representation, was still holding out the profession that he was negotiating not for himself only, but for himself and a partner. And this view of the case may have been strengthened by the remarks of the defendant, which (651) we understand to have been made after he had resolved to contest his liability to Summers—"that the bond had not been signed as he thought, or as the witness told him it was; that he had received the money, *but* that it was Watson's part of the stock." It is possible, indeed, that the jury might have regarded the latter part of this observation as an excuse for refusing to pay a partnership debt, after he had ascertained that he could set up a legal objection to the note.

As we do not see any error of law in the record, we cannot reverse the judgment. Let it be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Dickson v. Alexander, 29 N. C., 4; *Partin v. Lutterloh,* 59 N. C., 344; *Hartness v. Wallace,* 106 N. C., 431; *Smith v. Haynes,* 82 N. C., 450; *Dudley v. Bland,* 83 N. C., 224; *Fisher v. Pender,* 52 N. C., 484.

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(652)

THOMAS JOYNER, EXR. OF BRITTON JOHNSON, v. DREWRY VINCENT.

Mortgage—Possession of Mortgagor—Usury.

1. An instrument in the form of a bill from A to B, for a female slave, with this proviso, "provided, if the said A should well and truly pay unto the said B the above sum herein mentioned, before his death, then the above obligation to be void—only the increase, if any, to remain the property of B," is a mortgage to secure the repayment of the sum advanced and mentioned in the instrument; and if the mortgagor remain in the possession of the slave and her increase during his life, and die, leaving the money unpaid, the mortgagee or his personal representatives, may, at law, recover the slaves of the personal representatives of the mortgagor.

2. If, upon a mortgage of a slave, it is agreed that the mortgagee shall have the use of the slave in lieu of interest on the money advanced, it will not be usurious if that use does not exceed the legal rate of interest on the debt.

3. If, in a mortgage deed for a female slave, it is provided that the mortgagee shall have the increase of the slave, the transaction will not be usurious, though the increase exceed in value the legal rate of interest on the sum advanced, if the increase were not to vest in the mortgagee by reason or on account of the loan and forbearance, but were to become his in a different character, namely, as the donee of such increase; and parol evidence is admissible to prove the intended gift, for the purpose of repelling the imputation of a corrupt design to reserve usurious interest, whether it would be admissible or not to convert the apparent mortgage of the increase into a gift of them to the mortgagee of the mother.

4. A mortgagee is not, under any circumstances, as between him and the mortgagor, obliged to take possession of the mortgaged property before a forfeiture; and until a forfeiture by the nonpayment of the money, the possession of the mortgagor cannot be adverse to the mortgagee, so as to create a bar by the statute of limitations.

THIS was an action of Detinue, to recover a negro slave named Aggy, and other slaves, the issue of Aggy, tried at NORTHAMPTON, on the last circuit, before his Honor, *Judge Saunders.*

On the trial the plaintiff produced and gave in evidence a deed from one Robert Johnson to his testator, for the negro Agg or Aggy, dated 9 December, 1813. This deed was in the usual form of a bill of sale for slaves, expressed to be made in consideration of the sum of $150 paid by the purchaser to the seller, but with the following proviso: "Provided, nevertheless, if the said Robert Johnson should well (653) and truly pay unto the said Britton the above sum herein mentioned, before his death, then the above obligation to be void, only the increase, if any, to remain the property of Britton Johnson." The plaintiff then proved the other slaves to be the issue of Aggy, and showed a demand before the action brought, made of the defendant, and a refusal by him to surrender the slaves. He then called as a witness one William Nelson, who deposed that the negro Aggy went into the possession of Britton Johnson upon the execution of the deed, and remained there for about eighteen months or two years, when she had a child named Jacob, and shortly afterwards ran away, leaving the child with Britton Johnson; that she went to the house of Robert Johnson, and soon after Britton applied to the witness to go with him to see Robert on the matter; that he went, and Britton asked Robert why he did not send the girl home? to which he replied that the girl complained of Britton's wife; that she was a good girl whom he had raised and had never struck a blow; and he disliked to force her back. Britton said he had one little child now to raise by hand; if Robert kept the woman and left him all the children to raise which she might have, it would be very hard on him, as he was to have no interest for the $150, but the use of Aggy instead; and desired him to give him a note for the money. Robert replied that he had given Jesse Johnson (who was a stepson of his)

some negroes, and he wished to do as much for Britton (who was his nephew—the said Robert being childless), and therefore he had given him the issue which Aggy might have; that he would not give Britton a note; but in order that he might not complain of having to raise the little negroes, if Britton would consent to let Aggy remain with him, he would himself raise and take care of all the children she might have, for Britton, as long as he lived, without any trouble or expense to Britton, so that Britton would have them at his death. Britton said he was afraid to leave them so long, lest the right to them under the deed should not be good. To this Robert replied that old Mr. Moyt, who drew the deed, understood it as well as a lawyer, and proposed that Brit-
(654) ton, Jesse, and the witness should go to Mr. Burges (a gentleman of the bar), submit the deed to him, state what they desired to do, and obtain his opinion; if he thought the present instrument sufficient, the negroes to remain; otherwise another instrument to be drawn, in order to assure the negroes to Britton. To this Britton assented, and Mr. Burges was accordingly consulted and gave his opinion that the deed was good and that Britton might safely leave the negroes with Robert to bring up the young children, as had been proposed. This opinion was made known to Robert, and all the negroes sued for remained with him till his death in June, 1836, when the defendant took possession of them as his administrator. The boy Jacob, the first child of Aggy, was kept by Britton Johnson till his death, in December, 1837. The sum of $150 was the full value of such a negro as Aggy, at the time the deed was made.

The defendant called as a witness one Mrs. Clark, who stated that Britton Johnson said to her, some few years after the date of the deed, that Robert had paid up the money, and he had no claim to the negro Aggy. He also called one Jenkins, who said that Britton, five or six years after Aggy had run away, told him he had no claim to Aggy, as the money was paid by Robert Johnson; but that he had the writings, which he would never give up, but would stand a suit first. The defendant also called one Benthall, who stated that in a conversation between Robert and Britton, about twenty years ago, the former demanded of the latter the papers, who said he had them not with him, but that he would give them up another time. The defendant then showed that about the year 1827 Robert Johnson became *non compos;* and a guardian was appointed for him, who hired out the negroes from year to year during his life—he continuing *non compos* to his death; and then called a witness named Futrill, who stated that after Robert's becoming *non compos,* he went with Britton to Robert's house, when they found him calm, as he sometimes was; and after some words had passed between them, Robert demanded of him the negroes, upon which Robert

became furious, and abused and cursed Britton; and he shortly after left the house. This was all the material evidence given, except to character.

The defendant's counsel insisted that the deed under which (655) the plaintiff claimed was upon its face usurious and void; that if not so upon its face it was so upon the fact stated by William Nelson, that Britton Johnson was to have the use of negro Aggy in lieu of interest, and was also to have the increase of Aggy; that upon the true construction of the instrument only the increase which should be born to Aggy before the repayment of the sum mentioned in the deed were to belong to Britton; that the evidence showed that the money was repaid shortly after the time mentioned by Nelson, and before the birth of either of the children of Aggy sued for; and that consequently the plaintiff could not recover. And finally, if these points were against him, that the bailment existing between Robert and Britton had been ended, 1st, by the fact of the guardian of Robert hiring out the slaves, which the counsel contended put an end to the bailment in law, and made the possession adverse; 2ndly, by the demand of the papers and notice to Britton that he claimed and held for himself, and not for Britton; and 3rdly, by the demand stated by Futrill; and consequently the plaintiff was barred by the statute of limitations.

The plaintiff's counsel contended that there was no evidence of any usury—for though an agreement to let Britton keep the increase, in addition to the use of the negro Aggy, would be evidence of usury, if allowed, on account of a loan or forbearance, yet here the increase were intended as an advancement from a childless uncle to a nephew—were a gift; and therefore it was no evidence of usury; and that there was no evidence that the use of Aggy was worth more than the interest of the money—but if the jury believed there was any intention to take more than a lawful rate of interest, and there were a color to conceal it, then he admitted the transaction was usurious, and the plaintiff could not recover. Secondly, he insisted that the true construction of the deed was that all the increase of Aggy, during the life of Robert Johnson, should be the property of Britton; but that if the construction of the defendant's counsel were the true one, he denied that the money ever had been paid, and insisted to the jury that the evidence to show it was not to be relied on. Thirdly, he admitted that if the possession had become adverse by a demand and refusal, or by any act inconsistent with the title of Britton, then the plaintiff was barred; but he insisted (656) to the jury that the evidence to show it was not to be trusted. He denied that in law the hiring by the guardian put an end to the bailment, and of itself made the possession adverse; and insisted that if what Futrill stated actually occurred it could not bar, because Robert was at

the time a maniac, and had neither the legal nor actual control of the negroes, and because what passed did not amount to a demand and refusal. And, therefore, he contended that the possession was held as the bailee of Britton, of all the slaves; that the plaintiff had a right to recover Aggy, if the money mentioned in the deed had not been repaid; but he admitted that if it had been repaid the plaintiff was not entitled to recover Aggy, but that whether that was paid or not, he had a right to recover the other slaves, her issue.

His Honor instructed the jury that if the deed was infected with usury, it was void, and the plaintiff could not recover; that a corrupt agreement or understanding for more than the legal rate of interest would vitiate the deed, whatever the form in which it might be put; that if the increase of the negro Aggy were reserved to Britton Johnson in lieu of interest, besides the use of the negro, it would be evidence of a corrupt agreement for usury; but if the increase were really intended to be given by Robert as an advancement to his nephew Britton, and had no connection with the loan, then it would not be usurious. Whether allowing the use of the negro instead of interest would be usurious would depend on the value of the use, whether it exceeded the interest on the money, of which no evidence had been given, but of which the jury would judge; and if they were satisfied there was in either way a bargain or agreement for usurious interest, then they should find for the defendant. Whether the true construction of the deed was that all the issue of Aggy, during the life of Robert Johnson, or only such as might be born before the repayment of the money mentioned in the deed, would vest in Britton, his Honor said he would reserve for further consideration; but, in the meantime, that the jury would consider the case as if all the issue were within the operation of the deed; and he instructed the jury that if they were satisfied that the said money
(657) had been paid they should find their verdict for the defendant as to the negro Aggy, however they might find in regard to the other slaves.

As to the possession, his Honor instructed the jury that, supposing Britton Johnson had title under his deed, whether the plaintiff could recover or not would depend on whether Robert held possession for himself or for Britton. If for himself, commencing three years before the bringing of the action, then the plaintiff was barred; if for Britton, during the whole time, then the plaintiff was not barred; that such a possession as was mentioned by William Nelson, held under the agreement, and for the purposes stated by him, would not be adverse to Britton, but would be a possession for him, and would not bar, however long continued; but if the character of that possession was changed by any act inconsistent with the purposes for which he held, or with the title

of Britton, or by a refusal to deliver upon a demand made, or by notice to Britton that he no longer held for him, but for himself, then the statute would immediately apply and in three years would bar the right. The fact of hiring by the guardian, his Honor instructed the jury, was not an act so inconsistent with the relation of the parties as of itself merely to determine the bailment, and make the possession adverse; and as to the demand stated by Futrill, he instructed them that although Robert Johnson had been found *non compos,* and had a guardian appointed, yet if, in fact, he knew what he was about, and in answer to the demand, intended to assert a title or possession in himself, or deny the right of Britton, that would change the character of the possession, and put the statute in operation. And upon the whole, his Honor directed the jury to inquire whether the holding which was first for Britton had ceased to be for him and became a holding against him, and to regulate their decision accordingly.

The jury found for the plaintiff for all the negroes; and a motion being made for a new trial for misdirection, and especially in the construction of the deed, his Honor said he considered it unnecessary to inquire as to the propriety of that opinion, because the jury, by finding for the plaintiff for the negro Aggy, under the instruction given them, had declared that the money had not been paid, and so the instruction become immaterial; and the new trial being refused and judgment given for the plaintiff, the defendant appealed. (658)

Iredell for defendant.
Badger and B. F. Moore for plaintiff.

RUFFIN, C. J. There is no legal ground on which, as we conceive, the verdict and judgment in this case can be disturbed. The action is between the personal representatives of a mortgagee and mortgagor for a female slave and her issue, born subsequent to the execution of the deed, which was in 1813. The sum lent was $150, and the clause of redemption is thus expressed, "Provided, nevertheless, if the said Robert Johnson should pay unto the said Britton the above sum before his death, then the above obligation to be void; only the increase, if any, to remain the property of the said Britton Johnson." The mortgagor died in 1836, and the other party in 1837, and the present action was brought in 1838; and the jury have found that the debt remains unpaid.

Upon the case thus stated, the right of the plaintiff to recover the slave originally conveyed depends upon the plainest principles, and the right to the issue necessarily follows that to the parent. The objections to the recovery taken by the defendant have been considered by us, and such as the jury have not said are unfounded in fact, we deem to be untenable in law or misapplied in this case or in this forum.

The instruction upon the point of usury seems to us to be unexceptionable. Supposing it to have been intended that the mortgagee should have the use of the slave pledged, yet if that use did not, in the opinion of the jury, exceed in value the legal rate of interest on the debt, it is plain there was no usury. So, if the property in the issue, in addition to the use of the mother, would exceed in value the interest, yet that would not constitute usury, if the issue was not to vest in the mortgagee by reason or on account of the loan and forbearance, but was to become his in a different character, namely, as the donee of such increase. This is true, whether the intended donation be effectual in law or not;

for, although it may be void for want of some requisite formality
(659) as a gift, yet its actual existence, even in an informal shape,

repels the imputation of the corrupt design to reserve a greater rate of interest than is allowed by law; and without such motive usury cannot be committed. The evidence was therefore properly heard and considered upon this point, because it was a question of *quo animo* the agreement was thus framed.

There seems, however, to have been, upon the trial, a vague impression that the evidence of this agreement as to the issue was material to the plaintiff's right to recover, as being substantive evidence of a distinct title of the nephew to the issue. Were it material to the rights involved in the present suit in a court of law, it would be our duty to examine that question. The inquiry, whether the evidence on this subject establishes in law a gift from the uncle to the nephew, is very different from the inquiry whether the same was competent for the purpose to which it was directly adduced. The distinction is very apparent. In the one case, parol evidence is received to establish that an instrument is not infected with a secret vice that would invalidate it, or that a corrupt purpose, which might be inferred from the instrument without explanation, did not in fact and truth exist. The object of the proof is, therefore, to support the instrument in its present form as a valid security for the debt mentioned in it. But in the other view, the parol evidence is offered to make out a gift. By itself and independent of the deed, it is clearly inadequate. The question is, can it be received in aid of the deed to control and give a character to it by turning that into a deed of gift which, notwithstanding the unusual terms in which the right to redeem is reserved, must, by itself, be deemed to be of that species of conditional conveyances called mortgages? This is a grave question to the rights of these parties as they may ultimately be settled. It will arise when the present defendant applies to redeem. It does not arise now; or, rather, the rights here involved cannot be affected by it. Our inquiry is confined to the point, in whom is the legal title; and upon that it is evident the plaintiff must succeed. For as the instru-

ment is found to be untainted by usury, it is a valid subsisting mortgage for the mother, and of course carries the increase. Beyond that, therefore, search for a title to the plaintiff is supererogatory. (660)

In reference to the points on the statute of limitations, it is to be observed that the Court is also relieved from considering their correctness by the state to which the controversy is reduced in the views already taken of it. As the mortgagor had his whole life to pay the money, and had paid no part of it at his death, the mortgage became forfeited only on that event. We think that a mortgagee is not, under any circumstances, as between him and the mortgagor, obliged to take possession before a forfeiture, and thereby subject himself unnecessarily to an account. Whatever had occurred before the day of payment, our opinion is that the mortgagee might waive it, and that upon the forfeiture of the mortgage by the nonpayment of the money at the death of the debtor, a right to demand the mortgaged property thereby and then arose to the mortgagee. Consequently this action, which was brought within two years thereafter, is not barred.

PER CURIAM. Judgment affirmed.

Cited: Hinson v. Smith, 118 N. C., 507.

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(661)

THE STATE v. ELISHA KING ET AL.

Commissioners—Action of Majority.

1. Where a public act is to be done by commissioners for that purpose appointed, and the commissioners, or so many of them as by the terms of their appointment are required to act, do meet and confer, and a determination is made upon the subject by a majority of them, the majority will conclude the minority, and their act will be the act of the whole. And, after a decision once made, the commissioners have nothing further to do. They are *functus officio,* and cannot afterwards meet to annul or vary the act which they have done.

2. Where certain commissioners appointed to act on behalf of the public, in making a purchase, or accepting a donation of land, accept a proposition for a gift of a piece of land, to be laid off in either of two ways at the option of the commissioners, and a part of the commissioners are authorized by the whole to lay off the land without specifying in which way, the act of a minority in laying off the land will not be valid without the assent of the majority; though, if the proposition had not been in the alternative the act of laying off the land might have been performed by any one or more of the commissioners, or by any agent or attorney—provided that the act was done in conformity to the terms of the proposition.

3. A proposition to give a certain quantity of land for the use of the public, to be laid off twenty poles on each side of a certain lane commencing at a designated line and running thence to a particular river, is complied with by a donation of land laid off in the form of a parallelogram with the lane in the middle and extending to the river, though it may not have the river for the whole boundary on that side.

4. Where an act of Assembly, in one section, directs site to be selected for a town in a newly erected county, and in a subsequent section enacts that the County Court of the county "at its first session" shall appoint commissioners to sell the lots in said town, the first court which sits after the site is selected, and not the first court after the enactment, is the one vested with authority to make the appointment; and if an appointment be made before the selection of the site it will be premature and revocable at least, if not absolutely void.

AT THE last session of the General Assembly an act was passed by which the southern portion of the county of Buncombe was erected into a separate and distinct county by the name of Henderson. By a supplemental act, and in the eleventh section thereof, eleven persons were appointed commissioners, in the words of the act, "to select and determine upon a site for a permanent seat of justice in said county, who (662) shall locate the same as near the center of said county as practicable, taking into consideration both the extent of territory and population; and nine of the commissioners hereby appointed shall have power to act." It was further enacted in the eleventh section as follows: "Seven of the above appointed commissioners first named shall have power to purchase or receive by donation, for the use of the county of Henderson, a tract of land, consisting of not less than twenty-five acres, to be conveyed to the chairman of the County Court, and his successors in office, upon which a town shall be laid off to be called Hendersonville, where the courthouse and jail shall be erected, and where, after the completion of the courthouse, the courts of said county shall be held, and the clerk and register shall keep their offices." And the twelfth section directs "that the County Court of Henderson, at its first session, shall appoint five commissioners to lay off the lots of said town, who, after designating such as shall be retained for public uses, shall expose, after advertisement for thirty days, the residue to sale at public auction upon a credit of 12 and 18 months, and shall take from the purchasers bonds with security, payable to the chairman of the County Court and his successors in office." At the first term of the County Court thereafter, in February, 1839, the court appointed Elisha King, John Davis, Samuel M. Carson, John Woodfin and William Deaver, commissioners to lay off the lots of the town, and to perform the other duties prescribed in the twelfth section of the said act. At this time, the commissioners appointed in the act had not selected the site for the

town, but at length, on 27 March, 1839, a meeting was held, at which ten of the said commissioners, including the seven first named, were present, and then the following proceedings were had, as appears from their journal: "On motion of Captain Miller, agreed that the following sites be named as the point: one near the road on Gen. Brittain's and E. King's land, called Walnut Grove, and one on Shaw's Creek near Hugh Johnston's house. Sundry motions to add a third site being lost, vote called for. Vote as follows: *Road,* Edney, Jones, Allen, Jarrett. *Johnston's,* Clayton, Hightower, Wilson, Miller, Young, Deaver. The final decision in Johnston's lane as follows: he is to give as a donation 20 poles on each side of the lane, commencing at a (663) straight fence west of the house, and continue to the river; if more than 25 acres, to be given; if not that much, to be added on each side so as to make that quantity of land; or if the commissioners would prefer having the site north and south, will give 25 acres in that direction, making the lane the center. Then adjourned *sine die.*" Of the seven first-named commissioners, four—Miller, Wilson, Hightower, and Clayton—voted with the majority; and three—Edney, Jones, and Allen—voted with the minority. Immediately after the final vote, and before the adjournment of the board, Hugh Johnston, whose proposition had been accepted, was called into the room and informed thereof. It was then proposed that the seven first-named commissioners, all of them being then present, should proceed forthwith to survey the land and take a deed therefor; when the three who had voted against the site, suggesting that it was inconvenient for them to attend, requested the other four to do it, and declared that *they* would agree to what should be done by the four. In pursuance of this, these four went to the land, but before the survey began one of them, Miller, refused to proceed, and went off. After his departure the remaining three had the land run off in an oblong of 26 acres, forty poles wide, and having its length east and west according to the first or first part of the proposition of Johnston, and took a deed from him to the chairman of the County Court, which covered the site selected by the board of commissioners, and filed the same in the office of the clerk of the County Court. On 21 June it appears that ten of the persons who had been appointed commissioners in the act of Assembly met, in order, as the journal states, "to reconsider the vote theretofore taken as to the location of Hendersonville." After the object of the meeting was declared, two, Hightower and Clayton, desired it to be understood that they did not then consider themselves commissioners. A third, Colonel Chunn, who had not been present at the meeting of the board on 27 March, desired to understand whether or not the site for the village *had been located,* for if it had, he would not act as commissioner, but if not, he would act.

(664) And thereupon, on motion of Captain Miller, a vote was taken whether or not the site had been located, and the seven, who had made no objection to continuing to act as commissioners, voted that there had been no location. After this, Woodfin and Deaver, two of the five persons appointed by the County Court commissioners to lay off and sell the lots, being desirous of executing this their supposed duty, required of the other three, the present defendants, to unite with them in doing so, but they refused to comply with this request. An alternative mandamus having issued to the defendants, requiring of them to lay off and sell the said lots, or to show cause to the contrary, and they having made their returns thereto, the parties *agreed* upon the facts, and thereupon submitted the case to the decision of his Honor, *Judge Pearson,* on the last circuit, at Buncombe. He awarded a peremptory mandamus, and from this judgment the defendants appealed to the Supreme Court.

Clingman and Hoke for defendants.
The Attorney-General for the State.

GASTON, J., after stating the case as above, proceeded as follows: Upon the important question, whether the site for the seat of justice has been definitively fixed by those who were appointed by the Legislature to select it, we entertain the same views which have been expressed by his Honor. Where a public act is to be done by commissioners for that purpose appointed, and the commissioners, or so many of them as by the terms of their appointment are required to act, do meet and confer, and a determination is made upon the subject by a majority of them, the majority will conclude the minority, and their act will be the act of the whole. *Grendley v. Barker,* 1 Bos. & Pul., 229; *Ex parte Rogers,* 7 Cowan, 526. The act of Assembly authorized nine of the eleven commissioners to act. More than that number assembled, conferred, and resolved to fix on the site by a vote. The voice of the majority announced upon that vote was the voice of the body; and accordingly the journal, after recording the vote, pronounces the result of it as the final decision of the board. After this decision, the board (665) had nothing else to do; it was *functus officio.* It adjourned *sine die;* and those of whom it had been composed had no right to reassemble and vote that they had not selected a site.

Entertaining this opinion, and presuming that it is very desirable that this county contention should be at once settled according to the right on the main question, we feel reluctance in differing from the judge on the question whether the seven persons first named in the commission accepted the donation for the use of the county under the pro-

visions of the eleventh section. These persons having been all present when the final decision of the board was taken, and a majority of them having voted in concurrence with that decision, we agree with the judge in holding that they did resolve to accept Johnston's proposed donation—and if that donation, as proposed, had been absolute and definite, the mere act of surveying the land and taking the deed might have been performed by any one or more of the commissioners, or by any agent or attorney, provided that these acts were done in conformity to the terms of the proposal. The Superior Court held that Johnston's proposition was absolute and definite—to give 25 acres, 20 poles wide on each side of the lane, commencing at a straight fence west of the house and continue to the river, accompanied with a declaration that if the commissioners preferred that the length of the proposed donation should lie north and south, instead of east and west, he would vary the proposition accordingly. Now, it is not improbable that it was so understood, and that the commissioners, by their acceptance of it, without intimating a desire to have the land laid off in the form last suggested, meant to take the donation in the form first mentioned. But, after much reflection, we feel ourselves bound to pronounce that, as the terms of acceptance *set forth* the proposition *in extenso* as one in the alternative, the right to take the land, either according to the one or to the other form proposed, is reserved to those who are thereafter to act for the county—that is to say, to the seven commissioners. By the acceptance of Johnston's proposition by the full board, the site was established. It was to be west of his house, adjoining the fence, and on both sides of the lane; but, according to our interpretation of that proposition, the board left it to the seven commissioners who were then to act to *choose* how the land, the subject of the donation, should be run. And (666) if so, without inquiring whether all of the persons constituting this second commission should be actually present when the choice was made, it is clear that three of the seven could not make it. If they had reported their selection to their associates in full convention, and these had sanctioned, as they promised they would sanction, what had been so done, of course the act would have become that of the whole body. But nothing of this kind appears to have been done.

The mandamus, therefore, which has been ordered must be superseded. If the controversy is not otherwise adjusted, the seven commissioners are those who have yet to act upon this subject; and if *they* will not, it is upon them the *Court* must be invited to act.

We have considered the objections which were taken to the form of laying off twenty-six acres, and concur in the opinion expressed below, that these are not well founded. We think the fair interpretation of Johnston's first proposition is that the parallelogram should be forty

poles wide, comprehending the wagon road, which was to be in the center as near as might be, and also that the parallelogram should extend so far as to reach the river, not that the entire western boundary of the land should butt on the river.

One question has not been raised by the parties, but our attention has been necessarily called to it by the facts of the case. The County Court appointed commissioners to lay off and sell the lots in the county town before any such town existed. In doing this, we are of opinion that the court misconstrued the act of Assembly. Though the words of the twelfth section will admit of the interpretation that this appointment should be made at the first term after the enactment of the statute, to us it seems clear that the Legislature meant the appointment to be made at the first term after the purchase or donation of the land selected for the town was completed, as directed by the preceding section. We regard, therefore, the appointment made by the County Court as premature and revocable at least, if not absolutely void.

The judgment of the Superior Court must be reversed.

PER CURIAM. Judgment reversed.

Cited: S. v. Allen, 24 N. C., 184.

(667)

WILLIAM M. MONTGOMERY ET AL. v. WILLIAM B. WYNNS.

Construction of Bequests—Statute of Limitations.

1. In a bequest of slaves to a married woman for life, and then to all the children which she may have at the time of her death, and in case "any of them should die before marriage or arrival to full age," then the share of such to the survivors of them; "and if all of them die before marriage or arrival to full age," then over to other persons; the word "or" will be construed "and," and the limitation over will not be too remote, but will take effect upon the death of the mother and of all her children under age and unmarried.

2. Wherever the statute of limitations is a bar to the recovery of one of several parties plaintiffs in an action of detinue, it will operate against all, though the others were under the disability of infancy.

3. The possession by the tenant of a particular estate in chattels is not, after the expiration of the particular estate, necessarily adverse to the remainderman, but it may be so, and that without any act or declaration of his to that effect, and therefore it is proper to be left to the jury to infer, if they so think, from the circumstances of the case, that the possession of the particular tenant, after the expiration of his estate, was adverse to the remainderman, without any precise declaration to that effect, or any act for the special purpose of making known his claim.

4. As to land, the particular tenant holding over stands towards the remainderman as a tenant towards his landlord. But the idea of such tenancy does not belong to the ownership of distinct successive estates in personal chattels, and not arising out of any contract between the parties.

5. Adverse possession consists of actual possession with an intent to hold solely for the possessor to the exclusion of others, and as no color of title is requisite on which to found the possession of personal chattels, with or without a good title, the possession will be adverse, if the party holds for himself.

THIS was an action of detinue for a slave named Cimon, tried at HERTFORD, on the last circuit, before his Honor, *Judge Nash.*

The plaintiffs claimed the slave in question under the following clause in the will of Elizabeth Meredith:

"I lend to my granddaughter, Mary R. Montgomery, wife of George W. Montgomery, during her natural life, my two negro girls, Venus and Nancy, and man, Cimon; and upon her death I give the same to all the children which she may leave at the time of her death; and in case any of them should die before marriage or arrival to the (668) age of twenty-one years, then his, her or their share or shares to the survivors or survivor of them. And if all of them die before marriage or arrival to full age, then to the children of my granddaughters, Elizabeth R. Hare, Mary M. Montgomery and Julia A. Montgomery, to be equally divided *per capita.*"

It appeared in evidence that George W. Montgomery was the husband of Mary R. Montgomery, the granddaughter of the testatrix, as stated in the will, and that the slave Cimon was placed in his possession by the testatrix upon or soon after his intermarriage; that he continued in possession of said slave up to the time of his wife's death, which happened in the spring of the year 1832; that the said Mary R. Montgomery left surviving her by her said husband three children, all of whom died in the fall of 1832 while infants, and without having been married; that after the death of his said wife, George W. Montgomery remained in possession of the said slave up to the time of the death of his last surviving child, and continued thereafter in the undisturbed possession of said slave, exercising all the control usually exercised by a master over his slave, up to the time of the death of the said George in the month of December, 1836; that in February following, one Isaac Pipkin was appointed his administrator, and took the said slave into his possession, hired him out for that year, and in the ensuing year hired him to the defendant in this action. The plaintiffs proved further by Lewis M. Cowper, one of the executors named in the will of Mrs. Meredith, and who alone qualified thereto, that upon the death of his testatrix the negro Cimon was in the possession of George W. Montgomery; that he, the executor, never interfered in any manner with his possession, nor

ever made any formal assent to the legacy, having never said anything in relation to the matter up to the time of the death of the said George; that there was a sufficiency of assets, without the said slave, to pay the debts; and that a short time before the bringing of this action, and while the defendant was in possession of the said slave, he, the witness, was called upon by the attorney of the plaintiffs to know whether he would assent to the legacy to them, and he thereupon made a formal assent. It was proved further that the present plaintiffs were
(669) the only children of Elizabeth R. Hare, Mary M. Montgomery and Julia A. Montgomery, named in the said will, at the death of the survivor of the children of Mary R. Montgomery, wife of the said George W. Montgomery. It was admitted that William M. Montgomery, one of the plaintiffs, had been of full age more than three years before the bringing of this action.

The defendant objected:

1. That the plaintiffs were not entitled to recover because the limitation to them in the will was too remote.

2. That the action should have been brought in the name of the executor.

3. That the assent to the legacy of the plaintiffs having been made by the executor when the property was in the adverse possession of the defendants, and not before, they could not sustain their action.

4. That the plaintiffs were barred by the statute of limitations.

His Honor instructed the jury that the limitation over to the plaintiffs, in the bequest of Mrs. Meredith, was not too remote; that this was one of those cases in which the law, to carry out the intention of the testatrix, as apparent from the will, and to prevent the bounty from being defeated, would convert the word *or* into *and,* whereby the devise after a life estate would be to a life or lives in being, and twenty-one years after, which in law is a good limitation. Upon the second and third points his Honor charged the jury that a legacy was an inchoate right, not perfected at law until the assent of the executor, and that when the executor did assent, it related back to the death of the testator; and that, therefore, the action was well brought by the plaintiffs in their own name. Upon the last point he instructed the jury that if, in this case, William M. Montgomery was barred by the statute of limitations from bringing this action, the statute barred the other plaintiffs; that William M. Montgomery was not barred unless the possession of George W. Montgomery was adverse; that George W. Montgomery held the negro in question under the bequest in Mrs. Meredith's will by
(670) which a life estate was given to his wife, and after her death, and the death of her children under age and unmarried, to the plaintiff; that during the life of his wife he held the negro in his own

right, and after her death he held him for his children, under the devise to them, as being their parent and next friend; and after their death he would still continue to hold him, under the devise in the will, for the benefit of the plaintiffs, until, by some declaration or act of his, he had signified his intention to hold him as his own property and adverse to the plaintiffs; that it was for them to say whether the defendant had satisfied them that George W. Montgomery ever had, by act or declaration, signified or made known his intention to hold the negro Cimon as his own property, and adverse to the plaintiffs; that if the defendant had so satisfied them, then the statute began to run from such act or declaration, and if he held more than three years from that time, that his title in this action would be good, because it would be a bar to William M. Montgomery, and in that case they would find for the defendant; if, on the other hand, the defendant had not so satisfied them, then the statute was no bar, and they should find for the plaintiffs. There was a verdict and judgment for the plaintiffs, and the defendant appealed.

Iredell for defendant.
Badger for plaintiffs.

RUFFIN, C. J. The instruction to the jury upon the statute of limitations seems to the Court to lay down a principle that is not entirely correct. The possession of George W. Montgomery is presumed to be upon his own title and for his own benefit, and therefore adverse to the plaintiffs, as to the rest of the world, unless the circumstance that he had acquired the possession of the negro as owner of a particular estate prevents a possession, continued after the expiration of a particular estate, from becoming adverse to the remainderman. The plaintiffs cannot treat his possession as their own, upon the ground that some of them were infants; for, with respect to the statute of limitations, this action is to be regarded as if William Montgomery, who was of age more than three years before suit brought, was the sole plaintiff. *Riden v. Frion,* 3 Murp., 577. His Honor, indeed, placed the (671) question exclusively on the fact that the plaintiffs were remaindermen. As we understand his language, he held that the possession in this case, after the death of Mrs. Montgomery and her children, could not, in law, be deemed adverse upon the strength of the possession itself and the notorious exercise of all ordinary acts of ownership, however long continued; but that there must be some further and distinct declaration, or act of the party, for the purpose of specially signifying or making known that he claimed the negro as his own property, and held adversely to the remaindermen.

The rule thus laid down would have an important influence on the right to a most valuable species of property amongst us, and we are not prepared to give our assent to it. By it the owner of a particular estate and the remainderman are placed upon the footing of bailee and bailor, of which we are not satisfied. As to land, the particular tenant holding over stands perhaps towards the remaindermen as a tenant towards a landlord. But the idea of such a tenancy does not belong to the ownership of distinct successive estates in personal chattels, and not arising out of any contract between the parties, or those under whom they claim. The one is not obliged to preserve the interest of the other. The owner of the present interest is not the bailee of the owner of the future interest, and there seems to be no reason of policy to authorize the fictitious creation of that relation between them. In many cases, no doubt, the jury may justly infer, as a fact, that the possession thus continued is not adverse to the remainderman. In the present case, for example, it would be a natural inference that after the death of their mother the father retained the possession for her children. They were his own; were infants probably, living with him; and the limitation over to them was in clear terms that could not be misapprehended even by a layman. Besides, the father had no shadow of claim against his children. But none of those reasons apply to the present plaintiff, and the same inference will not arise in any mind. The plaintiffs are strangers to G. W. Montgomery or connected with him collaterally and remotely only; one of them is of full age, and resident probably in the same neighborhood; and they claim under a bequest which (672) is valid only by professional construction, and, taken literally, would render the limitation to them void. Is it not probable that G. W. Montgomery did not know that "or" could be read "and," and that therefore he might suppose the gift to his children to be, in law, absolute? If he did so believe, then, upon the death of the children, the father would be entitled as their next of kin; and if he so claimed, his possession was adverse. For adverse possession consists of actual possession, with an intent to hold solely for the possessor to the exclusion of others. No color of title is requisite on which to found the possession of personal chattels; and with or without a good title, the possession will be adverse if the party held for himself. But a colorable title or a plausible claim may tend to evince the nature of the possession; whether, for example, it be adverse or subservient to another title. If the principle stated by his Honor be admitted to be generally true, yet we think these are plainly grounds in this case on which a jury might find the possession to be adverse, without any precise declaration to that effect, or an act for the special purpose of making known his claim. With what actual intent the possession was kept was

for the determination of the jury, aided, indeed, by legal presumptions to a certain extent. If, from the terms of the will and the interpretation that an ordinary man would put on it, and from the length of the possession by G. W. Montgomery and his administrator after the death of his children, and from the acts of ownership, the jury inferred that the defendant, and those under whom he claims, in fact believed the title of G. W. Montgomery to be good, and for that reason kept the possession, the jury should have been instructed that such possession was adverse. We think those circumstances are evidence on which a jury might found such an inference, without the declaration required in the instruction, and without any further act than the possession and the exclusive exercise of dominion over the negro; and, therefore, that the judgment must be reversed and a *venire de novo* awarded.

PER CURIAM. Judgment reversed.

Cited: Watkins v. Flora, 30 N. C., 380; *Wear v. Burge,* 32 N. C., 171.

(673)

JAMES J. HOYT ET AL. v. ROBERT RICH.

Fraudulent Grant—Demurrer.

1. A grantee may, under the Act of 1798, 1 Rev. Stat., ch. 42, sec. 31, proceed to vacate a subsequent grant fraudulently obtained, with knowledge of his previous grant, though the subsequent grant covers a part only of the land included in his grant.

2. A petition under the Act of 1798, setting forth, as the matters constituting the fraud it charges, that the defendant, "at the time of obtaining his grant well knew, or had reason to believe, or had received some information that the land had been previously granted," may be demurred to for uncertainty; and if the defendant do not demur, but plead to the *scire facias*, *query* whether any judgment could be pronounced for the petitioner upon it.

3. A grant which is sought to be vacated as having been illegally or fraudulently obtained must (at all events where the proceeding is by *scire facias*) be vacated *in toto*, or not at all.

4. To support an application on the part of the grantee to vacate a grant, because of fraud in obtaining it, without knowledge of a previous grant for the same land, a case of clear fraud must be made out. Constructive notice of the prior grant—information that might have put a prudent man upon his guard before he completed his grant, a suspicion that the land or a part of it might not be vacant and unappropriated—that kind of notice which may be sufficient in equity to bar the plea of a purchaser for valuable consideration, is not enough to constitute the fraud contemplated by the act.

THE plaintiffs filed a petition in the Superior Court of RUTHERFORD County, setting forth that on 26 November, 1796, two grants from the State issued to Tench Coxe for lands lying in said county; that by several *mesne* conveyances the title of Coxe therein had been duly conveyed to the petitioner; and that subsequently the defendant obtained a grant from the State for land lying partly within one and partly within the other of the said grants to Tench Coxe; charging that the grant to the defendant was obtained by fraud, he, the said defendant, knowing that the land thereby purported to be granted was not vacant, but had been previously granted as aforesaid, and praying that a *scire facias* might issue directed to the defendant, and requiring of him to show cause wherefore the grant so fraudulently obtained should not be vacated.

The *scire facias* issued accordingly, and upon the return thereof (674) the defendant appeared and put in an answer to the petition.

In substance, it denied that the grants issued to Coxe; and if they did issue, that the title therein had been transferred to the petitioners; and that at the time he obtained his grant he knew that the land had been previously granted to Tench Coxe, or any other person; and averred that, in fact, the land granted to him was, at the time of obtaining his grant, vacant and unappropriated. The case, as stated by his Honor, *Judge Pearson,* before whom the cause was heard, does not show that any issues were made up and tried, but merely that the court dismissed the petition, because, although it appeared that a part of the land comprehended in the defendant's grant lay within the boundaries of one of the grants under which the plaintiffs derived title and a part also within the boundaries of the other of these grants, yet there was a part not covered by either of these elder grants, but which was in fact vacant and unappropriated at the time when the defendant obtained his grant. His Honor declaring it to be his opinion that the petitioners had no right to complain as to that part of the defendant's grant which did not interfere with their land, and also that the Act of 1798, 1 Rev. St., ch. 42, sec. 31, did not provide for the case of a junior grant, which only in part interfered with a senior grant, and as to another part was valid, as being upon vacant and unappropriated land. From this judgment dismissing their petition, the petitioners appealed to the Supreme Court.

No counsel appeared for the petitioners in this Court.
Hoke for defendant.

GASTON, J., after stating the case as above, proceeded as follows: The proceedings in this case have been so irregular that we should probably be obliged to reverse the judgment rendered below, even if we

concurred in the opinion expressed by the judge. The Act of 1798, 1 Rev. Stat., ch. 42, sec. 31, which first authorized a person claiming title under a grant, and aggrieved by the issuing of a subsequent grant, to have the latter vacated upon *his* petition, because made against law or obtained by false suggestions, surprise or fraud, directs (675) that a *scire facias* shall issue as the leading process; that the proceedings thereon shall conform to the general rules of practice in such cases; and that if, upon *verdict* or *demurrer,* the court believe that the grant was made against law, or obtained by fraud, surprise, or upon untrue suggestions, they may vacate the same, and a copy of their judgment shall be filed in the Secretary's office. The rules of practice referred to are the established rules of pleading and trial which obtain at common law on a *scire facias* to repeal the King's letters patent. In such cases the *scire facias* ordinarily issues out of and is returnable into the court of the Chancellor, but the jurisdiction exercised thereon by the Chancellor is a part of his common-law jurisdiction, and the pleadings and trials are according to the course of the common law. If the parties come to an *issue,* the Chancellor cannot try it. According to the course of common-law proceedings, none but a jury can try disputed facts, and therefore, in such a case, he delivers the record into the court of King's Bench for a trial at bar. But if the pleadings terminate in a demurrer, the Chancellor pronounces the judgment of the law thereon. See *Case of the Prince,* 8 Repts., 1, and *Queen v. Bewdley,* 1 P. Wms., 207; also 4 Inst., 88; Dyer, 197, b. 2 Wills. Ed. of Saund., note 72 o. When, therefore, the Legislature thought proper to delegate to persons aggrieved by a patent illegally or fraudulently made the high prerogative writ of *scire facias,* to have the patent revoked and vacated, it was deemed expedient to *declare* that the proceedings thereon should be according to the ancient law of the land—where judgment follows upon a *verdict* or *demurrer.* It has been since deemed expedient to enact that where proceedings are to be instituted on *the part of the State* to vacate a grant they shall be instituted before this Court, and shall be here proceeded on according to the course and practice in equity causes. Act 1830, ch. 2; 1 Rev. Stat., ch. 42, sec. 33. It may become a question how this Court, in the exercise of that jurisdiction, will have disputed facts tried; but, assuredly, none of the provisions of this act have any bearing on cases instituted by petitions of individuals under the Act of 1798. The question *directly* decided below has never, that we are aware of, been before judicially (676) considered. It is an important question, and not altogether free from difficulty. We agree with his Honor in thinking that a grant, which is sought to be vacated as having been illegally or fraudulently obtained, must (at all events, where the proceeding is by *scire facias*)

be vacated *in toto* or not at all. It is an entire thing—alleged to have been procured by imposition on the State, in evasion or violation of its laws. If these allegations be properly preferred and fully sustained, then the grant is in law ascertained to have wrongfully issued, and is to be vacated, and if they be not, it is *in law* good, and must stand unrevoked. There can be no question, we think, but that such is the settled law under the old-fashioned *scire facias* to repeal the King's letters patent, and that such was the law before 1830, when the State sought by *scire facias* to annul her grants. The inquiry then resolves itself into this: Does the Act of 1798, which authorizes the *sci. fa.* to be sued out on the petition of an aggrieved individual, restrict this remedy to him who has a right to the whole of the land alleged to have been improperly granted, and who is therefore aggrieved to the full extent of the illegal grant, or concede it to every one who has right to any portion of the land granted, and is aggrieved in part only by that grant? It is possible, perhaps probable, that the attention of the Legislature, when passing the Act of 1798, was not *distinctly* called to this inquiry; but, however that may be, the Court has no other mode of collecting their will than by the language they have used, except that so far as that language is ambiguous we may take into consideration the mischiefs which may attend the one or the other of the expositions of which it is susceptible. Upon the words of the act, we should find great difficulty in saying that there is room for the restricted interpretation which the act received below. There is no other designation of those authorized to petition than by the words "any person or persons claiming title to lands under a grant or patent from the King, the Lords Proprietors, or the State of North Carolina, who shall consider himself or themselves aggrieved by any patent or grant to any other person against law, or obtained by false suggestions, surprise or fraud." It has been
(677) settled that none but those *aggrieved* by the patent sought to be vacated, because of a previous interest in the subject-matter of that patent, are entitled to the remedy given by the act. The petitioner must be *in fact* a person aggrieved, and not an officious intermeddler. *Crow v. Holland,* 4 Dev., 417; *Hoyle v. Logan, ib.,* 495; *Featherston v. Mills, ib.,* 596. But if he be aggrieved—if he have a previous interest in the subject-matter of the new grant—if his title under the old grant may be clouded thereby—he comes manifestly within the description given by the act, whatever may be the extent of his grievance. It is because the patent complained of, if it remain unrepealed, may do *him injury,* that he has the right to demand its repeal, if he can show grounds sufficient in law to repeal it. But we apprehend that we should do violence to the plainly declared will of the Legislature were we to hold that he should not be permitted to exercise this right unless that

injury were coextensive with the whole subject-matter of the grant. We must not, where the law is plain, claim to be wiser than the lawmakers.

But if the words were less explicit, we are by no means certain that the inconveniences of the more obvious construction are so great as to justify a departure from it. We say nothing now of an application to vacate a patent merely because of *irregularities* in obtaining it. How far these irregularities may be availed of, when the application is made by an individual alleging himself to be aggrieved, opens a field for inquiry into which we do not mean to enter. It is enough to say that perhaps there are irregularities of which the State may complain, which, if waived by her, cannot be regarded as aggrieving any individual, and furnishing to him sufficient cause for a *scire facias*. Our remarks are confined to the case before us, which is an application to vacate a grant because of fraud in obtaining it, with knowledge of a previous grant for the same land. Now we have no hesitation in saying that to support such an application a case of clear fraud must be made out. Constructive notice of the prior grant—information that might put a prudent man upon his guard before he completed his grant, a suspicion that the land or a part of it might not be vacant and unappropriated—that kind of notice which may be sufficient in (678) equity to bar the plea of a purchaser for valuable consideration, is not enough to constitute the fraud contemplated by the law. We adopt the language, so far as it is applicable, which was used by a learned judge in a case somewhat analogous, where a registered was sought to be postponed to an unregistered conveyance because of fraud: "We cannot permit fraud to prevail, but it shall only be in cases where the notice is so clearly proved as to make it fraudulent in the grantee to take out a grant in prejudice to the known title of another, that we will adjudge the grant to be vacated." *Wyatt v. Burwell,* 19 Ves., 439. Where such a fraud is actually established, the grantee has little cause to complain if, as a penalty for his criminal act, he lose not only what he sought to take dishonestly from another, but that which he might honestly have secured to himself, if he had confined his grant thereto.

Perhaps, however, some real inconveniences may be found in practice to result from the construction we feel ourselves bound to adopt; but, on the other hand, it is obvious how completely the remedy provided by the law may be evaded if the other construction obtain. A fraudulent grantee will save himself effectually therefrom if he but take care that his grant, however injurious to others, shall include one acre of vacant land. By this contrivance he may practically repeal all the enactments of the law for the benefit of persons aggrieved.

We have entertained serious doubts whether the petition in this case is not too vague to warrant any judgment for the petitioner on the

scire facias. It charges, indeed, that the defendant procured his grant by fraud; but in setting forth, as it was necessary should be set forth, the matters constituting the fraud, it charges that the defendant, at the time of obtaining his grant, well knew or had reasons to believe or had received some information that the land had been previously granted. A demurrer to the *scire facias* because of this uncertainty in the petition, we think, might have been sustained. But as the defendant did not demur, but pleaded to the *scire facias*—for so we must understand his answer, as the petition, if the objection had been taken, might (679) and probably would have been permitted to be amended; and as the uncertainty might have been cured by verdict on specific issues, had not the judge dismissed the petition without a trial, because of what we believe an erroneous conception of the law, we forbear from expressing any decided opinion upon that point.

It is the judgment of this Court that the judgment of the Superior Court be reversed and the cause remanded for further proceedings therein.

PER CURIAM. Judgment reversed.

Cited: Holland v. Crow, 34 N. C., 281.

MEMORANDUM.

At a meeting of the Governor and Council, held at the Executive office on 10 February, 1840, Edward Hall, Esquire, of the town of Warrenton, was appointed a judge of the Superior Courts of Law and Equity for this State, *vice* Judge Saunders, resigned.

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